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W.P.A. 23331 of 2019 [via video conference]
CAN 1 of 2020
CAN 2 of 2020

[Sri Bappa Chakraborty -Vs- Registrar General, High Court at Calcutta & Ors.]

Mr. Sambuddha Dutta
Mr. Shamit Dutta
... .. for the petitioner

Mr. Joydeep Kar .. Sr. Advocate
Mr. Siddhartha Banerjee
Ms. Tapasika Bose
... .. for the High Court
Administration

In Re : C.A.N. 2 of 2020

Considering the urgency pleaded by the petitioner in the application filed under CAN 2 of 2020, the instant writ petition is taken up for hearing via video conference.

Accordingly, the application being CAN 2 of 2020 is disposed of.

In Re : W.P.A. 23331 of 2019

The short question that arises for consideration in the instant writ application is interpretation of Rule 5(3) of the Notification of the High Court dated 28th August, 1986 issued by the Chief Justice under Article 229(2) of the Constitution of India. The said Notification concerns the promotion to the post in the category of Upper Division Assistant and Superintendent Grade-II in the General Branch and to the Category of Assistant Court Officer in the Technical Branch (Part-I) and to the category of Centenary Librarian or Librarian in Technical Branch (Part-II).

The Rules also cover promotion to selection or to super selection grade posts.

Rule 5(3) of the said Rules is set out as follows :-

“5(3). The criteria for promotion to Selection or to Super Selection Grade posts shall be merit only.”

Sub-rule (3) of Rule 1 prescribes as follows :-

“1(3). Notwithstanding anything contained in any other Rules or Orders these Rules shall apply to all present or future holders of the posts mentioned in the Schedule ‘A’ to these Rules.”

The facts of the case are that the petitioner was, in the year 2019, holding the post of Assistant Registrar. Pursuant to a Notification for promotion to the post of Deputy Registrar, a list of 15 eligible candidates was published on 4th December, 2019. Admittedly, the feeder post for such promotion was of Assistant Registrar which the petitioner was.

It is equally undisputed that there were 40 Assistant Registrars who could have been eligible to participate for promotion to the post of Deputy Registrar. However, fifteen Assistant Registrars were called to participate in the promotion process to the post of Deputy Registrar under the Notification. These fifteen Assistant Registrar formed the zone of consideration that was arrived at by the High Court Administration by the seniority in the post of Assistant Registrar based on Notification dated 11th July, 1983 issued by the Chief Justice also under Article 229(2) of the Constitution of India.

By applying the aforesaid 1983 Notification, the Administration contended that the zone of consideration was necessary as there were only three vacancies available in the post of Deputy Registrar. For each vacancy, five Assistant

Registrars were considered eligible, totaling to fifteen, applying the aforesaid Notification dated 11th July, 1983. The Administration also submits that the aforesaid number of 15 Assistant Registrars was arrived at by reckoning the inter se seniority in the post of Assistant Registrar.

Learned counsel for the petitioner would argue by reference to judgements, inter alia, in ***J. Jayalalithaa & Ors. vs. State of Karnataka & Ors.*** reported in **(2014) 2 SCC 401 (Paragraphs 34 & 35)** and ***Promoters & Builders Association of Pune vs. Pune Municipal Corporation*** reported in **(2007) 6 SCC 143 (Paragraph 9)** that when a Statute or a Notification or a Rule is framed under powers conferred by the Statute, the same must be followed strictly. Administrative instructions or other practices even if followed in deviation in the past cannot be a precedent. The relevant paragraphs of the **J. Jayalalithaa decision (supra)** are set out hereinbelow.

“34. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim *expressio unius est exclusio alterius*, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.

35. In *State of U.P. v. Singhara Singh* [AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] this Court held as under: (AIR p. 361, para 8)

“8. The rule adopted in *Taylor v. Taylor* [(1875) 1 Ch D 426] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.”

(See also *State of M.P. v. S.K. Dubey* [(2012) 4 SCC 578 : (2012) 1 SCC (L&S) 753].)”

The relevant paragraph of the **Promoters & Builders Association of Pune decision (supra)** is set out hereinbelow.

