

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

+ **W.P.(C) No.1574/2014**

% **6th January, 2015**

BRIDGE AND ROOF COMPANY (INDIA) LTD.
EXECUTIVES' ASSOCIATIONPetitioner

Through: Ms. Maninder Acharya, Senior
Advocate with Mr. Snehasish
Mukherjee, Advocate.

VERSUS

M.K. SINGH AND ORS. Respondents

Through: Mr. Pankaj Kapoor, Advocate for
respondent No.1.
Mr. Arun Bhardwaj, CGSC with Mr.
Harvinder Oberoi, Advocate for
respondent Nos.2 and 3.
Mr. A.P. Dhamija, Advocate for
respondent No.5.

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

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

VALMIKI J. MEHTA, J (ORAL)

1. This writ petition under Article 226 of the Constitution of India is filed by the association of Executives of the respondent no.5-company M/s Bridge and Roof Company (India) Ltd. The petitioner Executives' Association seeks a writ, order or direction in the nature of *quo warranto* to

question the contractual appointment period (or till further orders) of the respondent no.1, Mr. M. K. Singh as a Director (Project Management) of the respondent no.5-company in terms of the order of the respondent no.5-company dated 21.7.2011. This order dated 21.7.2011 reads as under:-

“In exercise of the powers conferred to him under Article 10 of the Articles of Association of M/s Bridge & Roof Company (India) Limited (B&R), Kolkata the President is pleased to appoint Sh. M.K. Singh, CMD, Chairman and Managing Director, Richardson & Cruddas Ltd (R&C) to the post of Director (Project Management), Bridge & Roof Company (India) Limited (B&R) in Schedule ‘C’ scale of pay of Rs.65000-75000 (revised) for a period of five years from the date of assumption of the charge or until further orders, whichever event takes place earlier.

Detailed terms & conditions of appointment will follow.

Sd/-
(Ajay Kumar)
Under Secretary to the Govt. of India
Phone 23061531”
(underlining added)

2. At the commencement of hearing, on a specific query which is put to the learned senior counsel for the petitioner, it is conceded that the only relief which is claimed in the present writ petition is a writ in the nature of *quo warranto*. No other relief is sought on behalf of the petitioner except the relief in the nature of a writ, order or direction of *quo warranto*.

3. Following are the settled legal propositions so far as a writ of *quo warranto* is concerned in terms of the judgments of the Supreme Court which are quoted below:-

(i) In service matters if an appointment of a person is challenged not by seeking the writ of certiorari but seeking a writ, order etc of *quo warranto*, *locus* of the petitioner is not to be examined because the petitioner is only a relator to the Court with respect to alleged usurpation of a public office by a person.

(ii) A writ, order or direction in the nature of *quo warranto* is different than the writ, order or direction sought in the nature of certiorari questioning an appointment, and in the latter case only the affected persons who question the appointment of a person have a right to approach the Court i.e *locus* of the petitioners is in issue unlike a petition seeking a writ etc in the nature of *quo warranto*.

(iii) A petition seeking a writ etc of a *quo warranto* lies only against an appointment made which is in violation of a statutory provision or a statutory rule. A writ, order or direction in the nature of *quo warranto* cannot be sought merely on account of violation of any circular or guideline

or direction i.e where the appointment is not alleged to be in violation of a statutory provision.

(iv) Writ, order or direction in the nature of *quo warranto* can lie either against a public office or when through the office in question, appointment to which is challenged, a sovereign function is performed.

(v) The post in question has to be a public post having some amount of permanency and an appointment made which is for a contractual period or until further orders is not a public post.

(vi) If an appointment is challenged of a person to a public post, if in that writ petition, an order or a direction in the nature of *quo warranto* is not sought, the writ petition to challenge the appointment will have to be in the nature of a Public Interest Litigation wherein petitioners will seek a writ of declaration etc to question the appointment to a public post.

(vii) Mere suitability of a person for appointment to a post cannot be the subject matter of a petition seeking writ, order or direction in the nature of *quo warranto*.

