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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision: 12.11.2018

CWP No.17489 of 2014 (O&M)

Rohit Hurria

...Petitioner

Vs.

Haryana State Industrial & Infrastructure Development Corporation Limited & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. D.S.Patwalia, Senior Advocate, with
Mr. A.S.Chadha, Advocate, for the petitioner.

Mr. Rajvir Singh Sihag, Advocate,
for respondent No.1.

Mr. Harish Nain, DAG, Haryana,
for respondent No.2.

Mr. H.S.Hooda, Senior Advocate, with
Mr. P.S.Poonia and Mr. S.K.Nehra, Advocates,
for respondent No.4.

RAJIV NARAIN RAINA, J. (ORAL)

1. Haryana State Industrial & Infrastructure Development Corporation Limited (HSIIDC) [for short 'the Corporation'] invited applications for various posts including 02 posts of Deputy General Manager (Estate) and 05 posts of Senior Manager (Estate) vide advertisement dated 15.09.2008 (Annex P-2). For 02 posts of Deputy General Manager (Estate), 23 candidates including the petitioner, who was already working in the Corporation as Assistant General Manager (Projects) and Sanjeev Singh –

respondent No.4 appeared before the duly constituted Selection Committee. It may be noted that respondent No.4 has not applied for the post of Senior Manager (Estate). The Corporation filled up only one post of Deputy General Manager (Estate), whereas down-graded the second post to the post of Senior Manager (Estate) to adjust respondent No.4. Accordingly, 06 candidates have been appointed as Senior Manager (Estate) in response to 05 posts advertised.

2. In this background, the question which arises for consideration is that as to how a candidate who had applied for the post of Deputy General Manager (Estate) can be appointed to a lower post meant for direct quota. The selection process of both the posts was by way of direct recruitment.

3. The proceedings of interview held on 15.01.2009 for 02 posts of Deputy General Manager (Estate) show that 23 candidates appeared. The selected candidate, namely, Divya Kamal was at Sr.No.9 and has secured the highest marks of 71. The 2nd highest was the petitioner – Rohit Hurria securing 61 marks, while respondent No.4 – Sanjeev Singh obtained only 54 marks, which was less than 09 candidates. The proceedings reveal that on the date of interview itself, the Selection Committee found "one candidate, viz., Sh. Sanjeev Singh ideally suitable for appointment at the Senior Manager level rather than at the level of DGM keeping in view his experience in managing the Gymkhana Club at Faridabad, which would come handy to HSIIDC as the Corporation is executing various projects of Integrated Townships (IMTs) where clubs form an integral part of the infrastructure to be developed". Thus, the Selection Committee consisting of Shri Y.S.Malik, Financial Commissioner & Principal Secretary (Industries), Government of Haryana and Ms Dheera Khandelwal, MD,

Haryana Financial Corporation; Prof. Satish Kapoor, former Head of Department, University Business School, Panjab University, Chandigarh; & Shri Rajeev Arora, MD, HSIIDC, as Members, recommended that the Corporation may consider giving him (Sanjeev Singh) a counter offer for the post of Senior Manager (Estate) and the post of Deputy General Manager (Estate) may suitably be downgraded in case he accepts the offer. This curious recommendation of the Selection Committee and the appointment of respondent No.4 as Senior Manager (Manager) pursuant to such recommendation by down-grading one post of Deputy General Manager (Estate) has brought the petitioner before this Court by way of the instant petition praying that a writ in the nature of certiorari be issued quashing the proceedings dated 15.01.2009 to the extent the same recommend appointment of respondent No.4 as Senior Manager (Estate) by down-grading the second post of Deputy General Manager (Estate) asserting that the petitioner had a rightful claim as he was placed at No.2 in the merit list prepared by the Selection Committee. He has also sought a writ of mandamus directing the Corporation to consider his candidature for appointment to the second post of Deputy General Manager (Estate) with effect from the date the other incumbent, namely, Divya Kamal has been appointed as Deputy General Manager (Estate) and such relief be granted with all consequential benefits.

