

SUPREME COURT OF INDIA

Before :- Dr. A.S. Anand, M. Srinivasan and R.C. Lahoti, JJ.

Civil Appeal No. 6529 of 1999. D.d. 16.11.1999

A.P. Aggarwal - Appellant

Versus

Government of National Capital Territory of Delhi - Respondents

For the Appellant :- Mr. P.P. Rao, Senior Advocate with Mr. H.V.P. Sharma, Mr. A.N. Bardiyar, Advocates.

For the Respondent :- Mr. Mukul Rohtagi, Additional Solicitor General, Mr. K.C. Kaushik, Ms. Sushma Suri and Mrs. Anil Katiyar, Advocates.

Cases referred :

1. Shrilekha Vidyarthi v. State of U.P., 1991(1) SCC 212.
2. Madan Lal and others v. State of J & K and others, 1995(3) SCC 486.
3. R.S. Mittal v. Union of India, 1995 Supp.(2) SCC 230.
4. Virender S. Hooda and others v. State of Haryana and another, 1999(3) SCC 696.

JUDGMENT

M. Srinivasan, J. - Leave granted. Heard both sides and perused the records.

2. In November 1996, applications were invited for appointment to the post of Member, Appellate Tribunal, Sales-tax. The qualifications, classification and scale of pay, disqualifications, medical fitness, retirement age and retirement benefits were all set out in the advertisement. The appellant had the requisite qualifications and applied for the post. The post was to be filled up by the Central Government as per Section 13 of the Delhi Sales Tax Act 1975. The Selection Committee constituted for the purpose recommended a panel of two names for consideration for appointment by the Central Government. One Mr. M.L. Sahni who was a Member of the Delhi Higher Judicial Service at that time and the present appellant who was Addl. Legal Advisor, Ministry of Law, Justice and Company Affairs were on the panel. The Central Government appointed Shri M.L. Sahni as Member, Appellate Tribunal, Sales-tax 'for a period of three years or till such time as his successor joins, whichever is earlier'. Pursuant thereto Shri M.L. Sahni joined the post on 14.9.1997. Even by that time, he had been selected for the post of Member, Income-tax Appellate Tribunal. He was appointed as such in December 1997, and he relinquished the post of Member, Sales-tax Appellate Tribunal on 4.1.1998.

3. The Central Government instead of appointing the appellant as the Member, chose to

cause a fresh advertisement to be issued calling for fresh applications. Admittedly, a note was submitted for filling up the vacancy either by inviting applications through press advertisements or by appointing the appellant whose name was recommended earlier along with the name of Shri M.L. Sahni and to avoid delay in filling up the post, the latter course was suggested. But that was not accepted by the Government and it was decided to invite fresh applications for a wider choice.

4. In the meanwhile, the appellant had been making representations repeatedly to the concerned authorities for appointing him as Member, Sales-tax Appellate Tribunal. As there was no response to any representation and the Government proceeded to process the applications received pursuant to the fresh advertisements, the appellant filed O.A. No. 630 of 1998 on the file of the Central Administrative Tribunal, Principal Bench, New Delhi for quashing the fresh advertisement and the process of selection pursuant thereto and for a direction to appoint the appellant as Member, Sales-tax Appellate Tribunal. It should be mentioned here, that the provisions of Section 13 of the Delhi Sales-tax Act were amended with effect from 28.1.1998 whereby the words 'Central Government' appearing in the Section were substituted by the words 'Lt. Governor'. Thus the power of appointment vested thereafter with the Lt. Governor of Delhi. The appellant had therefore impleaded the Government of N.C.T. of Delhi through the Lt. Governor and the Secretary (Finance), Government of N.C.T. as respondents in his application. The application was contested by the respondents on the ground that the appellant did not get any right by the inclusion of his name in the panel. Before the Tribunal, reliance was placed by the appellant on Office Memorandum No. 39021\18\84-Estt. (B) dated 14.5.1987, Govt. of India, Ministry of Personnel, P.G. and Pensions (Department of Personnel and Training). It was stated on behalf of the appellant that the provisions in the Office Memorandum were mandatory and the vacancy in the post having occurred within a period of six months from the date of joining of Shri M.L. Sahni, it should be filled up by appointing the appellant. Reliance was also placed on the provisions of Section 13 of the Delhi Sales-tax Act 1975.