4. In the judgment in the case of ***B. Srinivasa Reddy Vs. Karnataka Urban Water Supply & Drainage Board Employees'***

Association and Ors. (2006) 11 SCC 731, Supreme Court has laid down the ratio that only when there is a violation of statutory provisions a writ of *quo warranto* can be sought, and a petition seeking *quo warranto* does not lie alleging violation of a mere circular or guideline etc which does not have statutory force. The Supreme Court has further clarified that unless the post is a public post i.e a post which is an appointment in terms of a statute (and not a post which is a contractual appointment till further orders) a writ of *quo warranto* cannot be issued. The relevant paragraphs of the judgment in the case of ***B. Srinivasa Reddy (supra)*** read as under:-

“43. Whether a writ of Quo Warranto lies to challenge an appointment made "until further orders" on the ground that it is not a regular appointment. Whether the High Court failed to follow the settled law that a writ of Quo Warranto cannot be issued unless there is a clear violation of law. The order appointing the appellant clearly stated that the appointment is until further orders. The terms and conditions of appointment made it clear that the appointment is temporary and is until further orders. In such a situation, the High Court, in our view, erred in law in issuing a Writ of Quo Warranto the rights under Article 226 which can be enforced only by an aggrieved person except in the case where the writ prayed for is for Habeas Corpus.

44. In the instant case, the power to appoint the Managing Director of the Board is vested in the Board under 4(2) of the Act. Neither the Act nor the Rule prescribed any mode of appointment or tenure of appointment. When the mode of appointment, tenure of appointment have been left to the discretion of the Government by the Act and the Rules and the Act makes it clear that the Managing Director shall hold office at the pleasure of the Government the High Court could not have fettered the discretion of the Government by holding that

Section 4(2) of the Act does not expressly give the power to the State Government to make ad hoc or contract appointment when the Act and the statutory rules have not prescribed any definite term and any particular mode, the High Court could not have read into the statute a restriction or prohibition that is not expressly prohibited by the Act and the Rules. It is well settled that when the statute does not lay down the method of appointment or term of appointment and when the Act specifies that the appointment is one of sure tenure, the Appointing Authority who has power to appoint has absolute discretion in the matter and it cannot be said that discretion to appoint does not include power to appoint on contract basis. An appointment which is temporary remains temporary and does not become a permanent with passage of time. The finding records by the learned Single Judge that the appointment is bad for the reason that the appointment which was made on temporary basis has continued for nearly 2 years is wholly contrary to law particularly when the Act and the Rule do not stipulate maximum period of appointment. The High Court, in our view, gravely erred in issuing a Writ of Quo Warranto when there is no clear violation of law in the appointment of the appellant.

45. The official memorandum dated 23.12.1994 on a plain reading of it applies only to Government servants. It has no manner of the application to the employees or servants of the statutory boards. The appellant is not a retired government servant. His appointment as Managing Director of the Board is not a post in Government service. The High Court has erred in law in applying the said official memorandum to the appointment of the appellant which is governed only by the Act and the Rules, even otherwise the High Court has failed to appreciate that the official memorandum running counter to the statutory provisions are ineffective and at any event cannot be enforced in a quo warranto proceedings.

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49. The law is well settled. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine, at the

outset, as to whether a case has been made out for issuance of a *Writ of Quo Warranto*. The jurisdiction of the High Court to issue a *Writ of Quo Warranto* is a limited one which can only be issued when the appointment is contrary to the statutory rules.

50. The official memorandum dated 23.12.1994 deals with re-appointment of retired government servants and granting extension of service to retired government servants. As already stated, the appellant is not a government servant nor a retired government servant. The official memorandum is an administrative instruction which is contrary to the provisions of the Act and statutory Rules neither the Act nor the Rules prescribe any age of retirement for the Managing Director of the Board. On the other hand, having regard to the dis-qualification prescribed by Section 7(1)(d) of the Act to the effect that an officer or servant of the Board cannot be appointed as Managing Director. The High Court could not have read an additional dis-qualification that a retired officer or a servant of the Board also cannot be appointed as Managing Director of the Board. The memorandum dated 23.12.1994 is no manner of application to the appointment in question and it is even otherwise ineffective inasmuch as it is an administrative instruction which is contrary to the provisions of the Act and the Rules. The High Court, in our opinion, erred in ousting the appellant from his service by issue of a *Quo Warranto* on the ground that the appellant having retired from this service of the Board on 31.01.2004 suffered dis-qualification under the said memorandum by a reading of the Act and the Rules the appellant acquired qualification for appointment on 31.01.2004 on his retirement and the view of the High Court that the appellant is dis-qualified on 31.01.2004 on his retirement from service of the Board is not only contrary to the Act and the Rules is also plainly opposed to the language of the memorandum itself. Even otherwise, no Writ of Quo Warranto could have been issued on the ground that even though the appointment is contrary to any statutory rule it is contrary to the administrative instruction which the High Court holds as disclosed the policy of the Government. There is no warrant to have taken such a view at all.