4. It is contended by Mr. D.S.Patwalia, learned senior counsel appearing for the petitioner that the appointment of Sanjeev Singh – respondent No.4 as Senior Manager (Estate) is on the face of it arbitrary, illegal, and unconstitutional and deserves to be set aside. Sanjeev Singh never applied for the post of Senior Manager (Estate). He was not selected

within the two advertised posts. He was accommodated only by down-grading one post of Deputy General Manager (Estate) in extraordinary fashion out of the blue. Sanjeev Singh had competed only for the post of Deputy General Manager (Estate) and was ranked far below in merit.

5 Mr. Patwalia argues that the work of the Selection Committee was limited to the selection of candidates by making its recommendations on merit to the Corporation. The Committee far exceeded its brief and jurisdiction in suggesting the name of Sanjeev Singh as "ideally suitable for appointment at the Senior Manager level rather than at the level of DGM". The Committee could not have recommended to the Corporation that it may consider giving him a "counter offer" for the post of Senior Manager (Estate) and the post of Deputy General Manager (Estate) be suitably down-graded in case he accepts the offer. It is well settled that posts cannot be filled beyond the advertised vacancies. Nor can the rules of the game be changed when it is being played. The terms and conditions of the employment notice inviting applications for filling up public posts are binding and cannot be changed except by the Board of Directors of the Corporation, which if done, would give rise to the necessity of holding a fresh selection process by inviting fresh applications from eligible candidates from the open job market for the post of Senior Manager (Estate). The appointment of respondent Sanjeev Singh is thus per se illegal act of the Corporation, as it alters the cadre strength of Deputy General Manager (Estate) and Senior Manager (Estate) in one stroke, which could not have been done except after due process of law, by following the rules & regulations of the Corporation. Even then the down-graded post should have been re-advertised as there may have been many other Sanjeev Singhs, who

were equal if not more suitable and meritorious in the field of managing Clubs. Hence, Articles 14 & 16(1) of the Constitution of India have been violated with impunity by an unheard of process which the selection committee resorted to. Strangely, a person applying for the higher post was not found suitable for that post, but for a lower post for which he was not even a contestant. Moreover, there is nothing on record to show from the advertised eligibility conditions and the criteria adopted that Corporation was looking for a person to manage its clubs at the level of Senior Manager (Estate). If that fact were known beforehand, the entire complexion of the selection would have changed.

6. On 25.05.2016, this Court passed the following order seeking answers:-

> "After hearing learned counsel for the parties and a perusal of Annexure P-2 shows that two posts of Deputy General Manager and five posts of Senior Manager were advertised. The respondents filled up five posts of Senior Manager but in case of Deputy General Manager, one post was filled up and second was down-graded to the post of Senior Manager just to adjust respondent No.4.
>
> Counsel appearing for respondent No.1-HSIIDC seeks time to assist the Court as to how a candidate who had applied in the category of Deputy General Manager, be appointed on the lower post meant for direct quota.
>
> Adjourned to 05.08.2016."

7. When the matter came up on 09.01.2017, the following order was passed:-

> "Learned counsel for respondent No.1 seeks short opportunity to place on record the decision of the competent authority and also the reasons which made with the Selection Committee in holding only one person suitable for the

selection and appointment to the post of Deputy General Manager after having given marks to all the candidates.

Adjourned to 14.03.2017."

8. In compliance of these interim orders, an affidavit dated 16.03.2018 has been filed by Sandeep Chawla, General Manager (P&A), HSIIDC, Panchkula on behalf of respondent No.1. It is deposed that there is a Recruitment and Promotion Policy framed by the Board of Directors of the Corporation, which regulates the appointment and service conditions of its employees. As per the policy, the Managing Director or any other officer to whom authority may be delegated by the Board of Directors is the appointment authority. The policy provides that power of relaxation pertaining to experience and age will vest in the Board of Directors of Corporation. The post of Deputy General Manager (Estate) is to be filled up 100% by promotion. However, if suitable candidate is not available for promotion, the post can be filled up by direct recruitment. Copy of the Recruitment and Promotion Policy has been annexed as Annex A-5. The Selection Committee had conducted simultaneous interviews on various dates for the advertised posts, which includes both the posts in issue. The Selection Committee was duly approved at the level of the Chief Minister, Haryana and while obtaining the approval, it was mentioned that short-listing would be based on educational qualification/experience etc. as may be decided by the Selection Committee. It is averred in Para.4 that during the course of selection, the Selection Committee in the light of the criteria found only one candidate, namely, Divya Kamal suitable for appointment to the post of Deputy General Manager (Estate) to which the appointing authority* concurred. [*The appointing authority was the Managing Director, who was the Member of the Selection Committee]

