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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.3398/2013

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28th November, 2013

W. MORRIS ROMEL ROY AND ORS. Petitioners
Through: Mr. Rahul Sharma, Advocate.

Versus

AIRPORTS AUTHORITY OF INDIA ...Respondent
Through: Mr. K.K. Rai, Senior Advocate with
Mr. Digvijai Rai, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

C.M. No.13121/2013 (under Order 1 Rule 10 CPC)

For the reasons stated in the application, the same is allowed
and the applicant is added as petitioner No.20.

C.M. stands disposed of.

+ W.P.(C) No.3398/2013

1. By this writ petition, the petitioners (twenty in number) seek
the relief that the respondent/Airport Authority of India should declare the
result by finalizing the merit list of the selection process of departmental

promotion to the posts of Junior Executive (HR). There are a total of 22 posts with respect to which the selection process took place.

2. The admitted facts are that the selection process for filling up of the 22 posts of Junior Executive (HR) by promotion commenced in the year 2011. Vide circular dated 20.6.2011 applications were invited from the eligible candidates and who were MBA graduates having at least 60% marks in graduation. This circular dated 20.6.2011 was supplemented with another circular dated 5.7.2011 as per which in addition to MBA graduates those candidates who had degrees in MA with Personnel Management or equivalent were also invited. The original last date which was given for submission of applications was extended and ultimately the last date for submission of applications became 25.7.2011. Petitioners applied in time and they were called in the selection process. Before calling the petitioners for interviews, they appeared in the written examination and since they qualified in the written examination they were called for the interviews. Interviews as per different zones were held on 4.1.2013, 5.1.2013 and 10.1.2013. Respondent took out a circular dated 11.1.2013 stating that the eligibility criteria was changed to the effect that even the probationers who had completed their probation periods till the date of interviews were eligible candidates for being appointed to the posts

of Junior Executive (HR). Some of these probationers, and whose numbers could not be given to me on behalf of the respondent, are said to have qualified in the selection process for appointment to the post of Junior Executive (HR) by promotion. Petitioners therefore claim to be aggrieved on account of changing the rules of the game midway by entitling probationers for being considered for promotion in the selection process and also the fact that there is no finalization of the merit list/select list of candidates for appointment by promotion to the 22 posts of Junior Executive (HR).

3(i) On behalf of the respondent, it is argued before me that entire selection process has been scrapped on account of irregularities in the same. The irregularities which are stated to exist and as argued before me are that since the Recruitment and Promotion Rules do not bar probationers for being considered for appointment by promotion to the post of Junior Executive (HR), the original circulars dated 20.6.2011 and 5.7.2011 were faulty because they wrongly denied entitlement of consideration to the probationers, and since the defect was only removed much subsequently by the letter dated 11.1.2013 issued by the respondent, therefore, the result is that many probationers at the outset did not apply for consideration for appointment by promotion in the selection process for the posts of Junior

Executive (HR) and therefore the respondent is justified in scrapping the selection process. Reliance is placed upon the judgment of the Supreme Court in the case of *State of A.P. and Ors. Vs. D. Dastagiri and Ors. (2003) 5 SCC 373* to argue the proposition that there is no vested right in the selected candidates to claim appointment and the respondent was entitled to cancel the selection process for the reasons that all the probationers who were entitled to apply but were not so informed that they were eligible by the circulars dated 20.6.2011 and 5.7.2011. The relevant para of the judgment in the case of *D. Dastagiri (supra)* which is relied upon is para 4 and the same reads as under:-

“4. In the counter affidavit filed on behalf of the respondents in Civil Appeal No. 915/2000, in paragraph 16 it is stated that the process of selection was cancelled at the last stage, i.e., before publishing the list of selected candidates on the sole ground that the State Government wanted to introduce prohibition and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In paragraph 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list was remained to be published, that does not advance the case of the

respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables. It is not the case of the respondents that there was (sic) malafide on the part of the appellants in refusing the appointment to the respondents after the selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as Excise Constables, was arbitrary. In the light of the facts that we have stated above, when it was open to the Government to take a policy decision, we fail to understand as to how the respondents can (sic) the action of the respondents as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection and publication of select list, mere concession or submission made by the learned Government Pleader on behalf of the appellant-State cannot improve the case of the respondents. Similarly such a submission cannot confer right on the respondents, which they otherwise did not have.”

- (ii) It is also argued on behalf of the respondent that there is no law which bars a probationer from appearing in a selection process of promotion to the higher post and which is a post of Junior Executive (HR) in this case. The argument is sought to be buttressed with the reasoning that even the Recruitment and Promotion Rules of the respondent do not

bar the probationers for being considered for appointment by promotion to the higher posts.

4. The issue therefore to be examined and decided in the present case is as to whether probationers have a right to be considered for appointment by promotion to higher posts although the probationary periods do not stand completed at the time of commencement of the selection process being the last date for submission of the applications for being considered for the posts in question.

