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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 15th October, 2019

Decided on: 22nd October, 2019

W.P.(C) 13439/2009

UNION PUBLIC SERVICE COMMISSION

..... Petitioner

Through: Mr. Naresh Kaushik, Ms. Vibhuti Tyagi and Mr. Tapasvi Raj, Advocates.

versus

R.A. KHAN AND OTHERS

..... Respondents

Through: Mr. Arun Bhardwaj, Advocate for DoPT.

Mr. Akshay Makhija, CGSC with Ms. Seerat Deep Singh, Advocate for UOI.

Mr. Sourabh Ahuja, Advocate for Intervenors.

Ms. Avnish Ahlawat, Standing Counsel with Ms. Palak Rohmetra and Ms. Laveena Arora, Advocates for R-9 & R-10.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. This petition by the Union Public Service Commission (UPSC) assails an order dated 9th September, 2009 passed by the Central Administrative Tribunal (CAT) allowing the OA No. 1453/2009 filed by the Respondents

Nos.1 to 8, directing the Respondents Nos.9 to 11 herein i.e. the Government of NCT of Delhi (GNCTD) (Respondent No.9), the Secretary, Social Welfare Department (SWD), GNCTD (Respondent No.10) and the Union of India in the Ministry of Personnel (PG and Pensions), Department of Personnel and Training (DoPT) (Respondent No.11), to consider the claim of the Respondents Nos. 1 to 8 for appointment against the post of Superintendent/CDPO ('Child Development Project Officer') within a period of two months from the date of the order.

2. At the outset, it is required to be noticed that in allowing the aforementioned application, the CAT followed its earlier orders dated 21st April, 2004 and 11th August, 2004 passed by it in OA No. 547/2004 (***Niraj Kumar Sinha v. Archaeological Survey of India***). That order was assailed by the Archaeological Survey of India in this Court in W.P.(C) No.14838-39/2006, which came to be dismissed by this Court on 20th September, 2006.

3. Against the aforesaid order of this Court, the ASI filed Civil Appeal No.2103/2008 which was dismissed by the Supreme Court of India on 4th November, 2015. The Supreme Court in the said order nevertheless clarified that the "question of law raised is kept open to be agitated in an appropriate case".

4. Consequently, notwithstanding the earlier judgment of the CAT which has been upheld by this Court in the case of ***Niraj Kumar Sinha*** (*supra*), the question must be examined afresh by this Court in view of the above order of the Supreme Court of India.

5. The question that arises in the present case concerns relaxation of the upper age limit from 30 to 32 years, for direct recruitment to the post of Superintendent, CDPO in the SWD. In other words, the question that arose before the CAT was whether Respondents Nos.1 to 8, who were Welfare Officers in the SWD of the GNCTD, could avail of the relaxation in the upper age limit from 30 to 32 years. Accordingly, they also assailed a note appended to Rule 4 of the Central Civil Services and Civil Posts for Upper Age Limit for Direct Recruitment (Rules), 1998 ('UAL Rules') as being ultra vires.

6. Respondents Nos.1 to 8 applied pursuant to an advertisement for appointment by way of a direct recruitment through the UPSC, for selection to the post of Superintendent in the SWD of the GNCTD.

7. The said advertisement was published in the Employment News by an Advertisement No.23 dated 13th December, 2008. Of the 16 posts advertised, three were reserved for SC, 1 for ST and 4 for OBCs. The remaining eight were unreserved. The prescribed age eligibility for the unreserved posts was that the candidate should not have exceeded 30 years as on the closing date. For OBC it was 33 years and for SC/ST it was 35 years. It was further indicated that the age requirement could be relaxed by five years for Central/UT Government Servants, as per the instructions issued by the Government of India from time to time. The last date for receipt of the applications for local candidates was 1st January, 2009.

8. Subsequent to the advertisement, 352 applications were received, which

included the applications from Respondents Nos.1 to 8. The UPSC states that since the recruitment was through an interview and it had received a large number of applications, it devised short-listing criteria. As far as Respondents Nos. 1 to 8 were concerned, they were found ineligible as they were not within the prescribed age limit, even after claiming the benefit of five years' age relaxation as Government Servants. The cut off date for this purpose was 1st January, 2009 and the Respondents Nos.1 to 3 and 5 to 8 herein, all in general category, were, with reference to that date, above 35 years age. Respondent No.4, who was in the OBC category, was over 38 years of age. Pursuant to the short-listing criteria, initially, 17 candidates were called for interview, which was scheduled for 4th and 5th June, 2009.

9. Aggrieved by not being called for the interview, Respondent Nos. 1 to 8 filed the aforementioned OA No.1453/2009 before the CAT, Principal Bench, New Delhi on 29th May, 2009. Before the CAT, the Respondent Nos.1 to 8 *inter-alia* placed reliance on the notification dated 21st December, 1998 issued by the DoPT, whereby relaxation in upper age limit was enhanced by two years, in case of recruitment by 'Open Direct Competitive Exam'.

