

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

% *Judgment Reserved on: May 09, 2013*
Judgment Pronounced on: May 14, 2013

+ **WP(C) 7649/2010**

MUNICIPAL CORPORATION OF DELHI Petitioner
Represented by: Ms.Madhu Tewatia, and
Ms.Sidhi Arora, Advocates

versus

RAJ KUMAR & ORS. Respondents
Represented by: Mr.Rakesh Malhotra, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J. & V.KAMESWAR RAO, J. (Court Decision)

1. Disposing of O.A.No.118/2010 filed by the respondents, vide impugned judgment dated January 29, 2010, in paragraph 7 thereof the Tribunal has noted: *‘On careful consideration of the rival contentions of the parties, though we do not find any challenge to the Recruitment Rules, yet the Rules are being framed by the respondents in wake of an order passed by the High Court on 18.12.2009’*. Further, in para 24 of its decision the Tribunal observed: *‘The High Court, therefore, in our opinion, was not wholly correct when it opined that a policy decision cannot be a subject matter of judicial review’*.

2. We need to highlight that a perusal of the decision of the Tribunal would reveal that after writing till paragraph 8, the Tribunal quoted paragraph 23 from the decision of the Supreme Court reported as 2008 (2) SCC (L& S) 279 A.Satyannarain vs.S.Purushotham. Thereafter, the Tribunal

proceeded to write its opinion in paragraph 9 onwards, but influenced by the fact that in the preceding para 8 it had quoted paragraph 23 from the decision of the Supreme Court, the serial number assigned to the next paragraph is 24 onwards.

3. Be that as it may, the reason why we have noted aforesaid is lest there be a confusion with respect to the numbering of the paragraph of the decision taken by the Tribunal.

4. Notwithstanding the fact that the Tribunal noted that there was no challenge to the Recruitment Rules, the final directions issued were contrary to the Recruitment Rules which were promulgated and were in force when the Tribunal decided the matter on January 29, 2010.

5. Let us now note the facts necessary to be noted by us.

6. Pursuant to a Resolution No.225 dated June 4, 1974, the Municipal Corporation of Delhi (MCD) notified the Recruitment Rules for the posts of :‘(i) *Malaria Supervisor*, (ii) *Insect Collector*, (iii) *Malaria Assistant (Microscopist)*, (iv) *Laboratory Technician (Microscopist)*, (v) *Basic Health Worker and* (vi) *Surveillance Worker*’. All posts were Class-III posts and were non-selection. 50% posts were to be filled up by direct recruitment and 50% by promotion from amongst Anti Malaria/Anti Larval Beldars and DDT Jamadars (SFW/DDT Beldars (FW) having six months experience in case of those who were matriculates and 10 years experience for those who were middle class. Pertaining to appointment by direct recruitment, Essential Qualifications were matriculation as also a Sanitary Inspector Diploma from a recognized institute.

7. In the year 1983 the 6 posts were clubbed under a common nomenclature ‘*Assistant Malaria Inspector*’ (AMI).

8. 400 vacancies existed to the posts of Malaria Supervisor, Insect

Collector, Malaria Assistant (Microscopist), Laboratory Technician (Microscopist), Basic Health Worker and Surveillance Workers which were later on, as noted above re-designated as Assistant Malaria Inspectors as of the year 1978.

9. It appears that the MCD was contemplating to amend the Recruitment Rules by stipulating that only 5% posts would be filled up by promotion and 95% would be filled up by direct recruitment. Fearing that 95% of the 400 vacancies may be filled up by direct recruitment, the '*Anti Malaria Chautharth Shreney Union (Regd.)*' filed a suit for permanent injunction and in the plaint reference was made to the post of Assistant Malaria Inspector as Anti Malaria Inspector. It is apparent that the claim in the suit was that existing posts be filled as per the existing Recruitment Rules and as of the said year the 6 posts were already being referred to in the department as those of Anti Malaria Inspectors.

10. By the time the suit was decreed, it was July 21, 1987 and by then the Recruitment Rules which were promulgated in the year 1974 came to be amended when a Notification dated August 12, 1985 was issued. As per the Recruitment Rules only 5% posts were to be filled up by promotion and 95% were required to be filled up by direct recruitment.

11. The judgment and decree dated July 21, 1987 disposing of suit No.379/1978 held that bureaucrats had not shed the hangover of the colonial post and deny right to poor labour. Noting that the Recruitment Rules were amended on August 12, 1985 the learned Sub Judge held that all department candidates inducted in service before the Recruitment Rules were amended shall be governed by the previous unamended Rules.

12. The judgment makes no legal sense and ignores the fact that the legal issue before the Learned Judge was whether vacancies which had accrued

when the suit was filed were required to be filled up as per the existing Recruitment Rules and not kept pending, to be filled up, till the Recruitment Rules were amended. We would have appreciated if the learned Sub Judge took note of the law that unless a conscious decision is taken to postpone making appointments pending amendment to the Recruitment Rules or unless the amended Recruitment Rules are retrospective, a vacancy which has accrued needs to be filled up as per the Recruitment Rule in vogue when the vacancy accrued.

