
(1999) 07 DEL CK 0006

In the Delhi High Court

Case No : Civil Writ Petition No. 4481 of 1994

B. Jumrani

APPELLANT

Vs

National Buildings Construction Corporation Ltd. and Others

RESPONDENT

Date of Decision : 26-07-1999

Acts Referred:

Constitution of India, 1950 — Article 226
NBCC (Recruitment) Rules, 1970 — Rule 3(1)

Citation : (1999) 4 AD 937 : (1999) 81 DLT 31 : (1999) 50 DRJ 861 : (1999) ILR Delhi 87

Hon'ble Judges : Usha Mehra, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Mr. B.T. Kaul, Mr. M.K. Gupta and Mrs. Bimla K. Kaul, for the Appellant; Mr. K.T.S. Tulsi and Mr. Ravinder Kumar, for the Respondent

Judgement

Madan B. Lokur, J.—In her writ petition filed under Article 226 of the Constitution, the Petitioner has challenged the validity of Office Order No. 1255/94 dated 1st June, 1994 purported to have been issued by Respondent No. 2 as the competent authority and Chairman-cum-Managing Director (for short CMD) of Respondent No. 1, the National Buildings Construction Corporation Ltd. (for short NBCC). She has also challenged Office Order No. 2686/94 dated 17th October, 1994 whereby Respondent Nos. 5 to 10 have been promoted to the post of Administrative Officer (for short AO) pursuant to the recommendations of a Departmental Promotions Committee (DPC) held on 12th October, 1994. Finally, the Petitioner has challenged the review of her Annual Confidential Reports (ACRs) by the CMD of NBCC. She has also prayed for consequential reliefs. The Union of India through the Secretary, Ministry of Urban Development has been impleaded as Respondent No. 3 since it is under his overall control that Respondent Nos. 1 and 2 function. Respondent No. 4 is the Department of Public Enterprises, but no effective relief has been claimed against this Respondent.

2. The writ petition was admitted for final hearing on 27th October, 1994 when an order for maintaining status quo was also passed. This interim order is still

continuing.

3. We heard learned counsel for the contesting parties on 23rd and 24th March, 1999, 12th, 20th, 26th and 28th April, 1999 and 11th, 17th and 27th May, 1999 when judgment was reserved. Written submissions were also filed by learned counsel for the contesting parties and these have also been considered. Respondent Nos. 5 to 10 chose not to put in appearance to contest the case.

4. At the relevant time, the Petitioner was holding the post of Assistant Administrative Officer (for short AAO) with the NBCC.

5. According to the Petitioner, she has been working for the last 4 1/2 years as AAO in the pay scale of Rs. 2000-3200. She was entitled to be considered for promotion to the next higher post of AO which is a Group A post carrying the pay scale of Rs. 2200-4000. The Petitioner says that she was considered for promotion in 1993 when her ACRs for the previous years including 1991-92 and 1992-93 were taken into account by the DPC but she was not able to make the grade because she was low down in seniority. The Petitioner has, however, not challenged these proceedings of the DPC.

6. The petitioner states that promotion to the post of AO is regulated by the NBCC (Recruitment) Rules, 1970 (hereinafter referred to as the Rules). Rule 2(b) defines "Competent Authority" and states that "competent authority in relation to the exercise of any power means any authority to which the power is delegated". Rule 3 reads as follows:-

3. Scope and Commencement : (1) These rules define the terms and conditions of service of the employees in the regular establishment of the Corporation.

Provided that employees of the Central or State Governments whose services are placed at the disposal of the Corporation on foreign service shall be governed by the terms and conditions which may be agreed upon between such Governments and the Corporation.

Provided further that the Board shall have the power to waive, add to or modify these rules in respect of any employee or any category of employees.