10. An interim order was passed by the CAT on 1st June, 2009 allowing Respondents Nos.1 to 8 to attend the interview subject to the outcome of the OA. While they were called for interview, the result was kept in abeyance, pending the final outcome of the OA. The contention of the UPSC before the CAT was that the aforementioned notification of the DoPT granted relaxation only where recruitment was by way of 'Direct Open Competitive

Exam' and not when it was only by way of interview.

11. As already noticed, the CAT by the impugned order has allowed the OA following its earlier order in *Niraj Kumar Sinha (supra)*.

12. When the present writ petition was listed before this Court on 26th November, 2009, while directing notice to issue, a stay was granted of the operation of the impugned order of the CAT. This interim order was confirmed on 4th August, 2010, when Rule DB was issued.

13. During the pendency of the present petition, an Office Memorandum (OM) dated 8th April, 2013 came to be issued by the DoPT, purporting to issue certain clarifications regarding the recruitment through open competition on an All India basis.

14. At the hearing on 17th March, 2016 the aforementioned OM was placed before the Court and the following order was passed:

“C.M.Nos.22832/2015 & 23046/2015

Learned counsel appearing for the private respondents in this writ petition submits that the issue in question is settled by O.M. No.36034//2/2013-Estt. (Res.), dated 8th April, 2013. As per the said OM, direct recruitment, whether by way of written examination or interview or combined method, are to be treated alike. It is accordingly submitted that the present writ petition can be disposed of in view of the clarification issued by the Department of Personnel and Training.

Learned counsel appearing for the Union Public Service Commission prays for some time to obtain instructions.

Relist on 9th May, 2016.

On the said date, we may take up the writ petition itself for hearing.”

15. At the next date of hearing i.e. 9th May, 2016 the UPSC drew the Court’s attention to a subsequent letter dated 20th April, 2015, on a perusal of which the Court passed the following order:

“C.M. Nos. 22832/2015 & 23046/2015

Learned counsel appearing for the petitioner-Union Public Service Commission has drawn out attention to the letter dated 20th April, 2015. It is submitted on behalf of the petitioner that Central Civil Services and Civil Posts (Upper Age limit for Direct Recruitment) Rules, 1998 are statutory Rules under Article 309 and Clause (5) of Article 148 of the Constitution. In this connection, he our attention is drawn to sub-rule 3, which specifically stipulates that direct open competitive recruitment does not include recruitment thorough limited departmental examination, short listing, interview, contract or by absorption or transfer or deputation. It is accordingly submitted that the office memorandum dated 8th April, 2013 would be contrary to the statutory rule and non-est.

In these circumstances, we issue notice to the Union of India, represented by the Department of Personnel and Training. Notice will be served along with a copy of this order on the Standing Counsel for the Union of India for obtaining instructions.

Mr. Saurabh Ahuja, Advocate, who appears for applicants Archana and Neeru Gahlot, submits that because of the interim order passed by this Court and the earlier interim order passed by the Tribunal, appointment of the applicants is at stand-still as results are not being declared. It is also pointed out that results for SC and ST categories for the same posts have been declared.

Learned counsel appearing for the UPSC will obtain instructions in this regard. The petitioners will produce the result in a sealed cover before the Court, if they are not inclined to declare the results in view of the impugned order and the challenge in the writ petition.

Relist on 14th July, 2016.”

16. On 4th October, 2016, CM Nos.23046-47/2015 were allowed and Mrs. Archana and Ms. Neeru Gahlot were permitted to intervene. These were two candidates who were not overage as on 1st January, 2009 and were prejudiced by the UPSC deciding to keep the results in a sealed cover. Both were unreserved candidates.

17. Subsequently, CM No. 40337/2018 was filed by Respondents Nos.1 to 8 stating that the final seniority list had been issued by Respondent Nos.9 to 11 for further promotions of the Superintendent/CDPO appointed on regular basis between 2009 and 2017. They prayed for a stay of the seniority list during the pendency of the petition. On 28th September, 2018 the following order was passed by the Court in this application:

“CM No.40337/2018

Issue notice.

Mr. Arun Bhardwaj, Advocate accepts notice on behalf of the respondent nos.9 to 11.

The applicants' grievance is that the tentative seniority list which was circulated has now been finalized - on 30.07.2018 and if allowed to be given effect to by way of promotions, it would irreparably prejudice them. The respondent, Government of NCT of Delhi, is hereby directed to issue a

corrigendum and circulate further order to all concerned to the effect that the seniority is subject to final outcome of these proceedings and any action taken would likewise be subject to the final outcome of the proceedings, which would determine the present respondents/applicants right to entry into the cadre of Superintendent, Department of Women and Child Development w.e.f. the year 2008 in question.