5. The Tribunal opined that the Government Office Memorandum was not mandatory and it was open to the Government to resort to fresh selection process. The Tribunal had also placed reliance on three decisions of this Court in which it has been laid down that a person in the waiting list does not get any right to be appointed to the post if vacancy arises subsequently. Ultimately, the Tribunal dismissed the application filed by the appellant.

6. The appellant filed a writ petition in the High Court of Delhi which was dismissed *in limine* by a non-speaking order. The High Court observed that it found no reason to interfere with the impugned decision of the Tribunal. Aggrieved thereby, the appellant has approached this Court. When the matter was pending before the Tribunal, there was a stay of the process of selection pursuant to the fresh advertisement. When notice was ordered by this Court in the petition for Special Leave, similar interim order was granted staying fresh selection.

7. The appointment of Member, Sales-tax Appellate Tribunal is governed by Section 13 of the Delhi Sales-tax Act 1975. Sub-Section (4) of Section 13 reads as follows :

'Any vacancy in the membership of the Appellate Tribunal shall be filled up by the

Central Govt. as soon as practicable.'

It is significant to notice use of the word 'shall' in the Sub-Section. There is no doubt that the statute has cast a duty on the Government to fill up the vacancy as early as practicable.

8. The Central Government issued an Office Memorandum on 14.5.1987 containing the instructions which would apply in respect of vacancies arising on or after 1.1.1986. The Memorandum is in the following terms :

'The undersigned is directed to refer to this Department's O.M. No. 39021\18\84-Estt.(B) dated 6th February 1985, 13th June 1985 and 20th November 1985 (copies enclosed) and to say that according to the existing procedure, the reserve lists prepared with effect from 1st January 1985 were to be operated only to fill replacement vacancies. Earlier to this the reserve lists were being used both for replacement vacancies and fresh vacancies of identical nature. Some of the Ministers have reported difficulties in filling up of vacancies caused in a situation where the recommended candidate joined the post for a short period and then resigned or where the vacancy occurred on account of the death of the candidate. It was pointed out that the posts could not be kept vacant for a long time till the next recruitment took place.

2. The matter has been examined in consultation with U.P.S.C. and it has been decided that the reserve lists may be operated in cases where a vacancy is created by a candidate resigning the post or in the event of his death, within a period of six months from the date of his joining the post subject to the condition that such an operation of the lists should be limited in respect of statutory posts and those of scientific, technical, academic or medical nature or other similar nature where it may not be possible to keep the post vacant till the completion of fresh recruitment or to make local arrangements.

3. In other types of cases also where the post could be manned normally on officiating basis or by internal arrangements, requests of the Ministries\Departments for operation of reserve lists will be considered by the Commission but only when it is apparent that making of such arrangements would not be feasible and the posts also cannot be kept vacant till the candidates from next recruitment process are available.

4. These instructions would apply in respect of vacancies arising on or after 1.1.1986.'

9. While it is the contention of learned senior counsel for the appellant that the instructions contained in the office memorandum are mandatory, the learned Additional Solicitor General appearing for the respondents has contended that they are only directory and there is absolutely no necessity for the government to strictly comply with the same. He places reliance on the words 'may be operated' appearing in Paragraph 2.

10. A reading of Section 13(4) of the Delhi Sales-tax Act and the Office Memorandum together shows that the latter was issued with a view to fill up the vacancy as soon as practicable. The statutory provision is expressed in mandatory language and in order to give effect to the same, executive instructions were issued in the office memorandum. The first paragraph of the office memorandum shows that the position prevailing prior to 14.5.1987 lead to some difficulties and the memorandum in question was being

issued in order to get over such difficulties and achieve the objective of early fulfillment of the vacancy contemplated in the Act. If the office memorandum is read in the light of the provisions in Section 13(4), there is no doubt whatever that a public duty is cast on the concerned authorities to fill up the vacancy within as short time as possible provided the conditions set out in the memorandum are present. There is no dispute in this case that the vacancy was created by the resigning of the post by M.L. Sahni within a period of six months of the date of joining the same. The list recommended by the Select Committee and accepted by the Government contained a panel of two names and the post is such it is not possible to make local arrangements to fill up the vacancy. Nor is it desirable to keep it vacant for a long time or till the completion of fresh recruitment.