2. These rules shall come into force with effect from the 1st January, 1970 or as per dates of various amendments.

7. The Petitioner further says that pursuant to directives of the Supreme Court, the Government had appointed a High Power Pay Committee (HPPC) under the Chairmanship of Hon'ble Mr. Justice R.B. Mishra (Retd.). The HPPC gave a Report which was accepted by the Government and directions for its implementation were also given by the Supreme Court. Pursuant thereto, the Government of India (Ministry of Programme Implementation) issued an Office Memorandum (for short O.M.) dated 12th June, 1990 laying down the pay scales for different categories of employees in Public Sector Enterprises. In so far the NBCC is concerned, the pay scale of a Private Secretary was fixed at Rs. 1640-2900 or

Rs. 2000-3500 (depending upon the level of the officer to whom he was attached). The pay scale of an Executive Secretary to the CMD (equivalent to Senior Private Secretary) was fixed at Rs. 2000-3500. The pay scale of an AAO was fixed at Rs. 2000-3200 and of an AO at Rs. 2200-4000.

8. In paragraph 5(e) of this O.M. it is clearly stated that "No PSE is authorised to modify the scales recommended by the HPPC."

9. The Petitioner says that Respondent Nos. 1 and 2 had attempted in 1991 and 1992 to upgrade the pay scale of Senior Private Secretary to make it equivalent to that of an Accounts Officer, that is Rs. 2200-4000 (which is the same pay scale as of an AO). This request was turned down by Respondent No. 3 in consultation with Respondent No. 4. Reliance is placed by the Petitioner on letters dated 3rd June, 1991, 19th September, 1991 and 23rd March, 1992.

10. The grievance of the Petitioner is that by the impugned Office Order No. 1255/94 dated 1st June, 1994 the Respondents effected two significant changes. Firstly, the post of Senior Private Secretary (SPS) which was a Group B post carrying the pay scale of Rs. 2000-3500 was upgraded as AO which is a Group A post carrying the pay scale of Rs. 2200-4000. According to the Petitioner, this was contrary to the Rules and the O.M. dated 12th June, 1990.

11. Secondly, the channel of promotion to the post of AO was widened, inasmuch as a Private Secretary (PS) carrying the pay scale of Rs. 2000-3200 who was earlier eligible for promotion only to the post of SPS, was now made eligible for promotion to the post of AO. Consequently, a PS could now compete with an AAO for promotion to the post of AO. According to the Petitioner, this was wholly impermissible being contrary to the Rules. Representations protesting against this were stated to have been made to the Respondents by the Petitioner and others, but to no effect.

12. The Respondents have controverted the contentions of the Petitioner and have submitted that the second proviso to clause (1) of Rule 3 of the Rules was amended by the Board of Directors (for short BOD) of NBCC in its 237th meeting held on 22nd June, 1988. The Respondents have also relied on the Resolution passed by the BOD in its 242nd meeting held on 15th June, 1989 and the Resolution of the BOD passed in its 285th meeting held on 21st July, 1995 to justify the Office Order dated 1st June, 1994.

13. The Resolution adopted by the BOD on 22nd June, 1988 reads as follows:

"Resolved that in supersession of all the powers delegated to him from time to time so far, the CMD of the Corporation may be and is hereby delegated powers as indicated in Appendix-I to the Agenda Item No. 3 of the 237th Meeting held on 22nd June, 1988."

14. The relevant extract of Appendix-I to Agenda Item No. 3 reads as follows:

"....The Chairman and Managing Director be and is hereby authorised to exercise

all or any of the powers vested in the Board for the management administration of the Company; except on matters as set out in Annexure 'A' in respect of which prior approval of the Board of Directors /Government will be necessary."

15. The excluded matters mentioned in Annexure "A" are, inter alia, the following under the heading "Personnel":

(i) Framing of, and any changes in Policies, Rules and Regulations relating to all personnel matters including recruitment, training, manpower development, promotion, deputation and other terms and conditions of service and disciplinary rules and procedures, in respect of employees of the Company.

(ii) Creation/Abolition of and appointment to the posts in the scale of the maximum of which is more than Rs. 2500 p.m. (the CMD may exercise powers for lower posts subject to Organisation Chart and Personnel Budget being approved by the Board).

16. Learned counsel for the Petitioner submitted that what was done by the impugned Office Order No. 1255/94 dated 1st June, 1994 clearly amounts to a change in the Rules relating to personnel matters including promotion. Clause (i) of Annexure A above prohibits this without the prior approval of the BOD. However, the Respondents relied on Clause (ii) and submitted that the CMD has abolished the post of SPS, which he was entitled to do. Apparently, the Respondents did not take into account the fact that this also required the prior approval of the BOD. Realizing this, the Respondents placed reliance on the Resolution passed by the BOD in its 242nd meeting held on 15th June, 1989.

