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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 2056/2015

Reserved on: 22nd January, 2016

Date of decision: 29th April, 2016

RAVENDRA GARG

..... Petitioner

Through: Mr. Arnunav Patnaik and Ms.
Bhabna Das, Advocates.

Versus

UNION OF INDIA AND ORS.

.... Respondent

Through: Mr. Jasmeet Singh, CGSC with Mr.
Srivats Kaushal, Advocate for UOI.
Mr. Naresh Kaushik, Advocate for the UPSC.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.:

Ravendra Garg, the petitioner assails order dated 23rd December, 2014 passed by the Principal Bench, Central Administrative Tribunal, New Delhi (Tribunal, for short), whereby his OA No.3631/2014 has been dismissed.

2. By order dated 4th December, 2009, the petitioner was appointed as the Director (Finance) in the National Projects Construction Corporation Limited (NPCC) with effect from 21st July, 2009, for a period of five years or till the date of superannuation or until further orders, whichever was

earlier. The said appointment was on the recommendation of the Public Enterprises Selection Board and with the approval of the Appointments Committee of Cabinet (ACC).

3. Consequently, the tenure of the petitioner came to an end on expiry of five years on or about 20th July, 2014. Earlier, on 22nd February, 2013, a memorandum under Rule 11 of the NPCC (CCA) (First Amendment) Rules, 2005, framing articles of charge was issued and served on the petitioner. On the basis of the report submitted by the Inquiry Officer, disciplinary authority imposed penalty of 'censure' vide order dated 8th May, 2014. An appeal against penalty of 'censure' was rejected. The petitioner, it was stated, has filed a separate OA challenging penalty of 'censure' and we are not concerned with the merits etc. of the same in the present writ petition.

4. The prayer made in the present writ petition is for quashing the order dated 30th September, 2014 whereby the petitioner was relieved from the post of Director (Finance). The petitioner also seeks quashing of the letter dated 30th September, 2014 of the Ministry of Water Resources, River Development and Ganga Rejuvenation and office memorandum dated 1st August, 2014 issued by the same Ministry. Direction is sought that the respondents should apply the benchmarking system to the petitioner as prescribed in D.O. No.5/6/2010-PESB dated 28th June, 2011 and the benchmarking chart/table should be placed before the competent authority

for grant or consideration of extension of tenure as Director (Finance) in NPCC.

5. The petitioner contends that there has been procedural illegality and abject failure on the part of the respondents in not applying the benchmarking system as mandated by the ACC guidelines dated 31th March, 2011 and PESB circular dated 28th June, 2011. This stipulation and prescribed procedure, it is contended, is salutary and stands reiterated in several office Memoranda and Circulars. This violation, it is urged, is contrary to the mandate of Articles 14 and 16 of the Constitution. The benchmarking criteria evolved and recommended by the ACC ensures objectivity and eliminates arbitrariness. Under the benchmarking system, points or marks are allocated in the Special Performance Report after considering the performance and attributes of the candidate. It is asserted that in the present case, the Special Performance Report was not prepared. CVC report also was not called for. ACC in their communication dated 25th July, 2014, had earlier asked the Ministry to apply the benchmarking system. Despite this letter, the Ministry for specious reasons did not apply the benchmarking system, even when the benchmarking system brooks no exception. In these circumstances, the communication of the Ministry dated 1st August, 2014, is untenable and liable to be struck down. The petitioner it is accepted had remained under suspension from 22nd

February, 2013 to 8th May, 2014 but this suspension was unjustified. The
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petitioner should be given pay and allowances for this period in terms of the Office Memorandums dated 22nd October, 1964 and 3rd December, 1995. Further, the suspension of the petitioner was irrelevant. The CMD, NPCC had erroneously not filled up the proforma, assessing the petitioner's benchmark before he had retired on 31st March, 2013. The contention of the petitioner is that the CMD concerned was prejudiced and was responsible for initiating a motivated enquiry. The petitioner was not accorded vigilance clearance as he was under suspension and inquiry proceedings were pending. The guidelines nowhere provide that benchmarking was not required if the employee was awarded penalty of censure. The PAR (Personal Appraisal Report) gradings of the petitioner ranged from 'Good' to 'Very Good'. In spite of this, the Special Performance Report was neither prepared as per the benchmarking system nor forwarded to the ACC. As the petitioner was under suspension between 22nd February, 2013 to 8th May, 2014, his PAR for the period 2013-14 could not be written. The CMD at the relevant time had not seen the work of the petitioner as he was reinstated on 8th May, 2014. It was, therefore, not possible for the CMD to assess the petitioner's performance. The petitioner's performance appraisal report should have been prepared on the basis of previous years' PAR.