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57. It is settled law that Writ of quo warranto does not lie if the alleged violation is not of a statutory nature. Three judgments relied on by Mr. P.P. Rao can be usefully referred to in the present context.

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59. In *High Court of Gujarat. v. Gujarat Kishan Mazdoor Panchayat* it was held by this Court that a Writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. The judgment in *Mor Modern Coop. Transport Society Ltd. v. Financial Commissioner & Secretary to Government of Haryana* was also relied on.

60. Thus it is seen that a writ of quo warranto does not lie if the alleged violation is not of a statutory provision.

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76. The Notification dated 31.1.2004 clearly states that the appointment is on contract basis and until further orders. While laying down the terms of appointment in its order dated 21.4.2004, the Government of Karnataka clearly stated that "term of contractual appointment of Sri B. Srinivasa Reddy shall commence on 1st February, 2004 and will be in force until further orders of the Government and this is a temporary appointment." Section 6(1) of the Act categorically states that the Managing Director shall hold office during the pleasure of the Government. Power and functions of the of the Board are laid in Chapter V of the Act. A reading of the Act clearly shows that neither the Board nor its Managing Director is entrusted with any sovereign function. Black's Law Dictionary defines public office as under:

"Public Office: Essential characteristics of "public office" are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government, key element of such test is that "officer" is carrying out sovereign

function. Spring v. Constantino 168 Conn.563, 362 A.2d 871, 875. Essential elements to establish public position as "public office" are position must be created by Constitution, legislature or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and power must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control or superior power other than law, and position must have some permanency and continuity, State V. Taylor.”

77. Carrying out sovereign function by the Board and delegation of a portion of sovereign power of Government to the Managing director of the Board and some permanency and continuity in the appointment are quintessential features of public office. Every one of these ingredients are absent in the appointment of the appellant as Managing Director of the Board. This aspect of the matter was completely lost sight of by the High Court.

78. The High Court, in the instant case, was not exercising certiorari jurisdiction. Certiorari jurisdiction can be exercised only at the instance of a person who is qualified to the post and who is a candidate for the post. This Court in *Dr. Umakant Saran v. State of Bihar* held that the appointment cannot be challenged by one who is himself not qualified to be appointed. In *Kumari Chitra Ghose v. Union of India*, a Constitution Bench of this Court held as under:

“12. The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded.”

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90. This Court, in the above judgment, held that such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up, these considerations are wholly irrelevant in judicial approach but because otherwise, functioning effectively would become difficult in a democracy.

91. Two important considerations must weigh with us in determining our approach to these questions. First, the post of Managing Director is a highly respectable post. It is a post of great confidence a lynchpin in the administration and smooth functioning of the administration requires that there should be complete rapport and understanding between the Managing Director and the Chief Minister. The Chief Minister as a Head of the Government is in ultimate charge of the administration and it is he who is politically answerable to the people for the achievements and failures of the Government. If the Chief Minister forfeits the confidence on the appellant, he may legitimately in the larger interests of administration appoint him until further orders as M.D. of the Board. It does not involve violation of any legal or constitutional rights. Secondly that the vast multitudinous activities in which a modern State is engaged, there are bound to be some posts which require for adequate discharge of their functions, high degree of intellect and specialized experience. It is always a difficult problem for the Government to find suitable officers for such specialized posts. There are not ordinarily many officers who answer the requirements of such specialized posts and the choice with the Government is very limited and this choice becomes all the more difficult, because some of these posts, though important and having onerous responsibilities, do not carry wide executive powers and officers may not, therefore, generally be willing to be transferred to those posts. The Government has in the circumstances to make the best possible choice it can, keeping in view the larger interests of the administration. When in exercise of this choice, the Government transfers an officer from one

post to another, the officer may feel unhappy because the new posts does not give him the same amplitude of powers which he had while holding the old post. But that does not make the appointment arbitrary. So long as the appointment is made on account of the exigencies of administration, it would be valid and not open to attack under Articles 14 & 16. Here the post of M.D. was admittedly a selection post and after careful examination of the merits, the Chief Minister selected the appellant for the post of M.D. It was not the case of the respondents that the appellant was not found qualified to the task or that his work was not satisfactory.” (emphasis added)