9. The Corporation admits in its return in Para.5 that while Sanjeev Singh – respondent No.4 was found by the Selection Committee to be "ideally suitable" for the post of Senior Manager (Estate) he was not found suitable for the post of Deputy General Manager (Estate) in view of his experience in managing Gymkhana Club at Faridabad. It is averred that rest of the candidates who were higher in merit than Sanjeev Singh in the selection for the post of DGM (Estate) were either already serving on the higher posts as in the case of the petitioner or were from open category. Rajeev Kumar Sharma, Sanjay Garg and Vaneet Bhatia were also serving as Assistant General Manager with the HSIIDC at the time of interview, but their performance in the interview was not up to the mark and as such they were not found suitable. But this is not recorded in the proceedings (Annex P-3) that the performance of the petitioner, Rajeev Kumar Sharma, Sanjay Garg and Vaneet Bhatia was not up to the mark and as such are not found suitable. This is a remark beyond record because it has been argued by the respondents that the very fact that Divya Kamal was found suitable means that none of the others was suitable including the petitioner by necessary implication but there is nothing on record to support the remarks and are accordingly oral statements. A reading of the affidavit dated 16.03.2018 together with the written statement filed by the Corporation supports only one view that the Corporation has no legal and valid defence and, therefore, extraneous considerations at play or sheer whimsicality cannot be ruled out in the strange case of appointment of respondent No.4.

10. The reply filed by respondent No.4 is on the same lines as that of the Corporation and nothing further needs to be added except for him taking the plea that the petition has been fled at the end of 2014 after an

unexplained and inordinate delay of more than four years and hence the petition is time barred. He says that at the time of interview, he was working as Manager with Gymkhana Club, Faridabad and had four years experience in the field of hospitality. The counter offer made to him was accepted and he joined as Senior Manager on 03.03.2009. He submits that he has been promoted to the post of Assistant General Manager (Estate) while the petitioner has been promoted as Deputy General Manager. He pleads that an Assistant General Manager at the time of interview, the petitioner could not have been offered appointment to the lower post of Senior Manager and, therefore, the petition is nothing but a sheer abuse of process of law and is a luxury or perhaps a proxy litigation. He has denied the allegations of favouritism etc. leveled by the petitioner regarding his appointment as false and baseless. For the rest, he adopts the reply filed by the official respondent.

11. Petitioner has filed a replication to the short written statement of respondent No.4. In the replication, it has been stated, and is of much interest, that vide advertisement dated 15.09.2008 through which 02 posts of Deputy General Manager (Estate) were to be filled, posts of Deputy General Manager (Joint Venture) and Deputy General Manager (Corporate Law) were also sought to be filled by way of direct recruitment. The Selection Committee not finding any suitable candidate for the said post made a recommendation to the Board of Directors to offer the suitable applicants lower posts by down-grading the posts of Deputy General Manager (Joint Venture) and Deputy General Manager (Corporate Law) to the level of Assistant General Manager (Joint Venture) and Senior Manager (Corporate Law). These recommendations were placed before the Board of Directors

and vide resolution and were accepted and so ordered. Copy of the resolution is placed as Annex P-5. But such procedure was not followed in the present case. Clause-12 of the Recruitment and Promotion Policy empowers the Board of Directors as competent to relax the criteria with reference to age and experience provided the candidate possesses qualification/credentials of 'exceptional merit'.