6. We do not find any merit in the contentions raised by the petitioner, which are devoid of legal substance and force. At the outset, we would

explicitly clarify that we are not examining and commenting on merits on the penalty of 'censure', as this is not the subject matter of challenge and directly an issue before us. The limited issue that arises for consideration in the present writ petition is whether the petitioner has been wrongly denied extension of tenure as the Director (Finance), NPCC. We would in the beginning observe that extension of tenure cannot be claimed as a matter of right. Tenure appointments are for the period specified. These contractual appointments are subject to the terms agreed and settled. It is within the domain and power of the respondents and the petitioner to agree or not agree to accept and accord extension of tenure. When a tenure appointment comes to an end, the respondents may or may not extend the tenure. Equally, the person may not accept or agree to another term. Of course, if the respondents act in an arbitrary manner, capriciously and contrary to law and do not extend the tenure on extraneous or irrelevant considerations, the said wrong can be checked and corrected. This is the limited scope in which a Court/tribunal exercises Power of judicial review in order to ensure objectivity and fairness in State action and the Courts do not act as an appellate forum.

7. By Office Memorandum dated 31st March, 2011, the Department of Personnel and Training had communicated to different authorities/public sector enterprises the guidelines, which should be followed, when a case is referred to the ACC for extension. The said guidelines read :-

“(a) All cases of extension shall be referred to the ACC, as is the existing procedure.

(b) The PESB shall, in consultation with the DPE, evolve a benchmarking system to be applicable while considering proposals for extension.

(c) All proposals in which the incumbents meet the benchmark and the Ministry/ Department decides to recommend extension shall be referred to the ACC for approval, not later than two months before the scheduled expiry of the tenure of the incumbent. No reference would be needed to PESB for a fresh joint appraisal.

(d) All proposals, wherein the incumbents meet the benchmark, but have some other issue such as vigilance etc. for which the Ministry/ Department is not inclined to recommend extension, shall be referred to the ACC for consideration six months before the scheduled expiry of tenure of the incumbent.

(e) All proposals wherein the incumbents do not meet the benchmark shall be referred to the PESB by the Department/ Ministry concerned. This reference has to be six months before the scheduled expiry of tenure of the incumbent. The recommendation of the PESB shall be referred to the ACC, for orders as at present.

(f) All proposals wherein the Ministry suggest termination/non-extension of the incumbent shall be accompanied by the proposal for giving additional charge.”

8. In the present case, we had called for the original records from the Ministry of Water Resources, River Development and Ganga Rejuvenation to examine how the question of extension of tenure in the case of the petitioner was examined. The file shows and establishes a detailed, fair

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and objective consideration. The Ministry of Water Resources was aware of the said guidelines dated 31st March, 2011. The Ministry of Water Resources had solicited ACC's approval for non-extension of the petitioner's tenure beyond 20th July, 2014 and to approach Public Enterprise Selection Board for appointment of the Director (Finance), NPCC. On a query being raised by the ACC, they were informed that the proposal sent for non-extension of petitioner's tenure had the approval of the Minister. The proposal was placed before the ACC, but they had at the first instance directed that it should be ascertained from the Ministry whether the petitioner meets the prescribed performance benchmark required for extension of tenure. The Ministry was accordingly directed to comply with the direction and furnish clarification. In reply, the Ministry wrote a detailed letter dated 1st August, 2014 stating that the petitioner's benchmark was not assessed for several reasons; (i) petitioner was under suspension with effect from 22nd February, 2013 to 18th May, 2014 and during this time, enquiry proceedings were pending; (ii) CMD, NPCC had not filled up the proforma for assessing the benchmark and had retired on 31st March, 2013; (iii) No proposal for extension of tenure was received from the NPCC within the prescribed period; (iv) The petitioner was not accorded vigilance clearance as he was placed under suspension and enquiry was going on.; (v) In the enquiry proceedings, penalty of 'censure'

had been imposed on the petitioner with the approval of the competent

authority; (vi) Copy of the PAR grading and the status of PAR was enclosed. As the petitioner was under suspension from 22nd February, 2013 to 8th May, 2014, his PAR grading for 2013-14 could not be written; and (vii) The benchmark proforma had not been filed by the CMD and countersigned by Secretary of Administrative Ministry. Furthermore, the present CMD and the Secretary had not seen the work of the petitioner for sufficient time and, therefore, it was not possible for them to assess his performance.

9. It is, therefore, clear to us that the ACC was conscious and aware of their guidelines dated 31st March, 2011. The attention of the Ministry was drawn to the said guidelines and their response dated 1st August, 2014 was communicated to the ACC. On examining the said response, the ACC was satisfied that they could examine the case objectively and decide whether or not the extension of tenure should be granted. The respondent Ministry had accepted that the performance of the petitioner viz. the benchmark had not been assessed for the reasons stated by them. It is not the case where the ACC did not examine the aforesaid aspects. Upon consideration of relevant facts, the ACC came to the conclusion that the approval should be granted against non-extension of tenure in the present case.

