

(2009) 05 DEL CK 0329

In the Delhi High Court

Case No : Writ Petition (Civil) No. 6147 of 2008

Balvinder Singh

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 20-05-2009

Acts Referred:

Institutes of Technology Act, 1961 — Section 13, 13(2), 33, 6

Citation : (2009) 05 DEL CK 0329

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : Anusuya Salwan, for the Appellant; Arjun Mitra, for respondent Nos. 2 and 3 and Dinkar Singh, for UOI, for the Respondent

Final Decision : Disposed Off

Judgement

V.K. Shali, J.—This order shall dispose of CM No. 11746/2008 and CM No. 3709/2009. Both these applications have been filed by the main contesting parties namely the Petitioner and the Respondent No. 2/IIT Delhi. The first application is for stay while as the second one is for vacation of the ad interim order granted on 25.8.2008.

2. Briefly stated the facts as given in the petition are that the Petitioner filed the present writ petition for quashing of the Board Resolution dated 29.3.2005 passed by the Respondent No. 2 by virtue of which the three posts in the cadre of Assistant Registrar were directed to be upgraded to the post of Deputy Registrar. It was also prayed that Respondent No. 2 should be directed to consider the case of the Petitioner for promotion to the post of Asstt. Registrar (Admn.) on the basis of the test /interview and after taking into consideration the AC Rs for the period when he was on deputation. The main contention of counsel for the Petitioner in assailing the said Board Resolution was that the aforesaid conversion of the post was in violation of the instructions of Respondent No. 1 inasmuch as that there was a ban on creation of new posts and further that up gradation of the existing posts to any higher post tantamount

to creation of a new post. Reliance in this regard is placed at page 57 on letter dated 14.8.2002 issued by the Ministry of HRD/Respondent No. 1, wherein in Clause 6 it was observed that no new posts /pay scales shall be created or upgraded by the Institute itself without prior approval of the Government. It was also urged that according to letter dated 16.9.1991 issued by the Government of India, Ministry of Finance up gradation of a post in effect amounts to creation of posts. It was on the basis of this submission, the learned Counsel has contended that because of this up gradation of posts, the Petitioner's right to be considered against one of such vacancies of Assistant Registrar will get reduced and therefore, he was aggrieved by such an action on the part of the Respondent No. 2.

3. The second submission of the counsel for the Petitioner was to the effect that the aforesaid conversion of three posts of Assistant Registrar to the post of Deputy Registrar could not be said to be a simple rationalization of posts in the efficient functioning of the institute on account of the fact that such a rationalization under the Indian Institute of Technology Act, 1961 such a power is only vested with the Council u/s 33 of the Act. The relevant Section of 33 of the said Act reads as under :

33. (1) It shall be the general duty of the Council to co-ordinate the activities of all the Institutes.

(2) Without prejudice to the provisions of Sub-section (1) the Council shall perform the following functions, namely:

(a) ...

(b) to lay down policy regarding cadres, methods of recruitment and conditions of service of employees, institution of scholarships and free ships, levying of fees and other matters of common interest;

(c) ...

(d) ...

(e) ...

(f) ...

4. So far as the stand of the Respondent No. 1 is concerned, it has been stated that the Ministry of HRD has not issued any instructions to IIT for up gradation of any post of Assistant Registrar to the post of Deputy Registrar and further that as per instructions of Government of Ministry of Finance dated 03.8.1967, the competent authority to create a post should ordinarily not resort for creation of post retrospectively. Thus so far as the Respondent No. 1 is concerned, it has supported the case of the Petitioner that UOI has not permitted the Respondent No. 2 to upgrade the post of Assistant Registrar to the post of Deputy Registrar and further if at all any up gradation is to take place, the same cannot be done retrospectively.

5. The Respondent No. 2 has contested the claim of the Petitioner that the up gradation of three posts of Assistant Registrar tantamount to creation of new posts or that so far as the ban which is imposed on creation of new posts by the Government of India/ Respondent No. 1 that will be applicable to the case of the Respondents. The Respondent for this purpose has relied upon Section 6(h) and 13 (a) & (d) of the IIT Act, 1961. The aforesaid two sections reads as under :

6. (1) Subject to the provisions of this Act, every institute shall exercise the following powers and perform the following duties namely:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) to institute academic and other posts and to make appointments thereto (except in the case of the Director)

13. (1) ...