13. Fortunately, the Corporation understood the decree to mean that the existing 400 vacancies had to be filled up as per the Recruitment Rules of the year 1974 i.e. 50% in the quota of promotees.

14. The decree passed is *ex facie* contrary to law. There is no rule of law that a Recruitment Rule cannot be amended. There is no rule of law that a person has a vested right to be considered for promotion as per the Recruitment Rule in vogue when he entered service. The settled law is that nobody has a vested right to be promoted. The only right which vests in a person is to be considered, along with the other eligible candidates, to be promoted. Law empowers the Executive to amend existing Recruitment Rules and the same may alter or even adversely affect a right to be considered for promotion. After all, what is Cadre Restructuring all about?

15. The existing Recruitment Rules, framed in the year 1974, came to be amended, as noted above on August 12, 1985. As noted above, 95% posts of Assistant Malaria Inspector were required to be filled by direct recruitment.

16. Without challenging the Recruitment Rules as amended, respondents filed O.A.118/2010 pleading that as of the year 1974, 50% posts of Anti Malaria Inspector (Assistant Malaria Inspector) were to be filled up by

promotion and 50% by direct recruitment. It was pleaded that the decree dated July 21, 1987 passed by the learned Sub Judge required 50% of the existing vacancies to be filled up by promotion. It was pleaded that promotions have been effected on September 11, 1990, October 22, 1997 and September 30, 1998 as per the Rules of 1974 and thereafter no promotions have been made. Pleading that in the year 1985 promotional quota was reduced to 5% it was pleaded that this caused resentment among the existing feeder cadre and that the Corporation had decided to amend the 1985 Rules to provide 30% quota to the promotes. Grievance was that till the decision to amend the Recruitment Rule notified in the year 1985 was given effect to by providing 30% quota for promotees, the Department should not fill up the existing vacancies; for the reason 95% thereof would be filled by direct recruitment. Second grievance was to an educational qualification being prescribed even in the promotee quota i.e. the requirement of having a Sanitary Inspector Diploma.

17. Though the claimants before the Tribunal did not bring out, it is apparent that the problem they were facing was not possessing the Sanitary Inspector Diploma because availing age relaxation they could compete amongst the direct recruits provided they had possessed the diploma. Relief sought was to quash the intended recruitment by resorting to direct recruitment. But surprisingly, as per prayer (B) a direction was sought that appointments should be as per the Rules of 1974.

18. It is apparent that prayer (B) ran in the teeth of the grievance made in the Original Application.

19. A writ petition was filed by Bhola Ram Sharma and others in this Court on the subject of recruitments to be made to the post of Assistant Malaria Inspector and in which an interim order was passed by a learned

Single Judge of this Court. Being not relevant, we do not burden ourselves to note the grievance raised in the writ petition and the interim order passed, but would note that a Contempt Petition was filed by Bhola Ram Sharma and others, registered as Contempt Case No.6510/2006, in which on December 18, 2009 an order was passed by a learned Single Judge of this Court as under:-

“The counsel for the Ministry of Urban Development, Govt. Of NCT of Delhi states that certain clarifications were sought from the MCD and of which the reply is awaited. The counsel for the MCD states that the clarifications sought will be replied to on or before 28th December, 2009. It is informed that the Dy.MHO (Malaria), MCD is the officer responsible for giving the said clarifications. If the said clarification is not furnished by the MCD to the Ministry of Urban Development by 28.12.2009, the Dy.MHO (Malaria, MCD to remain present before this Court on the next date to show cause as to why he should not be punished for disobeying the direction of the Court. The counsel for the Ministry of Urban Development states that when the clarifications are received from the MCD, the file will be sent to the Law Department for their final clearance and which is likely to take one week and is thereafter to be sent to the office of the Lt.Governor for notification and which is likely to take 15 days time. If the file upon receipt of clarification from the MCD is not sent by the Ministry of Urban Development to the Law Department within two working days and if upon receipt of final clearance from the Law Department the file is not sent to the office of the Lt. Governor again within two weeks, the Addl. Secretary, Deptt. Of Urban Development, NCT of Delhi to remain present before this Court on the next date of hearing.”

20. It appears that the contempt alleged was of some orders passed with respect to a decision taken by the MCD to amend the Recruitment Rule of the year 1985 so that 30% posts of Assistant Malaria Inspectors could be available in the promotee quota and the problem was that the UPSC and the Central Government were dragging on the matter; neither was approval

WP(C) 7649/2010

being granted nor rejected. Order dated December 18, 2009 reflects said state of flux i.e. that the Ministry of Urban Development was seeking clarifications from the MCD.

21. What surprises us is the fact that after noting order dated December 18, 2009, the impugned order passed by the Tribunal records a finding that in its opinion the view taken by the High Court that a policy decision cannot be a subject matter of judicial review was not wholly correct.

22. The order dated December 18, 2009, which we have extracted above, does not speak of the issue at all.

23. In the impugned order the Tribunal has held that amendments to Recruitment Rules cannot be made in a manner where promotional avenues are nullified, opining that such amendments would be hit by Article 16 of the Constitution of India.