12. Though there can be no two opinions that the selection and the appointment of Sanjeev Singh – respondent No.4 is prima facie illegal, arbitrary, unconstitutional and discriminatory. Mr. H.S.Hooda, learned senior counsel representing respondent No.4 has argued that the petition still deserves to be dismissed on the ground of delay and laches so as not to upset an appointment made in the year 2009 and challenge brought after more than 4 years. When I asked Mr. Patwalia as to what he has to say about this objection, he draws attention to contents of Paras.8 & 9 of the petition which explain laches sufficiently, which deserve to be read in extenso. The same are reproduced as follows:

> "8. That it came to the knowledge of the petitioner that one Vikas Chaudhary & Rishi Chauhan, Senior Managers (Estate) working in the respondent Corporation had approached the respondent authorities w.r.t. some seniority issues also relating to the appointment of respondent No.4 as Senior Manager (Estate). It had then that the petitioner filed application under the RTI to the respondent Corporation seeking information regarding the selection in pursuance to Advertisement P-2. It also came to light that Vikas Chaudhary had approached this Hon'ble Court by filing C.W.P.No.16012 of 2014, challenging an order dated 08.08.2004 wherein the inter-se merit of the officers in the cadre of Senior Managers was disturbed. When the petitioner went through the petition, he was shocked to find out that in

fact respondent No.4 herein had never applied for the post of Senior Manager (Estate), but though in the selection proceedings in pursuance to the advertisement P-2, he has also applied for the post of DGM (Estate). On reading of the pleadings, the petitioner further came to know that in fact Sh. Sanjeev Singh, respondent No.4 herein was appointed on the post of Senior Manager (Estate) by downgrading the post of DGM (Estate) and though such officer had got 54 marks in the selection process. The petitioner through the said pleadings also came to know that in fact he had obtained higher marks than the said respondents i.e. 61 marks in the same selection process. The relevant extract of the pleadings in the writ petition i.e. C.W.P.No.16012 of 2014 which is now pending adjudication before this Hon'ble Court for 27.08.2014 is reproduced herein below for the kind perusal of this Hon'ble Court:

> "That similarly respondent No.6 (Sanjeev Singh) never applied for the post of Senior Manager (Estate). He had applied for the post of Deputy General Manager (Estate) and he was not selected within 2 advertised posts, but he was selected as Senior Manager by downgrading the post and he was awarded 56 marks. It is very strange that respondent No.6 had applied for the post of Deputy General Manager (Estate) and he also competed for the said post and he had obtained 54 marks. One candidate (Divya Kamal) who has obtained 71 marks was selected and appointed as Deputy General Manager (Estate) while there were 7 candidates who had obtained higher marks to respondent No.6, namely, Rohit Hurria obtained 61 marks; Jai Parkash obtained 59 marks; Rajiv Kumar Sharma obtained 59 marks; Sanjay Garg obtained 57 marks; Vinit Bhatia obtained 56 marks; Vikas Chaudhary (petitioner) obtained 55 marks; Sanjeev Moudgil obtained 55 marks and Sanjeev Singh (respondent No.6) obtained 54 marks. So there is no justification even to appoint respondent No.6 as Senior

> Manager by ignoring the claim of 7 candidates who had obtained higher marks to him. So even the appointment of respondent No.6 as Senior Manager is on the face of it arbitrary and liable to be set aside and there is no justification to declare respondent No.6 senior to the petitioner."
>
> 9. That shocked to the aforesaid pleadings and reading the same in consonance with the scattered information was supplied to the petitioner including the proceedings of the Selection Committee for filling up the post of Deputy General Manager (Estate), he was shocked to find that infact the petitioner was at merit position No.2 in the recommendations made by the Selection Committee, but despite that it was stated by the Committee that since no second officer was found suitable for being appointed as Deputy General Manager (Estate), therefore, the second post be downgraded and the private respondent herein i.e. respondent No.4 be appointed to such downgraded post on the rank of Senior Manager (Estate). A copy of the proceedings of the selection committee dated 15.01.2009 supplied to the petitioner under the RTI Act is appended herewith as Annexure P-3."