5. Promotion is from a lower post to a higher post, and therefore, before seeking promotion a person must be holder of a lower post. To be a holder of a lower post a person has to be employed in that post within a regular /permanent employment. A probationary employee, similar to an adhoc employee or a temporary employee, cannot be said to be a holder of a post, and therefore, not being holder of a post which is *a sine qua non* for promotion, a probationary/adhoc/interim employee cannot be an eligible candidate for promotion to a higher post. In my opinion, it is implicit in the very term of promotion that promotion is of a regular/permanent employee of an organization. Promotion surely can only be of a regular/permanent employee inasmuch as it would be an absurd position that if for some reason a probationary employee is promoted but thereafter

for valid reasons his original period of promotion itself is held not to be successfully completed and therefore there takes place termination of services of such an employee. It is not the law that by participating and being successful in the selection process for promotion there is an automatic passing of an order by an employer that probationary officer has successfully completed the period of probation. The period of probation can only be successfully completed in accordance with the applicable rules or agreement, and on completion of the probationary period. Of course, there may be confirmation of the employee even prior to completing the probationary period, however, an order would be required that the probationary period stands successfully completed and the employee is now a regular/permanent employee. I put it to the learned senior counsel for the respondent to show me any judgment of any Court which lays down a ratio that promotion can be granted even to those employees who are not regular/permanent employees but are only probationary employees, however learned senior counsel for the respondent very fairly states that he does not have any judgment with him though it is argued that it is the general/ normal law that a probationer should be held entitled to appointment to a higher post by promotion. I however cannot agree with this argument urged on behalf of the respondent that a probationary officer

without his successfully completing the period of probation or without his being deemed to be confirmed in the job by making his appointment as regular/permanent, a probationary employee can/ must be considered for promotion.

6. The judgment in the case of *D. Dastagiri (supra)* relied upon by the respondent does not help the respondent for the reason that the proposition of law stated therein is not in doubt that for valid reasons a selection process can be scrapped and there is no vested right in a selected candidate for being appointed although his name appears in the select list/merit list for appointment. However, the crux of the matter is that there must exist valid reasons for scrapping of the selection process and not appointing the candidates in the select list or in not finalizing the select list itself. In the case of *D. Dastagiri (supra)* there were valid reasons for scrapping of the select list and hence bonafide action of the State because the State Government had made a policy decision not to employ Excise Constables on account of prohibition policy of the State Government. Once there are valid reasons, the government cannot be forced to make appointments. The point however is that government's action cannot be arbitrary and whimsical and a successful candidate is entitled to be

appointed unless some bonafide/valid reasons are given by the government.

7. The law in this regard with respect to entitlement or disentitlement of the government to scrap the selection process and not give appointments to the candidates in the select list is stated in the Constitution Bench judgment of the Supreme Court in the case of *Shankarsan Dash Vs. Union of India (1991) 3 SCC 47*. Para 7 of this judgment reads as under:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Ors.* : (1973)IILLJ266SC ; *Miss Neelima Shangla v. State of Haryana and Ors.* : [1986]3SCR785 and *Jitendra Kumar and Ors. v. State of Punjab and Ors.* [1985] 1 SCR 899.”

(underlining is mine)

8. A reference to the aforesaid para of the judgment of the Supreme Court shows that the State does not have a licence to act in an arbitrary manner and the decision not to fill up the vacancies has to be taken for bonafide and appropriate reasons. Therefore one will have to examine in facts of the present case whether germane reasons are given and so argued before me for scrapping of the selection process and in not finalizing the select list although the entire selection process is complete by conduct of the interviews and also otherwise a merit list has been prepared which has not been published.

9. The argument which is argued before this Court of selection process requiring to be scrapped on account of change of rules of the game midway by allowing probationers as valid candidates and also that all eligible probationers in whatever posts employed with the respondent ought to have been considered, is an argument which in my opinion does not give valid and germane reasons for scrapping of the selection process and not finalizing the merit list/select list. I have already held above that probationers cannot be part of a promotion process unless and until the probationary officers stand confirmed as regular/permanent employees. Admittedly, respondent allowed (may be just before the interviews were conducted) probationary officers to be part of the selection process,

however, that cannot mean that the entire selection process can be scrapped because all that it means is that probationary officers who were wrongly considered in the process will have to be ousted from the merit list which has to be finalized and the merit list which has to be finalized can in law only be of those employees who participated in the selection process as regular/permanent employees of the respondent. Therefore, there is no reason to scrap the entire selection process and all that is required is that the probationary officers who in the first place could not have been considered in the selection process, cannot be validly considered for the selection process merely because of the circular of the respondent dated 11.1.2013. Therefore, it will suffice to direct the respondent that in the present case the selection process can be completed without at all considering the probationary officers for appointments to the 22 posts of Junior Executive (HR) which are to be filled up by promotion.

10. In view of the above, the writ petition is allowed. Respondent is directed to now finalize the select/merit list of the 22 promotion posts of Junior Executive (HR) in terms of the selection process which culminated by the interviews from 4.1.2013 to 10.1.2013. Since the probationary officers cannot be considered as valid candidates who are entitled to participate in the selection process, if any select list has already been made

by the respondent including therein probationary employees, though not published, a fresh select list/merit list will be made whereby probationary officers would be excluded and only the regular/permanent employees will be considered for appointments by promotion to the posts of Junior Executive (HR) in terms of the merit list. Direction is given to the respondent to finalize the merit list/select list in terms of this judgment within a period of eight weeks from today. Parties are left to bear their own costs.

NOVEMBER 28, 2013
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VALMIKI J. MEHTA, J.