10. The guidelines dated 31st March, 2011, are in the nature of administrative instructions. In the factual background of the case in question and after considering the entire record, including the PAR grading

in earlier years on consideration of the letter dated 1st August 2014 by their letter dated 26th September, 2014 the ACC conveyed their approval on proposal for non-extension of tenure after in depth and thorough examination. This scrutiny and conclusion cannot be bludgeoned and brushed aside as if there was lack or absence of independent application of mind by the ACC. This is a case in which there was contemplative and reflective examination of the relevant facts and issues and thereafter, it was decided that the extension of tenure should not be granted.

11. Adherence to the guidelines in question is for a purpose and objective. It enables the ACC to examine each case expeditiously, transparently and in a fair manner. It helps in taking decisions. Facts of the present case are peculiar. The petitioner himself had levelled allegations and casted aspersions on the objectivity and conduct of the earlier CMD. Filling of the PARs by the said CMD and awarding of benchmarks would have been questioned and challenged for lack of objectivity, etc. It is in this context that we have to examine and consider the actions of the respondents. Guidelines are pointers and enablers like tools and implements to effectively and methodically discharge and consider cases of extension or non extension. They are not rigid rules, but procedural guidelines. The guideline should be normally followed, but cannot read as binding and inelastic rudiments and first principles. Law does not require that the guidelines must be followed even when following them would

result in complications and asymmetrical consequences. When guidelines are framed they should be adhered to, but at the same time, there has to be flexibility when implementation of procedural guidelines in a particular case or factual matrix would itself be impossible or create inequities.

12. Reliance placed upon the decision of the Supreme Court in ***Dr.Amarjit Singh Ahluwalia Vs. The State of Punjab & Ors.*** (1975) 3 SCC 503, does not assist or further the case of the petitioner.

Administrative instructions, it was observed, do not have force of law but the State should not depart from or negate them without rational justification, and it was observed that to fix an artificial date for commencement of continuous service for the purpose of giving seniority to some in contravention of the said circular would violate Articles 14 and 16 of the Constitution. Pertinently, the ratio observes that the State should not depart from their policy without rational justification. Articles 14 and 16 embody the principle of rationality. In the present case, we have noted the rationale and reasons given by the Ministry and accepted by the ACC. In the written submissions filed and in the submission recorded above, the petitioner has sought to challenge and question each of the reasons given in the communication of the Ministry dated 1st August, 2014 to allegedly demonstrate that the reasons should not be accepted. This is not acceptable.

This is not the manner in which a decision taken by the administrative authorities can be questioned and challenged. The scope of judicial review

is limited. Merits of the said decision are not amenable to legal scrutiny. We do not think in the facts of the present case, the examination undertaken by the ACC and the reasoning as to why guidelines for the purpose of benchmark cannot be adhered to, can be rejected as make-belief and whimsical. The reasoning has a good foundation.

13. Similarly in *Virender S. Hoodav Vs. State of Haryana* JT 1999 (5) SC 621, it was observed that though an administrative instruction cannot be enforced, a policy declared by the State as to the manner of filling up posts, especially when in accord with the rules and instructions issued by the Public Service Commission from time to time, should be followed. We fail to understand how this decision is of any assistance to the petitioner in the factual matrix of the present case, for the guidelines with regard to the benchmarking were certainly examined with reference to the facts in question, and thereafter, for reasons and grounds given by the Ministry, the ACC went on to examine the question of non-extension of tenure. On identical grounds, decision of the Delhi High Court in *Anand Darbari vs. Union of India and Anr.* (2000) 84 DLT 718 would be of no assistance to the petitioner.

14. Administrative law distinguishes between mandatory and directory provisions. Procedural provisions are normally directory and not mandatory. It is the intent of the legislature which determines as to whether the provisions of law are mandatory or directory. For ascertaining

the real intention, one has to look at; the nature and design of the statute and the consequences which would follow from construing one way or the other; the impact of other provisions, whereby necessity of complying with the provision in question is avoided; the circumstances, whether the statute provides for a contingency for non-compliance with the provisions, whether non-compliance is visited with some penalty; serious or the trivial issues etc. (See *State of U.P. Vs. Babu Ram Upadhyaya* AIR 1961 SC 751).