13. The petitioner says that he came to know for the first time while going through the pleadings in CWP No.16012 of 2014 filed by Vikas Chaudhary & others that respondent No.4 herein had never applied for the post of Senior Manager (Estate). He also did not know about the downgrading of the post of Deputy General Manager (Estate). He did not even know that he obtained higher marks than respondent No.4 in the same selection process and, therefore, there is no delay in approaching the Court. He filed the petition as soon as he was apprised of the facts from that petition and from information supplied under the RTI Act. To strengthen his case, Mr. Patwalia refers to **Secretary, State of Karnataka Vs. Umadevi**, (2006) 4 SCC 1 (*Umadevi-3*), wherein the Constitution Bench has laid down

that any appointment made in violation of recruitment rules would be violative of Articles 14 and 16 of the Constitution of India rendering the same nullity, as such even if the appointee has continued in service for a long period, he cannot be further allowed to continue in service but, if; however, it was found that the appointment was not illegal, but irregular, in that eventuality he could be permitted to continue in service and the same could be regularized in case he had worked for ten years or more on duly sanctioned post. He also cites the ruling in **Nagendra Chandra etc. Vs. State of Jharkhand & others**, (2008) 1 SCC 798, a case relating to the appointment of Constables in the year 1990 pursuant to vacancies notified through notice displayed on the notice board in the Office of Zonal Inspector General, Ranchi. Subsequently, when it transpired that the vacancies were neither advertised through the employment exchange nor in the newspaper, the Director General -cum- Inspector General of Police directed that all such persons, including the appellants, be dismissed from service and consequentially they were dismissed. Some of the Constables filed writ petitions challenging the orders of their dismissal, which were quashed by learned Single Judge of the High Court on the ground that opportunity of hearing was not given. State of Jharkhand filed letters patent appeals. In the meantime, the appellants also challenged their orders of dismissal by filing separate writ petitions. The letters patent appeals and the writ petitions filed by the appellants therein were heard together by a Division Bench. The appeals were allowed by setting aside the orders of the Single Judge and the writ petitions filed by the appellants were dismissed with a modification only that orders of dismissal from service should be treated as orders of termination so as not to debar future employment under the State. That is

how the matter came up before the Supreme Court. The Supreme Court concluded in Paras.9 & 10 as follows:

> "9. In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspapers, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same.
>
> 10. In the result, the appeals fail and the same are accordingly dismissed, but in view of the fact that the appellants have continued in service for a period of fourteen years, we may, however, observe that their cases may be considered for future appointment and age bar, if any, may be relaxed in relation to them. There shall be no order as to costs."

14. Mr. Patwalia points out that the appellants had continued in service for a period of 14 years without litigation or stay orders after which their services were terminated and the only concession give was that their cases may be considered for future appointment and age bar, if any, may be relaxed in relation to them.

15. He next refers to the decision in **Ashok Kumar Sonkar Vs. Union of India & others**, (2007) 4 SCC 54 the Supreme Court holding that in cases of illegal appointment by fraudulent ways, the principles of equity will have no role to play. Sympathy, as is well known, should not be misplaced. The Court again drew a distinction between 'irregular' and

'illegal' appointments. If an appointment is irregular, the same can be cured by regularization, but if appointment is illegal, it is *non est* in the eye of law, which renders the appointment to be a nullity. The Court observed that in making appointment of the appellant, the provisions of Articles 14 and 16 of the Constitution and statutory rules were not complied with. The appointment, therefore, was illegal. The appeal was dismissed. On facts, the appellant, Ashok Kumar Sonkar, applied for the post of Lecturer in Tridosa Vigyan in the Department of Basic Principles, Banaras Hindu University. The last date for applying was 30.05.1995. As on that date, he had not completed his M.D. in Sharir Kriya. He had only been admitted for the Degree of M.D. on 01.08.1992 and his final examination was to be held in October, 1995. Despite this, he was selected and offered appointment. He joined the post. Length of years of service did not save his appointment with the dismissal of the SLP.