17. The BOD passed the following Resolution in its meeting held on 15th June, 1989:

"The Board approved the proposal for amendment to NBCC (Recruitment) Rules as contained in Item No. 242/10 of its meeting held on 15.6.1989."

18. The relevant extract of the note for the Agenda Item No. 242/10 is as under:

"Under the existing rules, only the Board of Directors have the powers to modify the rules/conditions of various categories of employees of the Corporation. It is suggested that the Chairmancum-Managing Director of the Corporation may be authorised to review the rules and make suitable amendments which may be submitted to the Board for information in the following meeting."

19. The first sentence of this extract states the correct position, namely that only the BOD could amend the Rules. The second sentence authorized the CMD to review the Rules and make suitable amendments which, nevertheless, had to be submitted to the BOD. In other words, the amendments made by the CMD did not ipso facto come into effect. Both sentences, if read conjointly, make it clear that the BOD did not abdicate its rule making power. It still retained control over its power which had not been fully delegated. As such, the competent authority to issue the Office Order dated 1st June, 1994 continued to be the BOD and the

CMD was not, under the Rules, competent to issue the impugned Office Order. The Resolution of the BOD in its meeting held on 15th June, 1989 does not help the case of the Respondents.

20. Furthermore, it appears to us that even the Respondents understood the Resolutions passed in 1988 and 1989 in the same manner. In our view, the Respondents would not normally have approached the Central Government in 1991 and 1992 for upward revision of the pay scale of the post of SPS if the CMD had the power which he purported to exercise as a result of these Resolutions.

21. The last document in this regard, which is relied upon by the Respondents is an extract from the Minutes of the Meeting held on 21st July, 1995 and the same is as under:

"Item No. 285/4

Creation of new posts/re-designation of Posts in the regular establishment.

The Board noted the position as enumerated in the agenda item and also confirmed the action taken by the CMD from time to time with regard to creation of new posts/re-designation of posts in the regular establishment in the past."

22. The posts which were redesignated (no new posts were created) are mentioned in Appendix-V to the Agenda Note and are as follows :

"STATEMENT SHOWING EXISTING POST WHICH HAVE BEEN REDESIGNATED.

Sr. Existing Month/Year Redesignated post and scale of pay No. Post of redesign-
CDA (Rs.) IDA (Rs.) nation of post 1. xx xx xx xx 2. xx xx xx xx 3. xx xx xx
xx 4. xx xx xx xx 5. xx xx xx xx 6. xx xx xx xx 7. Sr. June, 94 Admn
2200-4000 2500-4300 Private Officer Secretary

23. The contention of learned counsel for the NBCC was that the Office Order dated 1st June, 1994 was validly issued pursuant to the Resolution passed on 22nd June, 1988 and 15th June, 1989 and to put any doubts to rest, the said Office Order was "ratified" by the BOD in its meeting held on 21st July, 1995, as a part of an ongoing process of review.

24. On the other hand, learned counsel for the Petitioner submitted that what had been approved by the BOD was redesignation of the post of SPS as AO and not the reclassification or recategorization of the post of SPS. The difference, as pointed out by the learned counsel, is that redesignation merely means a change of nomenclature and nothing more. He placed reliance in this regard on Office Order No. 1048/92 dated 19th May, 1992 whereby the post of Office Superintendent (amongst others) was redesignated as AAO. This involved only a change of name. However, in the present case what has been done by the Respondent is not only a change of name but also change of pay scale and change of duties. This, according to learned counsel, amounts to something much more than mere redesignation.

25. We find substance in the contention of the learned counsel for the Petitioner. The Respondents have not only redesignated the post of SPS as AO but have changed the pay scale of the said post, converted it from a Group B to a Group A post, changed the promotional avenue and also perhaps the duties and responsibilities attached to the post. This was impermissible and well beyond what was ostensibly intended by the BOD.