15. In *Gridco Limited and Another versus Sadanand Doloi and Others*, (2011) 15 SCC 16 while dealing with contractual employment and termination of contractual employment, the Supreme Court examined the difference between public and private law activities of the State, for the State while exercising its powers and discharging its functions acts for public good and in public interest. State action can be challenged on the ground of arbitrariness, unfairness and unreasonableness. In this context, it has been observed that even if the dispute falls within the domain of contractual obligations, it would not relieve the State of its obligation to comply with basic requirements of Article 14. These principles ensure Rule of Law. However, these principles cannot invoke to amend, alter or vary express terms of contracts between the parties when they are freely entered into. The mutual rights and liabilities of parties are governed by the said terms and law relating to contracts. Reference was made to *State*

Chandra Anand versus Union of India, AIR 1953 SC 250 and *Parshotam Lal Dhingra versus Union of India*, AIR 1958 SC 36. Referring to *DTC versus Mazdoor Congress*, 1991 Supp (1) SCC 600 and *Central Inland Water Transport Corporation Limited versus Brojo Nath Ganguly*, (1986) 3 SCC 156, it was observed as under:-

36. In *Parshotam Lal Dhingra v. Union of India* [AIR 1958 SC 36] this Court followed the view taken in *Satish Chandra case* [AIR 1953 SC 250] . Any reference to the case law on the subject would remain incomplete unless we also refer to the decision of the Constitution Bench of this Court in *DTC v. Mazdoor Congress* [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] where this Court was dealing with the constitutional validity of Regulation 9(b) that authorised termination on account of reduction in the establishment or in circumstances other than those mentioned in Clause (a) to Regulation 9(b) by service of one month's notice or pay in lieu thereof. Sawant, J. in his concurring opinion held that the provision contained the much hated rules of hire and fire reminiscent of the days of *laissez faire* and unrestrained freedom of contract and that any such rule would have no place in service conditions.

37. To the same effect was an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] where the Court had refused to enforce an unfair and unreasonable contract or an unfair and unreasonable clause in a contract entered into between parties who did not have equal bargaining power.

38. A conspectus of the pronouncements of this Court and the development of law over the past few decades thus show that there has been a notable shift from the stated legal position settled in earlier decisions, that termination of a contractual employment in accordance with the terms of the contract was permissible and the employee could claim no protection against such termination even when

one of the contracting parties happened to be the State. Remedy for a breach of a contractual condition was also by way of civil action for damages/compensation. With the development of law relating to judicial review of administrative actions, a writ court can now examine the validity of a termination order passed by public authority. It is no longer open to the authority passing the order to argue that its action being in the realm of contract is not open to judicial review.

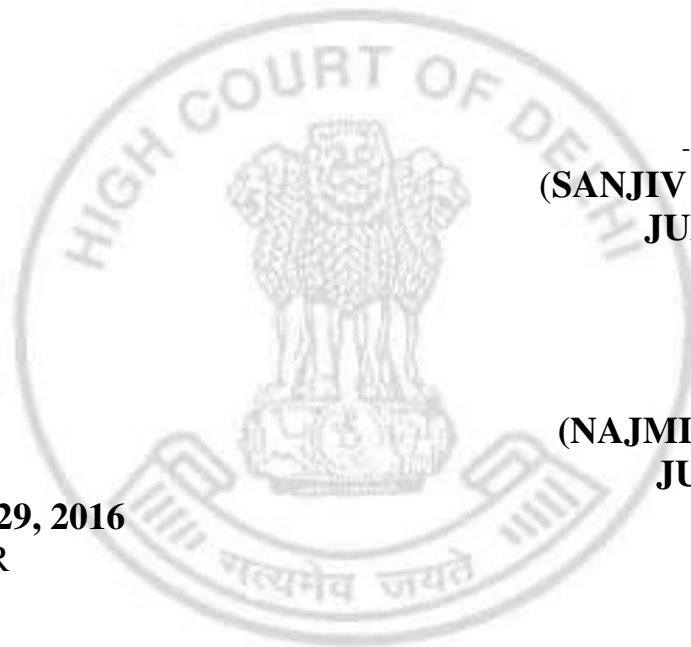
39. A writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract. Having said that we must add that judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the armchair of the Administrator to decide whether a more reasonable decision or course of action could have been taken in the circumstances. So long as the action taken by the authority is not shown to be vitiated by the infirmities referred to above and so long as the action is not demonstrably in outrageous defiance of logic, the writ court would do well to respect the decision under challenge.

40. XXXXX

41. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an over-sympathetic or protective approach towards the latter."

16. In the factual matrix of the present case it cannot be said that the failure to resort to benchmarking criteria vitiates the ACC decision. The guidelines stipulated in letter dated 28.06.2011, as noticed above are to expedite the process and help the ACC in taking a decision objectively, transparently and without calling for records and information.

17. In light of the above, we do not find any merit in the present writ petition and the same is dismissed. There will be no order as to costs.



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(SANJIV KHANNA)
JUDGE

-sd-

(NAJMI WAZIRI)
JUDGE

APRIL 29, 2016
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