16. In **Municipal Corporation, Jabalpur Vs. Om Prakash Dubey**, (2007) 1 SCC 373, the Supreme Court observed in Para.11 as follows:

> "11. The question which, thus, arises for consideration, would be: Is there any distinction between 'irregular appointment' and 'illegal appointment'? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of the rules might not have been strictly adhered to."

17. Further, Court relied on observations made in R.N.Nanjundappa Vs. T. Thimmiah & another, (1972) 1 SCC 409, which case is relevant to this case.

18. On the other hand, Mr. Hooda relies on the Constitution Bench decision in State of Madhya Pradesh Vs. Bhailal Bhai, AIR 1964 SC 1006, which sounds a cautionary note on exercise of power to give relief under Article 226 as discretionary. The relevant extract from the judgment reads as follows:

> "17. At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its

> aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on grounds like limitation, the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution."

19. He contends that if suit was filed after three years of cause of action, it would have been dismissed, the cause of action accrued from the appointment of respondent No.4. He also relies on my decision in **Parminder Kaur & others Vs. State of Punjab & others**, 2017 (2) PLR 498 on delay and laches in a case of recruitment. This was a case where similarly situated persons had obtained relief and, therefore, they had argued that relief to the petitioner should follow. On facts, the petition was found belated and suffering from inordinate and unexplained laches regarding a stale and dead claim. This Court had also relied on *Bhailal Bhai* case and on similar relief and waiver of right by reason of delay on the judgment of the Supreme Court in State of U.P. & others Vs. Arvind Kumar Srivastava & others, (2015) 1 SCC 347 on the loss of rights of fence-sitters, who approached the Court riding on the back of previous litigation to which they were not party, but came after judgments were pronounced. Direction 22.2 was applied to dismiss the case on delay and laches and on waiver of acquiescence.

20. Mr. Rajvir Singh Sihag, learned counsel representing the Corporation, has argued that the challenger not being aggrieved with the

selection of the successful candidate, the proceedings would be seen in the nature of public interest litigation. Consequently, the writ is not maintainable and such proceedings are not maintainable in service matters barring writ of quo warranto, which is not applied for. He placed reliance on **Madan Lal Vs. High Court of Jammu & Kashmir & others**, (2014) 15 SCC 308. In this case, the Supreme Court had put a query to the appellants before them and it was fairly submitted that they have no grievance against any of the selected candidates in that particular selection. Therefore, if at all the appellants' grievances are to be considered, relating to ascertainment of quota for direct recruit posts in the appeals it would only amount to a consideration by way of a public interest litigation which cannot be permitted to be made, more so, when the appellants have chosen not to challenge the selection of any one of the candidates by way of direct recruitment or any of the promotees.

21. I am not impressed with the argument made on behalf of Corporation that petition not being in the nature of public interest litigation is not maintainable. The petitioner had applied for the post of Deputy General Manager (Estate). His case was considered and he was put at No.2 in the merit list. He could approach the Court only after discovery of full facts, obtaining of which he has explained in Paras.8 & 9 of the writ petition, as reproduced above. He made a representation on 14.07.2014 to appoint him as Deputy General Manager (Estate) in pursuance to the advertisement which post is lying vacant till date, as no resolution has been passed by the Board of Directors. The Board of Directors of the Corporation have not re-determined the cadre strength of Deputy General Manager and Senior Manager. In the absence of any resolution by the Board of Directors, one

post of Deputy General Manager (Estate) is still vacant and the petitioner will be right in asserting so in Para.11 of the petition. It is not recorded in writing by the Selection Committee that the petitioner is not suitable for the post of Deputy General Manager (Estate). Mr. Patwalia has laid charge on the appointment of respondent No.4 as a back door entry and nothing more than favour shown to a blue-eyed boy of the high-ups of the Corporation and beyond the appointment of respondent No.4 suffers from illegality and vice of favouritism and arbitrary action of the Selection Committee while in mid-stream of the interview to downgrade the post of Deputy General Manager (Estate) to adjust respondent No.4 in such an extraordinary manner that it defeats law, justice and equity. There may be delay in approaching Court, but this is not public interest litigation. The petitioner is personally aggrieved as he was a contestant on a post downgraded and usurped by the 4th respondent will the helping and guiding hand of the Selection Committee. Thus, the judgment in *Madan Lal's* case is of no help to the Corporation. No other judgment is cited.