26. We also find that what has been done by the Respondents is also in disregard of the refusal by the Government and the Department of Public Enterprises to upgrade the pay scale of SPS from Rs. 2000-3500 to Rs. 2200-4000 as it clear from the letters dated 3rd June, 1991, 19th September ,1991 and 23rd March, 1992. We cannot permit the Respondents to achieve indirectly what they could not achieve directly. Moreover, the recommendations of the HPPC and the O.M dated 12th June, 1990 are binding on the Respondents and they cannot get out of the rigours of the same in the manner that they are seeking to do.

27. Learned counsel for the Petitioner also submitted that the Resolution of the BOD passed on 21st July, 1995 is in violation of the interim stay granted by this Court on 27th October, 1994. We do not propose to go into this aspect because we have been told that a contempt petition on this subject is already pending in this Court. We need not go into this also because we have found on merits that the CMD could not have validity passed the impugned Office Order No. 1255/94 dated 1st June, 1994 and that it was not subsequently "ratified".

28. In support of his submissions, learned counsel for the Petitioner has relied upon three decisions of the Supreme Court. All these decisions are on the question of ratification and the contention of learned counsel was that when a delegate acts in excess of the powers delegated to him, his action is void ab initio and it cannot be validated by subsequent ratification The decisions relied upon are :

i) District Collector, Chittoor and Others Vs. Chittoor District Groundnut Traders Association and Others, ;

ii) Dr Ramesh Chandra Tyagi Vs. Union of India (UOI) and Others, ;

iii) Marathwada University Vs. Seshrao Balwant Rao Chavan, ;

29. We are afraid that none of these decisions are applicable or relevant to the facts of the present case. In fact, in Marathwada University Vs. Seshrao Balwant Rao Chavan, , the Supreme Court has clearly laid down that the principles of ratification governing transactions of a company do not apply to statutory delegation of powers. The three decisions relied upon by learned counsel for the Petitioner deal with statutory delegation of powers and not with regard to ratification of a transaction by a company or any of its officers.

30. Learned counsel for the Respondents also cited three decisions to buttress his submissions. They are :

- i) Union of India and others Vs. S.L. Dutta and another, ;
- ii) S.K. Chakraborty and Others Vs. Union of India (UOI) and Others, ;
- iii) Shri Parmeshwari Prasad Gupta Vs. The Union of India (UOI), ;

31. The first two decisions were cited in support of the proposition that "the Court should rarely interfere where the question of validity of a particular policy is in question and all the more so where considerable material in the fixing of policy are of a highly technical or scientific nature" and that the Respondents were "fully competent to bring about necessary changes in the staff pattern.... under its control for the purpose of streamlining the organisation and improving the efficiency of the administration."

32. We have no quarrel with either of these propositions, as indeed we cannot. But, with respect, the submission of the learned counsel for the Petitioner was on the legal competence of the CMD to issue and implement the impugned Office Order dated 1st June, 1994 - he did not either question its wisdom or necessity. Consequently, the two decisions mentioned above are not of any assistance.

33. The third decision concerns ratification of an act and that such ratification "would always relate back to the date of the act ratified....". This decision would also not be applicable in view of our finding, on facts, that the Office Order dated 1st June, 1994 was not ratified.

34. The next submission of learned counsel for the Petitioner is that she has been put to a disadvantage because of the widening of the channel of promotion to the post of AO. This submission deserves to be rejected. We are in agreement with the learned counsel for the Respondents that a change in the chances of promotion does not amount to a change in the conditions of service. (See Union of India and others Vs. S.L. Dutta and another,). As such, the Petitioner cannot claim to be adversely effected.

35. Insofar as the second grievance of the Petitioner is concerned, namely, with regard to the DPC held on 12th October, 1994. In view of our finding that the Office Order dated 1st June, 1994 is not valid, it would ipso facto follow that officers (other than AAOs) who were considered by the DPC were not entitled to be so considered. Consequently, the proceedings of the DPC held on 12th October, 1994 stand vitiated. Indeed, it may be mentioned that the submissions made by learned counsel for the parties proceeded on the basis that the validity of the proceedings of the DPC held in October, 1994 would depend upon the validity of the impugned Office Order dated 1st June, 1994.

36. The final grievance of the Petitioner is with regard to the "review" of her ACRs by Respondent No. 2, that is, the CMD of NBCC. It is alleged that sometime in September, just prior to the holding of the DPC on 12th October, 1994 and CMD "reviewed" and downgraded her ACRs for 1992-93 and 1993-94.