9. Feeling aggrieved by the decision of the High Court, Pune Municipal Corporation filed Civil Appeal No. 3800 of 2003 [Reported as *Pune Municipal Corpn. v. Promoters & Builders Assn.*, (2004) 10 SCC 796] in this Court. After hearing learned counsel for the parties, this Court allowed the appeal by the judgment and order dated 5-5-2004. The judgment of the High Court was set aside and the writ petition filed before the High Court was dismissed. For the sake of convenience, the relevant part of the judgment of this Court is reproduced below: (SCC pp. 798-800, paras 3-7)

“3. The question now for consideration is whether the State Government can make any changes of its own in the modifications submitted by the Planning Authority or not. The impugned Section 37 of the Act reads as follows:

‘37. (1) Where a modification of any part of, or any proposal made in, a final development plan is of such a nature that it will not change the character of such Development Plan, the Planning Authority may, or when so directed by the State Government shall, within sixty days from the date of such direction, publish a notice in the Official Gazette and in such other manner as may be determined by it inviting objections and suggestions from any person with respect to the proposed modification not later than one month from the date of such notice; and shall also serve notice on all persons affected by the proposed modification and after giving a hearing to any such persons, submit the proposed modification with amendments, if any, to the State Government for sanction.

(1-A)***

(1-AA)***

(1-B)***

(2) The State Government may, make such inquiry as it may consider necessary and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final development plan shall be deemed to have been modified accordingly.

(emphasis supplied)

4. Reading of this provision reveals that under clause (1), the Planning Authority after inviting objections and suggestions regarding the proposed amendment and after giving notice to all affected persons shall submit the proposed modification for sanction to the Government. Deliberation with the public before making the amendment is over at this stage. The Government, thereafter, under clause (2) is given absolute liberty to make or not to make necessary inquiry before granting sanction. Again, while according sanction, the Government may do so with or without modifications. The Government could impose such conditions as it deems fit. It is also permissible for the Government to refuse the sanction. This is the true meaning of clause (2). It is difficult to uphold the contrary interpretation given by the High Court. The main limitation for the Government is made under clause (1) that no authority can propose an amendment so as to change the basic character of the development plan. The proposed amendment could only be minor within the limits of the development plan. And for such minor changes it is only normal for the Government to exercise a wide discretion, by keeping various relevant factors in mind. Again, if it is arbitrary or unreasonable the same could be challenged. It is not

the case of the respondents herein that the proposed change is arbitrary or unreasonable. They challenged the same citing the reason that the Government is not empowered under the Act to make such changes to the modification.

5. Making of DCR or amendments thereof are legislative functions. Therefore, Section 37 has to be viewed as repository of legislative powers for effecting amendments to DCR. That legislative power of amending DCR is delegated to the State Government. As we have already pointed out, the true interpretation of Section 37(2) permits the State Government to make necessary modifications or put conditions while granting sanction. In Section 37(2), the legislature has not intended to provide for a public hearing before according sanction. The procedure for making such amendment is provided in Section 37. Delegated legislation cannot be questioned for violating the principles of natural justice in its making except when the statute itself provides for that requirement. Where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it is not permissible to read natural justice into such legislative activity. Moreover, a provision for 'such inquiry as it may consider necessary' by a subordinate legislating body is generally an enabling provision to facilitate the subordinate legislating body to obtain relevant information from any source and it is not intended to vest any right in anybody. (*Union of India v. Cynamide India Ltd.* [(1987) 2 SCC 720] , SCC paras 5 and 27. See generally *H.S.S.K. Niyami v. Union of India* [(1990) 4 SCC 516] and *Canara Bank v. Debasis Das* [(2003) 4 SCC 557 : 2003 SCC (L&S) 507] .) While exercising legislative functions, unless unreasonableness or arbitrariness is pointed out, it is not open for the Court to interfere. (See generally *ONGC v. Assn. of Natural Gas Consuming Industries of Gujarat* [1990 Supp SCC 397] .) Therefore, the view adopted by the High Court does not appear to be correct.

6. DCR are framed under Section 158 of the Act. Rules framed under the provisions of a statute form part of the statute. (See *General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav* [(1988) 2 SCC 351 : 1988 SCC (L&S) 542 : (1988) 7 ATC 296] , SCC para 14.) In other words, DCR have statutory force. It is also a settled position of law that there could be no 'promissory estoppel' against a statute. (*A.P. Pollution Control Board II v. Prof. M.V. Nayudu* [(2001) 2 SCC 62] , SCC para 69, *STO v. Shree Durga Oil Mills* [(1998) 1 SCC 572] , SCC paras 21 and 22 and *Sharma Transport v. Govt. of A.P.* [(2002) 2 SCC 188] , SCC paras 13 to 24.) Therefore, the High Court again went wrong by invoking the principle of 'promissory estoppel' to allow the petition filed by the respondents herein.