Dasti under signatures of the Court Master.”

18. This Court has heard the submissions of Mr. Naresh Kaushik, counsel for the UPSC, Mr. Arun Bhardwaj, counsel for DoPT, Mr. Akshay Makhija, counsel for Union of India, Mr. Sourabh Ahuja, counsel for the Interveners and Mrs. Avnish Ahlawat, Standing Counsel for Respondents Nos. 9 and 10.

19. Mr. Kaushik for the UPSC submitted that the interpretation placed on the note appended below Rule 3 of the UAL Rules, was contrary to the plain language of the said note and the clarification issued by the DoPT by its letter dated 20th April, 2015 reflected the correct position in law. He submitted that the benefit of the enhanced upper age limit by two years for recruitment by direct open competitive exam to the Central Civil Services and Civil Posts, cannot be granted to the Respondent Nos.1 to 8, as the recruitment was done only by way of interview and this has been clearly excluded from the ambit of the relaxation under the UAL Rules. The question of the Central Government having jurisdiction to interpret the OM would only arise if there was any doubt or confusion in respect thereof. He submitted that the CAT exceeded its jurisdiction by substituting the plain language of the note with its own interpretation. He referred to the order dated 12th May, 2009 in W.P.(C) No. 6676/2008 of this Court, which held as under:

“In case where the method of recruitment is by interview, such recruitment is not included within the expression Direct Open Competitive Examination and, therefore, the benefit of Rule 3 would not be admissible.”

20. Mr. Kaushik also referred to the decision in ***Dr. J.C. Sharma v. Union of India*** (W.P.(C) No. 3589/2000), where it was held as under:

“The Rules relied on by the petitioner provides for relaxation of the limit by two year, by increasing the upper age limit, only for recruitment by direct open Competitive examination method to the Central Civil Services recruitment rules. The rules also clarify that "Direct Open Competitive Examination" means direct recruitment by open competitive Examination conducted by UPSC or Staff Selection Commission or any other authority under the central Government and shall not include recruitment through limited departmental examination or by short listing or by interview.”

21. Mr. Kaushik submitted that the OM dated 8th April, 2013 would be contrary to the statutory rules and therefore *non-est*.

22. The intervenors, supported the UPSC and adopted the above arguments. Reference is made to the decisions in ***District Collector and Chairman v. M. Tripura Sundri Devi (1990) SCC (L & S) 520*** and to the decision in ***Dhananjay Malik v. State of Uttaranchal AIR 2008 SC 1913***.

23. On behalf of the private Respondents, reliance was placed by Mr. Mittal on the clarification issued by the UPSC itself the OM dated 8th April, 2013 of the DoPT which according to them made it clear that interview was part of an open competitive exam. This was consistent with the view expressed by the CAT in ***Niraj Kumar Sinha***, the appeal against which was dismissed

by the Supreme Court. It is submitted by Mr. Mittal that notwithstanding the order passed by the Supreme Court leaving the question of law open, no other interpretation was possible on the expression 'Direct Open Competitive Exam'. In other words, according to him there was no warrant for excluding appointment by way of interview from the scope of that expression.

24. The above submissions have been considered. The Note below Rule 3 of the UAL is the bone of contention between the parties. It reads thus:

“3. Increase in the upper age limit:

The upper age-limit for recruitment by the method of Direct Open Competitive Examination to the Central civil services and civil posts specified in the relevant Service/recruitment rules on the date of commencement of the Central Civil Services and Civil posts (Upper Age-limit for Direct Recruitment) Rules 1998, shall be increased by two years.

Note: “Direct Open-Competitive Examination” for the purpose of these rules shall mean direct recruitment by Open Competitive Examination conducted by the Union Public Service Commission or the Staff Selection Commission or any other authority under the Central Government and it shall not include recruitment through Limited Departmental Examination or through short-listing or by interview or by contract or by absorption or transfer or deputation.”

25. OM dated 8th April, 2013 purported to clarify the meaning of the phrases “recruitment otherwise than on the results of an Open All India Competitive Examination” and “posts filled by direct recruitment on the results of an All India Competitive Examination”. It sought to clarify that the expression

“Direct recruitment otherwise than by open competition means:

“(i) any recruitment not made by UPSC or (ii) recruitment not made through written competitive tests held by other authority.”

26. Para 3 referred to instructions that already existed in regard to interpreting the expression “direct recruitment on the results of All India Competitive Exam” and it was clarified that this expression meant:

“(i) all recruitment by UPSC whether through written examination or by interview or both and; (ii) recruitment made by other authorities including Staff Selection Commission or any other appointment authority through written competitive examination or tests (but not by interview only).”