37. With regard to the ACR for 1992-93, learned counsel for the Petitioner

submitted that the Petitioner was considered for promotion in 1993 and at that time her ACRs for 1991-92 and 1992-93 were considered by the DPC. It is another matter that the Petitioner was not selected for promotion in that year but the point sought to be made by the learned counsel was that the DPC which met in 1993 did not find any irregularity in the ACR recorded for 1991-92 or 1992-93. As such, it was submitted that there was no reason for anybody to come to the conclusion that there was some irregularity in the ACR recorded for the year 1992-93. However, we need not go into this aspect of the matter since we were shown the ACRs of the Petitioner for 1992-93 and 1993-94 and submissions were addressed inviting us to decide whether the correct procedure was followed or not in recording the ACRs for these two years, for the limited purpose of determining whether the CMD was right in "reviewing" those ACRs.

38. As regards the procedure for writing the ACRs is concerned, there is no dispute about the fact that the ACR has to be initiated by a Reporting Officer (for short RO 1). It is then reviewed by a superior authority called the Reviewing Officer (for short RO 2). The final word is, however, with the Countersigning Officer (for short CO) who is superior to the RO 2.

39. The learned counsel for the Respondent has pointed out in his written submissions that the ACR for 1992-93 ought to have been initiated by the Manager (Public Relations) as RO 1. The RO 2 was the Chief Project Manager (Personnel and Administration) holding additional charge of Public Relations Division vide office Order dated 24th June, 1992 and the CO was the Director (Planning). There is no dispute that in actual fact, for the ACR of 1992-93, the RO 1 , RO 2 and CO were one and the same officer, namely, the Manager (Public Relations).

40. The learned counsel for the Petitioner made three submissions to support the ACR for 1992-93 being written, reviewed and countersigned by the same officer. It was submitted, firstly that the officer was superior enough to be the CO, so there was nothing wrong in his acting for and on behalf of a junior officer. It was then submitted that nothing irregular was found in this ACR when the DPC met in 1993. Consequently, the objection now raised is belated and mala fide. It was finally submitted that when the next DPC initially met in September, 1994 It had recommended that Petitioner for promotion (who was placed at Serial number 2 in the list) and, Therefore, to hold that the ACR was irregular is a mischievous afterthought.

41. Unfortunately, we are unable to agree with the Petitioner in regard to this aspect of the case. The purpose of an ACR has been dealt with by the Supreme Court in several decisions. Learned counsel for the Respondents relied on the following decisions :

- i) State Bank of India etc., Vs. Kashinath Kher and others, etc., ;
- ii) State of U.P. Vs. Yamuna Shanker Misra and another, .

iii) U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others, .

iv) V. Kashyap and Another Vs. Indian Airlines and Others, .

42. There is no doubt that an ACR has to be written objectively and dispassionately. It is intended to give an opportunity to an officer to remove any deficiencies and to improve the efficiency of public service. It is for this reason that a three tier hierarchical structure is adopted for the recording of an ACR. Quite clearly, the object of recording on ACR cannot be achieved if the RO 1, RO 2 and CO are one and the same. One officer, however, superior or competent, cannot replace a three tier structure in matters of objective assessment, impartiality and improvement of public service. We have no doubt that such an ACR cannot be accepted as correctly appraising the performance of an officer. For this reason, we are also not impressed by the submission that because the DPC held in 1993 and September 1994 found nothing wrong with the ACR of 1992-93, it should be accepted as correct.

43. As regards the ACR for 1993-94, there does appear to be a sufficient amount of controversy. There is no dispute that RO 1 who initiated the ACR of the Petitioner was competent to do so. The controversy is with regard to the superior authority, that is, RO 2/CO. (Incidentally, in the ACR for 1993-94, the RO 1 and RO 2 are the same.)

44. According to the Petitioner, the Chief Project Manager (Personnel and Administration) (for short the CPM) was competent to countersign the ACR (which he did). However, the Respondents submitted that the CPM was not concerned with the Public Relations (PR) Division in which the Petitioner was working. It was submitted that by virtue of an Office Order dated 11th January, 1993, the PR Division was to report directly to the CMD and as such it was the CMD who was the RO 2 and CO of the Petitioner.