5. The recent judgment of the Supreme Court in the case of ***Rajesh Awasthi Vs. Nand Lal Jaiswal & Ors. (2013) 1 SCC 501*** refers to and relies upon earlier judgments of the Supreme Court on the issue of *quo warranto* and reiterates the principles qua issuance of a writ, order or direction in the nature of *quo warranto* as have been given in the case of ***B. Srinivasa Reddy (supra)***.

6. I may state that the horizon with respect to filing of a Public Interest Litigation with respect to appointment of a public post has been broadened by the Supreme Court in its judgment of a Division Bench of three Judges in the case known as CVC case being ***Centre for PIL and Anr. Vs. Union of India (UOI) and Anr. (2011) 4 SCC 1*** wherein the Supreme Court has held that with respect to a public post, a Public Interest Litigation can be filed questioning the appointment to a public post by seeking a writ of declaration and wherein Courts are empowered to examine whether the

candidate has institutional integrity for appointment to the post and whether relevant material has been considered for appointment of the person to the public post. The present case concededly is not a Public Interest Litigation and which is already stated at the commencement of this judgment. I may also state that with respect to issuance of a writ of declaration in the Public Interest Litigation cases, this has been also so held by the Supreme Court in its recent judgments in the cases of *State of Punjab Vs. Salil Sabhlok and Ors. (2013) 5 SCC 1* and *N. Kannadasan Vs. Ajoy Khose and Ors. (2009) 7 SCC 1*.

7. The admitted position which emerges in the present case is as under:-

(i) There is no violation of a statutory provision or any rule which is alleged in the writ petition for questioning the appointment of the respondent no.1 to the post of Director (Project Management) of the respondent no.5-company.

(ii) The post in question is not a public post in the sense that any sovereign function is being performed and also that the post is not a public post because appointment is not pursuant to statutory provisions.

(iii) There is no permanency which is attached to the post because appointment of the respondent no.1 in terms of the order dated 21.7.2011 is

for a period of five years or until further orders, the position which is identical to the position before the Supreme Court in the case of **B. Srinivasa Reddy** (*supra*). What is alleged by the petitioner is violation not of any statutory provision but of the appointment not being made as per the doctrine of “Best Principle”.

8. In view of the settled legal position as per the judgments of the Supreme Court stated above, therefore this writ petition seeking order or direction in the nature of *quo warranto* will not lie because there is no violation alleged of a statutory provision and the post in question is not a public post.

9. Learned senior counsel for the petitioner very strenuously urged the following arguments in support of the writ petition:-

(i) The appointment in question is to a public post inasmuch as the selection of the respondent no.1 for the post of Director (Project Management) with the respondent no.5-company is through the Public Enterprise Selection Board (PSEB), and PSEB has been constituted as per the resolution passed by the Parliament, and notified in the Gazette in the form of the notification dated 3.3.1987 of the Ministry of Personnel, Public Grievances and Pensions and the Department of Personnel and Training.

Accordingly, it is argued that not only the post in question is a public post
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but effectively there would be appointment pursuant to a statutory provision because the notification dated 3.3.1987 was gazetted after following the procedure as prescribed for conduct of business rules for moving of a resolution in the Parliament. In support of this argument reliance is placed upon the following judgments of this Court:-

(a) ***P.V. Narsimha Rao and Ors. Vs. C.B.I. 68 (1997) Delhi Law Times 553.*** (single Judge)

(b) ***L.K. Advani and Ors. Vs. Central Bureau of Investigation 66 (1997) Delhi Law Times 618.*** (Single Judge)