24. Noting that a policy decision, where an employee's chance of promotion is diminished cannot be the subject matter of a judicial review, the Tribunal has opined that introducing educational qualifications for purposes of promotion forecloses the right to be promoted.

25. Disposing of the Original Application, the Tribunal held that MCD could fill up, by direct recruitment, 70% posts but 30% should be kept unfilled till MCD re-examined the matter.

26. Now, if we take into account the final decision taken by the Tribunal, in light of the pleadings made and prayer (A), the rationale for the decision would be that the existing Recruitment Rule framed as of the year 1985 had only 5% posts of Assistant Malaria Inspectors in the promotion quota and the proposed amendment was to increase the same to 30%.

27. The only grievance the Corporation could therefore have could be that till the Recruitment Rule was amended, its hand could not be tied to fill up

the posts as per the Recruitment Rules in vogue, more so for the reason Assistant Malaria Inspectors are required keeping in view the climatic conditions in Delhi which are favourable to mosquitoes breeding and the resultant danger of malaria and dengue.

28. At this stage we must note that in the year 2010, MCD has amended the Recruitment Rules and notified the same on February 16, 2010, as per which 30% posts have been reserved to be filled up by promotion from amongst the feeder cadre post with the stipulation that a diploma in Sanitary Inspector Course would be mandatory.

29. Arguments were advanced before us that the Recruitment Rule finally framed in the year 2010 has taken away the promotional avenue of the feeder cadre post because no incumbent thereof possesses the diploma in Sanitary Inspector. Contention urged by learned counsel for the respondents was that when respondents entered service they were given to understand that upon acquiring the necessary experience they would be eligible to be promoted to the post of Assistant Malaria Inspector and the decision to prescribe the educational qualification of possessing Sanitary Inspector Diploma would be arbitrary and violating the right of the respondents to employment under the State.

30. Sufficient would it be to state that with passage of time, requirements of jobs keep changing. Science and technology throws challenge in every sphere of life. Since DDT had played havoc by causing environmental pollution, notwithstanding mosquito larvae being destroyed when DDT was sprayed, eco-friendly bio-larvaeside have been developed and thus there may be every need to have technically qualified people functioning as Assistant Malaria Inspectors.

31. We are unable to discuss any further because of the reason that before

the Central Administrative Tribunal grievance of the respondents was to fill up vacant posts of Assistant Malaria Inspectors as per the Recruitment Rules amended in the year 1985 under which only 5% posts were available in the promotion quota and the respondents were desiring that as and when the proposed amendment introduced in the year 2008 by the MCD, requiring concurrence from the Central Government, was given effect to by amending the Recruitment Rules so that 30% posts fall in the promote quota, recruitment process should be put on hold. The respondents were not aware then, that the final amendment to the Recruitment Rule may provide for them 30% posts in the promotee quota but would take away a right to be considered for promotion for all of them, because henceforth, only those who possess Sanitary Inspector Diploma would be eligible to be considered for promotion. Thus, MCD was not even called upon to justify its decision as to why it finally resolved that even within the promotee quota, eligibility would be, apart from others, the condition of a Sanitary Inspector Diploma possess by the candidate.

32. The Tribunal could not have restrained MCD to fill up the vacant posts merely because an amendment was proposed to the Recruitment Rule, but we need not trouble ourselves any further on the subject because as of today, the amended Recruitment Rules have come into force.

33. Thus, if the respondents have any grievance to the introduction of the term in the promotee quota of possessing a Sanitary Inspector Diploma, on properly constituting pleadings, a fresh of cause of action may be presented before the Tribunal and in said circumstance MCD would be entitled to justify the rationale for said decision.

34. But, we would be failing not to note the decisions of the Supreme Court which highlight that unless a Government servant has an incentive to

earn promotion, his performance would be lacking in motivation and this would be jeopardising public interest and hence the desirability to grant at least one, if not two promotions, to a Government servant are no longer applicable in the current regime since the year 1999 when, accepting the recommendations of the 5th Central Pay Commission an Assured Career Progression Scheme was introduced by the Central Government which was adopted by the MCD under which a Government servant, if could not earn a promotion within the first 12 years of joining service, becomes eligible to be granted an *in situ* promotion by being placed in the next above pay scale and upon no promotion being earned even after 24 years becomes entitled to another *in situ* promotion. With the acceptance of the recommendations of the 6th Central Pay Commission, the Modified Assured Career Progression Scheme has given further benefit by providing for three *in situ* promotions upon completing 10, 20 and 30 years service.

35. The petition stands disposed of permitting the petitioner to fill up the post of Assistant Malaria Inspectors as per the current Recruitment Rules and simultaneously reserving liberty for the respondents to challenge the Recruitment Rules as amended in the year 2010, but advising them to weigh the option whether or not to challenge the amendment keeping in view the benefits which have accrued to them firstly under the Assured Career Progression Scheme and secondly under the Modified Assured Career Progression Scheme.

36. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

MAY 14, 2013/skb