22. It is fundamental to service law that no one can get a job in Government or public sector, if he has not applied for it within time fixed pursuant to a public notice/advertisement issued inviting applications from eligible candidates for filling advertised posts/vacancies in public sector undertakings etc. created by statute. Employers have also to obey the principles of Constitution enshrined in Article 14 so that their acts are not criticized as arbitrary, unreasonable and discriminatory. Besides, Article 16 guarantees equal opportunity to all citizens to apply and compete for public posts. Merely because respondent No.4 has continued to work since 2009 will not cure the patent defect and illegality inherent in his appointment. If

the Selection Committee had reached the conclusion that respondent No.4 was "ideally suitable" or fell in relaxation rule of 'exceptional merit', then the Board of Directors should have been sounded to act according to the dictates of law of procedural fairness by calling other talented and ideally suitable persons by public advertisement in order to give all candidates who may wish to apply an opportunity of consideration. The Board could have taken a decision to advertise a single post of Senior Manager and invite fair competition from all eligible candidates for the post. There were other suitable options before the HSIIDC and the Selection Committee to have deferred the entire selection process qua one post of Senior manager (Estate) and to have re-initiated it once again having discovered a jewel in the crown to run their clubs. The 4th respondent would then have been pitted against his peers coming forwarded had they known the Corporation is looking for a suitable person to run their Gymkhana Clubs in properties developed by them in Haryana. It is often said it is not the decision but the decision making process that it open to judicial review. The decision making process in this case is seriously flawed to a point difficult to maintain. The Court cannot turn a blind eye to a fraud committed on public appointment by reason of sympathy or compassion alone.

23. It is, therefore, in my considered view, held that the recommendation of the Selection Committee down-grading the post of Deputy General Manager (Estate) to Senior Manager (Estate) all of a sudden to bestow an undue favour on the 4th respondent was a patently erroneous decision/recommendation that was made contrary to law. And which course of action was also against the fundamental tenets of service jurisprudence and constitutional standards set by Article 14 and 16 (1), namely, that no

citizen shall be appointed to a post he has not even applied for. As a result of which erroneous action the recommendation made by the Committee was wrongly and blindly accepted by the appointing authority beneath the weight of senior bureaucrats of which unfortunately the appointing authority was a member, making way for an out of the blue favour done to a person who was not even in the race for the public post. The Selection Committee fell in grave wishful thinking in reducing one of the higher posts by increasing the lower one and offering it to the 4th respondent without inviting applications from eligible candidates who may have come forward had the post been advertised to open merit. In this case the scheme of public appointments envisaged by the Constitution has been impaired irretrievably. To sustain the appointment would be an address which falls in the penumbra of sympathy and compassion which is out of place in the context. The argument based on long service and right to livelihood by way of mitigation to maintain the appointment is accordingly rejected.

24. Going by the foregoing discussion, it is not legally possible; however hard one may try to save the appointment of the 4th respondent in any of the circumstances, for a thing which is illegal to begin with will not become legal by passage of time.

25. As a result, the instant petition is allowed. The appointment of the 4th respondent is quashed including all decisions leading to his appointment which are accordingly set aside being illegal, arbitrary, discriminatory and unconstitutional. The post of Senior Manager (Estate) occupied by the 4th respondent is declared vacant and may, therefore, be re-advertised. HSIIDC is directed to consider the case of the petitioner on merit for the second advertised post of Deputy General Manager (Estate)

from the date Divya Kamal was appointed, but with notional consequential benefits within a period of two months from the date of supply of the certified copy of this order.

12.11.2018 **[RAJIV NARAIN RAINA]**
Vimal **JUDGE**

Whether speaking/reasoned: Yes
Whether Reportable: Yes