27. A careful reading of the above clarification appears to suggest that where it is an instance of recruitment by UPSC, such recruitment only by way of interview would also be covered under the above expression. However, the UPSC itself addressed a further letter dated 7th April, 2015 on which a further clarification was issued by DoPT on 20th April, 2015. This clarification was sought even when *Niraj Kumar Sinha’s* case was pending in the Supreme Court. The said clarification reads as under:

“Subject: Central Civil Services and Civil Posts (Upper Age limit for Direct Recruitment) Rules, 1998 clarification in the context of observations made by Apex Court in C.A. No. 2103/2008 filed by *UPSC & Anr. vs. Niraj Kumar Sinha*, regarding.

Sir,

I am directed to refer to the Commission’s letter No. F.25/8/2004-R.IV dated 7th April, 2015 on the subject

mentioned above and to say that the Union Cabinet in its meeting held on the 12th May, 1998 approved the proposal of this Department to increase the general age of retirement from the existing 58 years to 60 years in case of Central Services, All India Services, Armed Forces and CPOs. The Cabinet while considering the Note of DOPT regarding increasing the age of retirement also directed that the maximum age of recruitment may be extended by two years in cases where recruitment is done through direct open competition to All India Services, Central Services and other Civilian Posts under the Union Govt.

2. Since the above-mentioned orders of the Cabinet were limited to recruitment through “civilian direct open competition”, and there is no precise definition of this term, the implication is that recruitment through limited departmental examination and recruitment to Armed Forces would stand excluded from the proposed orders. It would also imply that posts where recruitment is done through interview etc. by shortlisting of candidates through UPSC, Staff Selection Commission and other bodies would also be excluded.

3. It is requested that the facts mentioned in the preceding paragraphs may be placed before the Hon’ble Supreme Court for soliciting further directions of the Hon’ble Court in the matter, in consultation with the Department of Legal Affairs.

4. This issues with the approval of the Joint Secretary (Establishment) in this Department.”

28. Specific to the present case, instructions have been issued by the UPSC to counsel appearing on its behalf in this Court on 6th April, 2016 *inter-alia* stating as under:

“2. In this connection, you are informed that in another Court

case of similar nature (C.A. No. 2103/2008 filed by *UPSC & Anr. Vs. Niraj Kumar Sinha* before the Hon'ble Supreme Court of India), comments of DoP&T were sought to clarify the interpretation of "Direct Open Competitive Examination" mentioned in DoP&T's Notification No. 15012/6/98-Estt. (D) dated 21.12.1998 and O.M.No.36034/2/2013-Estt. (Res.) dated 08.04.2013. According to the comments of DoP&T, posts where recruitment is done through interview etc. by shortlisting of candidates through UPSC, Staff Selection Commission and other bodies stand excluded from "civilian direct open competition". The comments of DoP&T [relevant paragraph – para 2 of DoP&T's letter vide F.No.15012/6/98- Estt. (D) dated 20.04.2015] has been enclosed for perusal and further necessary action."

29. The Court finds that there is no ambiguity in the said expression, since it would envisage some written exam combined with other forms of selection, but not recruitment only by way of interview. The Note makes it explicit in the exclusionary portion that it "shall not include recruitment through Limited Departmental Examination or through short-listing or by interview or by contract or by absorption or transfer or deputation." When Rule 3 of the UAL Rules is read as a whole with the Note it leaves no manner of doubt in this regard.

30. Learned counsel for the UPSC is right in his submission that the occasion for invoking Rule 5 pertaining to 'interpretation', would be relevant only where any question arose in that regard. Indeed, in the present case there could have been no ambiguity on this aspect. While it is true that the OM dated 8th April, 2013 did cause some confusion, it cannot override the UAL Rules which continue to hold the field.

31. The Supreme Court in *Dhananjay Malik s. State of Uttaranchal* (*supra*) has, following the decision of the Constitution Bench in *Sant Ram Sharma v. State of Rajasthan AIR 1967 SC 1910* clarified the position in this regard, in the following terms:

“12. A Constitution Bench of this Court in the case of *Sant Ram Sharma v. State of Rajasthan (1968) II LLJ 830 SC*, has pointed out at p. 1914 SC that the Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

13. The aforesaid ruling has been reiterated in paragraph 9 of the judgment by a three Judge Bench of this Court in the case of *Union of India v. K.P. Joseph [1973] 2 SCR752*, as under:

Generally speaking, an administrative Order confers no justiciable right, but this rule, like all other general rules, is subject to exceptions. This Court has held in *Sant Ram Sharma v. State of Rajasthan and Anr. (1968) II LLJ 830 SC*, that although Government cannot supersede statutory rules by administrative instructions, yet, if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed and these instructions will govern the conditions of service.”

32. In that view of the matter, the view taken by the CAT in the impugned order dated 9th September 2009 is unsustainable in law and is accordingly set aside.

33. The petition is allowed, but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

OCTOBER 22, 2019

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