(c) ***Miss Kumkum Khanna and Others Vs. The Mother Aquinas, Principal, Jessus and Mary College, Chanakyapuri, New Delhi and Anr. AIR 1976 Delhi 35.*** (Division Bench)

(ii) Reliance is also placed upon the judgment of the Supreme Court in the case of ***N. Kannadasan Vs. Ajoy Khose and Ors. (2009) 7 SCC 1 (para 131)*** to argue that once the holder of a public office is appointed although he is not eligible and without following the processual machinery being fully complied with, a writ of *quo warranto* will lie. Para 131 of the judgment in the case of ***N. Kannadasan (supra)*** relied upon reads as under:-

“131. Concededly, judicial review for the purpose of issuance of writ of Quo Warranto in a case of this nature would lie:

(A) in the event the holder of a public office was not eligible for appointment;

(B) processual machinery relating to consultation was not fully complied.

The writ of quo warranto proceedings affords a judicial remedy by which any person who holds an independent substantive public office is called upon to show by what right he holds the same so that his title to it may be duly determined and in the event it is found that the holder has no title he would be directed to be removed from the said office by a judicial order. The proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right. It is indisputably a high prerogative writ which was reserved for the use of Crown. The width and ambit of the writ, however, in the course of practice, have widened and it is permissible to pray for issuance of a writ in the nature of quo warranto.”

10. Both the arguments urged on behalf of the petitioner in the opinion of this Court do not merit acceptance and the reasons for the same are contained hereinafter.

11. What is a public post has been stated clearly and categorically by the Supreme Court in para 76 in the judgment in the case of ***B. Srinivasa Reddy (supra)*** and which para 76 has been reproduced above. Supreme Court in para 76 lays down the ratio that the essential element to hold that the post is a public post is that the post must be created either by the Constitution, legislature or through the authority conferred by the legislature or the portion of the sovereign power of the government which is vested in

the public post must be delegated by the legislature or through legislative authority and the post must have some permanency and continuity. In the present case, as already stated above, facts with respect to appointment of the respondent no.1 as the Director (Project Management) of the respondent no.5 company are nearly identical to the case of ***B. Srinivasa Reddy (supra)*** and in which case the Supreme Court held that any contractual appointment till further orders does not have the necessary permanency for the same to be called a public post. I have already reproduced above the order dated 21.7.2011 by which the respondent no.1 was appointed as a Director (Project Management) of the respondent no.5-company and which is clearly an appointment for five years or until further orders and which appointment the Supreme Court in the case of ***B. Srinivasa Reddy (supra)*** has held not to be a public appointment/appointment to a public post, much less that the post is such that it involves performing of a sovereign function or a function under a statute or statutory provision. The judgments of the different learned Single Judges of this Court or of the Division Bench which are relied upon on behalf of the petitioner therefore would have no application once the Supreme Court has clearly laid down the ratio as regards the *quo warranto* in the case of ***B. Srinivasa Reddy (supra)*** and which has thereafter been followed in the recent judgment of the Supreme Court in the case of ***Rajesh***
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Awasthi (supra). To complete the narration, it is to be reiterated at the cost of repetition that the present petition is not in the nature of Public Interest Litigation for it to come within the ratio of *Centre for PIL and Anr. (supra)*, *State of Punjab (supra)* and *N. Kannadasan (supra)* referred to above. The first argument urged on behalf of the petitioner is therefore rejected.

12. So far as the second argument by placing reliance upon para 131 of the judgment of the Supreme Court in the case of *N. Kannadasan (supra)* is concerned, it may be stated that the said para in fact goes against the petitioner because the said para requires appointment to a public post and public post is only a post which is under a statute or where the sovereign function is being performed, and in the present case appointment is not to a public post. Once the appointment is not under a statute, the post in question is not a public post and nor is the post held by a person holding public or sovereign office and therefore there does not arise any issue with respect to claiming of a writ or order in the nature of *quo warranto*.

13. In view of the above, it is clear that the petitioner is not entitled to the reliefs of any writ, order or direction in the nature of *quo warranto* and therefore this writ petition is dismissed with costs. Certificate of fees of the counsels for the respondents be filed on behalf of the

respective respondents within a period of two weeks from today. Costs can be recovered in accordance with law.

JANUARY 06, 2015
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VALMIKI J. MEHTA, J.