7. For the foregoing reasons, the view adopted by the High Court cannot be sustained."

(emphasis added)

Learned counsel for the petitioner, therefore, submits that even if there are 40 candidates in the feeder post and when merit is the only criteria to be followed for the purpose of promotion, the Administration was not justified and has acted illegally in applying the zone of consideration principle and by

inviting only 15 persons only to participate in the selection process based on seniority.

It is further argued that the High Court Administration had done indirectly what it could not have done directly. As a consequence whereof, not only has the Administration been deprived of meritorious candidates for the post of Deputy Registrar but superior candidates like the petitioner herein have also been deprived of an opportunity to participate for promotion.

Per contra, Mr. Joydeep Kar, learned senior counsel appearing for the High Court Administration would submit that the application for the Zone of Consideration Rule is not new to the High Court Administration in the promotional posts. He further submits that this has been the practice for decades. Reliance in this regard has been placed to the 1983 circular (supra).

It is submitted that the 1983 and 1986 circulars issued albeit under powers conferred under Article 229 of the Constitution of India by the Chief Justice operate in completely different fields. He, therefore, submits that non-obstante clause in the 1986 Circular cannot be read or understood to exclude the zone of consideration completely from being applied to promotion.

It is next argued that the 1983 Circular has not been challenged by the petitioner even after the same was introduced by the Administration in the affidavit-in-opposition.

In support of his argument, Mr. Kar would first rely upon the decision of the Hon'ble Supreme Court in the case of **S. B. Mathur & Ors. vs. Chief Justice of Delhi High Court & Ors.**

reported in **1989 Supp (1) SCC 34**. There is particular reference made to paragraph 20. Paragraph 20 is set out hereinbelow :-

“20. In the case before us, zone has been restricted by prescribing that out of the total number of candidates who satisfy the eligibility requirement, the zone of consideration will be limited to a multiple of 3 to 5 times of the number of vacancies and the persons to be considered will be determined on the basis of their seniority in the combined seniority list. It appears to us that there is nothing unreasonable in this restriction. It was open to the Delhi High Court to restrict the zone of consideration in any reasonable manner and limiting the zone of consideration to a multiple of the number of vacancies and basing it on seniority according to the combined seniority list, in our view, cannot be regarded as arbitrary or capricious or mala fide. Nor can it be said that such restriction violates the principle of selection on merit because even experience in service is a relevant consideration in assessing merit. We may also refer, in this connection, to the decision of this Court in *V.J. Thomas v. Union of India* where it has been pointed out that even though minimum eligibility criterion is fixed for enabling one to take the examination, yet the examination can be confined on a rational basis to recruits up to a certain number of years. In adopting such a policy which underlay the Note to clause (4) of Appendix I to the new Rules in question, there is nothing which is arbitrary or amounting to denial of equal opportunity in the matter of promotion. It had the desired effect of not having a glut of Junior Engineers taking examination compared to fewer number of vacancies. Length and experience were given recognition by the Note. The promotion can be thus by stages exposing the promotional avenue gradually to persons having longer experience. This seems to be the policy underlying the Note and there was nothing arbitrary or unconstitutional in it. Such a limitation caters to a well known situation in service jurisprudence that there must be some ratio of candidates to vacancies. If for taking an examination this aspect of classification is introduced, it is based on rational and intelligible differentia which has a nexus to the object sought to be achieved (see SCC p.13 para 13). In view of what we have pointed out above, the submission of Mr. Thakur in this connection must also be rejected.”

It is argued that the application of the zone of consideration principle even though not specifically mentioned in the promotional Rules would not be fatal to the promotional process. Specific reference was made to the observations of the Supreme Court that since expressions like *‘irrespective of seniority’* or *‘without regard to seniority’* are not used in the 1986 Circular (supra), the Administration is entitled to apply the seniority principle for the purpose of arriving at the zone of

consideration. It is explained by Mr. Kar that it would be an uphill task to conduct the selection process for three posts in Assistant Registrar with 40 candidates.