45. It may be recalled that by an Office Order dated 24th June, 1992, the CPM was asked to hold additional charge of the PR Division and report to the Director (Planning). Subsequently, Office Order dated 11th January, 1993 was issued requiring the Manager (PR) to report directly to the CMD. Thereafter, another Order dated 24th March, 1993 was issued whereby the Deputy Company Secretary of NBCC was asked to look after the work of the PR Division and function as Public Relations Manager. He was also to report directly to the CMD as far as the work of PR Division was concerned. By necessary implication the Order dated 24th June, 1992 was rescinded. The position, Therefore, was that from 11th January, 1993 onwards the CMD was the RO 2/CO of the Petitioner and from 24th March, 1993 the Deputy Company Secretary who was holding additional charge as Manager (PR) was the RO 1 of the Petitioner. Consequently, the learned counsel for the Petitioner is not correct in his submission that the CPM was competent to either review or countersign the ACR for the year 1993-94.

46. Even though we have found in favor of the Respondents that the procedure

in recording the ACR of the Petitioner for the years 1992-93 and 1993-94 was not followed, this does not mean that the CMD was entitled to "review" downgrade her ACRs in September 1994.

47. As regards the ACR for 1992-93, Respondent No. 2 was not the CMD of NBCC during that reporting year and he could not have, under any circumstances, reviewed the ACR for 1992-93: Respondent No. 2 had assumed office of the CMD on or about 6th January, 1994.

48. As regards the ACR for 1993-94, as per the procedure for recording the ACRs, the Petitioner had stated in her rejoinder affidavit that in the case of the RO2, he should have observed the work of the officer reported upon for at least three months before commenting on his (or her) performance. If the RO 2 did not have this period available to him, then his predecessor should act as the RO 2, failing which the appropriate column should be left blank. This has not been denied by the Respondents in their sub-rejoinder in reply to the Petitioners rejoinder. The same rationale applies in the case of the CO. In the case of the Petitioner, the views of the earlier CMD were not obtained as RO 2/CO and instead the views of Respondent No. 2 CMD were obtained, who had a little less than three months time to assess the performance of the Petitioner. This was irregular, even though it was a matter of a few days only.

49. Quite apart from this, we have not been given any reason why the Respondents could not have got the ACR for that year countersigned by the previous CMD, who had sufficient time to observe the work of the Petitioner and others similarly placed while, in contrast, Respondent No. 2 had less than three months time to observe the work of the Petitioner.

50. For these reasons, we are of the view that the procedure adopted in recording the ACRs of the Petitioner for 1992-93 and 1993-94 was not correct; but, it could not have been corrected by Respondent No.2 (who became the CMD only in 1994) by countersigning it since he was not the CMD for the reporting period 1992-93 and had insufficient time for reviewing the work of the Petitioner during 1993-94.

51. The learned counsel for the Petitioner contended that it was not the Petitioner's fault that the proper procedure was not followed in recording the ACRs for 1992-93 and 1993-94, and so there is no reason why she should suffer. The question is not of anybody committing a lapse or a default, it is really of following the correct procedure without anybody being blamed for the error.

52. In view of the above discussion, we quash Office Order No. 1255/94 dated 1st June, 1994 (Annexure P-IV to the writ petition) issued by the Respondents. We also quash the proceedings of the Departmental Promotions Committee held on 12th October, 1994. Consequently, the promotion of Respondent Nos. 5 to 10 to the post of Administrative Officer in the NBCC by the Order dated 17th October, 1994 is set aside. We find that the NBCC erred in not following the correct procedure in recording the Annual Confidential Report of the Petitioner for

the years 1992-93 and 1993-94. Since we were not called upon to decide whether the correct procedure was followed in recording the Annual Confidential Report of the Petitioner for these years except for the purpose of determining the authority of the CMD to "review" the ACRS, we refrain from passing any order in this regard. However, we hold that Respondent No. 2 could not have "reviewed" the Annual Confidential Report of the Petitioner for the years 1992-93 and 1993-94. Consequently, we direct the NBCC to hold a review Departmental Promotions Committee for promotion to the post of Administrative Officer in accordance with law and in consonance with the above directions.

53. The writ petition is allowed. The parties shall, however, bear their respective costs.