11. In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said, that the instructions contained in the Offence Memorandum dated 14.5.1987 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory requirement of the Statute. It is not therefore open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any stage that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection.

12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us (vide *Shrilekha Vidyarthi v. State of U.P., 1991(1) SCC 212*).

13. Learned Additional Solicitor General referred to the judgment of this Court in *Madan Lal and others v. State of J & K and others, 1995(3) SCC 486* and placed reliance on Paragraph 23 of the judgment at Page 502. That ruling has no relevance in the present case. The advertisement was for applications to the post of Munsif. According to the advertisement, there were 11 vacancies to be filled up and the requisition to the Public Service Commission was to select 11 persons for filling up the said seven vacancies. While sending the list of selected candidates, the Public Service Commission sent a list containing more names than 11. That was obviously with a view to fill up the vacancies, if any of the 11 candidates according to their merit did not join, from among the 11 candidates in the waiting list according to their merit. The Bench held that once the 11 candidates who were selected joined the post, the list got exhausted and the waiting list could not be used for any purpose thereafter. That principle will not apply in the present case in view of the facts already set out by us.

14. In *R.S. Mittal v. Union of India, 1995 Supp.(2) SCC 230* the question arose with regard to selection of candidates to the post of Judicial Member, Income-tax Appellate Tribunal. The selection was made by a Selection Board consisting of a sitting Judge of

this Court. The Selection Board prepared a panel of selected candidates which included the name of the appellant before this Court and sent its recommendations. The candidates who were at numbers 1 and 2 in the panel did not accept the appointment. The Bench observed that though a person on the select panel has no vested right to be appointed to the post for which he has been selected has a right to be considered for appointment and at the same time the appointing authority cannot ignore the select panel or decline to make an appointment on its whims. The Court said that when a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, ordinarily there is no justification to ignore him for appointment and that there has to be a justifiable reason to decline to appoint a person who is on the select panel. However, on the facts of the case, the Bench did not give any relief to the appellant as he was only No. 4 and no information was available about the stand of the person who was at No. 3 of the select panel. While reversing the findings given by the Central Administrative Tribunal to the extent indicated in the judgment, the Bench dismissed the appeal but directed the Government to pay cost of the proceedings to the appellant which was quantified at Rs. 30,000/-.

15. In *Virender S. Hooda and others v. State of Haryana and another, 1999(3) SCC 696*. The Haryana Service Commission advertised 12 posts of Haryana Civil Service (Executive Branch). On completion of selection final list was published. Some of the selected candidates did not join and the appellant that they should have been considered against the vacancies so arising, depending upon the ranking obtained by the appellants in the competitive examination. They relied on Government Circulars dated 22.3.1957 and 26.5.1972 according to which the vacancies which arose within six months from receipt of recommendations of the Commission, should be filled up from the waiting list maintained by the Commission. The writ petition filed by the appellants was dismissed by the High Court in the view that the administrative instructions contained in the Circulars could not be enforced. Reversing the decision of the High Court, the Division Bench of this Court observed that the Government ought to have considered the case of the appellants as per the rank obtained by them and the appellants had to be appointed if they came within the range of selection. The Bench pointed out that when those vacancies arose within a period of six months from the date of previous selection, the Government circulars were attracted and the view of the High Court that the vacancies arose after selection process commenced had no relevance and they are contrary to the declared policy of the Government. The Bench observed that the view taken by the High Court that the administrative instructions could not be enforced by the appellants would be looking at the matter from a narrow and wrong angle. The Bench said, "when a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same". The ruling will apply on all fours in the present case.

16. In the circumstances we have no hesitation in allowing the appeal and directing the respondents to appoint the appellant as Member, Sales-tax Appellate Tribunal as he is the only other person in the panel of names selected by the Select Committee and as nothing has been brought out against him by the Government.

17. On the facts, we find that all the conditions set out in the office memorandum

issued by the Central Government dated 14.5.1987 are fulfilled in the present case and the rejection of the appellant's name without any reason therefor is arbitrary and unconstitutional. The initiation of fresh process of selection is not valid and it is hereby quashed. The appeal is allowed accordingly. No costs.

18. I.A. Nos. 2 and 3 of 1999.

In view of the disposal of the civil appeal, these two applications do not survive. They are dismissed as infructuous.