This Court notes that in the facts of the S.B. Mathur case (supra) the strength in the feeder post to the promotional post of Assistant Registrar had increased in volume from 1964 all the way upto 1972 and further until the promotion process was undertaken. What was originally a feeder post with one or two categories of persons came to be increased substantially by merger of and/or effects of reorganisation of the jurisdiction of the Delhi High Court viz-à-viz the Punjab & Haryana High Court. As many as eighty candidates emerged in the feeder post against a very limited number of candidates in the promotional posts. Another fact that is noticeable in the Mathur decision (supra) is that challenge was also made to the equating of different categories in the feeder post. It is in that light and in those facts that the Hon'ble Supreme Court had upheld the instructions of the Administrative Committee of the Delhi High Court in limiting the zone of consideration at feeder level to a limited number of posts based on seniority.

Further the language of the notification issued by the Chief Justice of the Delhi High Court under Article 229 of the Constitution of India appears to be different from the language used in the 1986 notification issued by the Chief Justice of the Calcutta High Court.

In fact, in the last part of paragraph 21 of the Mathur Decision (supra) one of the expressions used which would exclude any application of any zone of consideration is the expression '*on merit alone*'. The Hon'ble Supreme Court went on

to hold in the said paragraph that it is the expression '*on merit alone*' (which is the same) '*merit only*' under Rule 5(3) of the 1986 notification (*supra*) would totally exclude any doubts left on application of administrative instructions to dilute any notification issued under Article 229 of the Constitution of India.

This Court, therefore, is of the view that the decision of the Hon'ble Supreme Court in the case of ***S. B. Mathur & Ors.*** (*supra*) cannot come to the aid of the High Court administration.

Mr. Kar relies next upon the decision of the Hon'ble Supreme Court in the case of ***Union of India & Ors. vs. B.S. Darjee & Another*** reported in ***(2011) 10 SCC 186*** particularly paragraph 10 thereof. The facts of the case are substantially different from the instant case and even the ***S. B. Mathur*** decision (*supra*). The zone of consideration in the said decision for promotion to the post of Head Constable was clearly specified to be by seniority as per the Rules of the CISF. Merit was not a criteria for the actual promotion. The said decision is, therefore, distinguishable in the facts of the case and does not come to the aid of the Administration.

It is seen in the instant case that the zone of consideration is obvious, clear and comprises in the entire cadre of Assistant Registrars. The High Court Administration could not have created any separate/special zone of consideration in the feeder post outside the scope of the notification dated 28th August, 1986. When merit alone is the criteria for promotion, the entire class of Assistant Registrars in the instant case, 40 in number, were entitled to participate in the promotional post of Deputy Registrar. Administrative inconvenience of the High Court cannot stand in the way of the need for quality persons in

the post of Deputy Registrar and the right of all qualitatively competent persons in the feeder post to participate in the promotional process. The argument of convenience of the High Court Administration cannot be countenanced by this court.

The last argument of Mr. Kar that the 1983 notification operates in the field different from that of 1986 notification is incredible and unacceptable. The 1986 circular clearly at Rule 1(3), set out hereinabove, prescribes that the said Rule would apply notwithstanding any Rule for the time being in force. The promotion process and the Rules applicable therefor are to be governed in entirety by the notification of 1986 itself. Applying the 1983 notification which contained the zone of consideration would amount to permitting the administration to do indirectly which the administration is not entitled to do directly. Back door methods of introducing criteria and promotion cannot be allowed no matter how laudable or justifiable the object and purpose behind the same may be.

This Court is unable to see any rational nexus in introducing the zone of consideration principle with the object sought to be achieved which ought to be receiving the best available candidates for the three posts of Deputy Registrar advertised by the Administration.

Following a wrong precedent from the past amounts to asking for equal benefit, wrongly given to another person. Negative equality is not permitted in Indian Service jurisprudence.

The zone of consideration principle applied by the Administration in the promotion to the post of Deputy Registrar as published is held to be arbitrary and unconstitutional. Since

no other Assistant Registrar has come forward to challenge the act of the Administration, this Court is not inclined to interfere with the promotions already granted under the aforesaid promotion process except as follows :-

The High Court Administration shall conduct a separate and independent written test for the petitioner to participate in the aforesaid promotion process from the post of Assistant Registrar to Deputy Registrar. If the petitioner succeeds in such written test and the interview thereafter and unless he is found absolutely and by no stretch of imagination suitable, he shall be afforded promotion.

This Court is not inclined to interfere with the next promotional process from the post of Deputy Registrar to the post of Joint Registrar.

With the aforesaid observations, the writ petition is allowed and disposed of.

In view of disposal of the writ petition, the connected application being CAN 1 of 2020 is also disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Rajasekhar Mantha, J.)