(2) Without prejudice to the provisions of Sub-section (1), the Board of any Institute shall

(a) take decisions on questions of policy relating to the administration and working of the Institute;

(b) ...

(c) ...

(d) Institute and appoint persons to academic as well as other posts in the Institute.

(e) ...

(f) ...

(g) ...

6. It was urged on the strength of these two provisions that so far as the exercise which has been undertaken by Respondent No. 2 is concerned, it is only the rationalization in the cadre of Registrars which includes not only one Registrar but three Deputy Registrars and existing 14 Assistant Registrars by virtue of which three posts of Assistant Registrars have been directed to be upgraded as Deputy Registrar for the efficient discharge of the Registry though

such upgraded posts can be interchanged by the post of Assistant Registrar thereby meaning that the functions which will be discharged by the Deputy Registrar can also be permitted to be discharged by the Assistant Registrar. It was also contended by counsel for the Respondent No. 2 that so far as the Petitioner is concerned apart from the fact that he has woken up belatedly to challenge the resolution only in 2008 though it was passed in 2005. Further it was urged that he can by no stretch of imagination be said to be aggrieved person because he is yet to be selected as Assistant Registrar. It was contended that according to the Recruitment Rules which are not disputed by the Petitioner, 50% of the posts of Assistant Registrar are to be filled up by direct recruitment while as other remaining 50% are to be filled up on the basis of departmental promotion recommendations. It is only a person working as an Assistant Registrar who has put in 8 years of service that he can be considered in the quota of direct recruitment to the post of Deputy Registrar which has been fixed at 75%. For departmental promotion quota, he ought to have completed 16 years of service to the said post of Asstt. Registrar before being considered for the post of Deputy Registrar. Therefore, today when the Petitioner is yet to be appointed as an Assistant Registrar, he cannot be said to be aggrieved on account of creation or the conversion of three posts of Assistant Registrar to the post of Deputy Registrar as he does not fall in the zone of consideration for the appointment to the post of Deputy Registrar.

7. It has been further contended by the Respondent No. 2 that the Petitioner has already been rejected twice for appointment under the departmental promotion to the post of Assistant Registrar while as for the third occasion his name is still under consideration and the proceedings are yet to be finalized. On the strength of these submissions, it has been urged that so far as the Petitioner is concerned, he cannot be said to be in any manner being prejudiced on account of vacation of the interim order which has been granted on the very first date i.e. 25.8.2008 by virtue of which though the Respondent No. 2 was permitted to go ahead with the selection process but no appointment to the post of Deputy Registrar was to be made. Another submission which was made by counsel for Respondent No. 2 was that Section 67 read with Section 13 (a) & (d) empowers the Respondent No. 2 not only to institute a post but also fill up the same. It was urged that on the strength of these provisions which forms part of the Act of Parliament, the subordinate legislation in the form of administrative instructions of the Government of India cannot be read so as to have overriding effect on the provisions passed by the Parliament. In any case, it was urged by the learned Counsel for the Respondent No. 2 that at the time when the aforesaid impugned Board Resolution was passed, the nominee of the Govt. of India were present and the said resolution was sent to the concerned administrative Ministry and till date no objection to such a resolution has been raised.

8. This fact was disputed by counsel for Respondent No. 1 as well as by counsel for the Petitioner. Learned Counsel for the Petitioner had drawn my attention to a letter wherein it was shown that the resolution in question was brought to the

notice of Respondent No. 1 only in December, 2008 and it was urged by counsel for the Petitioner that it is only after filing of the present writ petition that Respondent No. 2 has deemed it necessary to bring this fact to the notice of Respondent No. 1.

9. It was also contended by the learned Counsel for the Petitioner that Section 33 of the Act which gives the power to the Council to rationalize the cadre only is authorized to change the strength of the cadre be that in the category of Assistant Registrar or any other and since the Council has not passed any such resolution therefore, the resolution in question cannot be given effect to.

10. I have carefully considered the respective submissions of the parties and gone through the record.

11. On the very first date i.e. on 25.8.2008, this Court was pleased to pass an ad interim order by virtue of which Respondent No. 2 was permitted to continue with the process of selection to the post of Deputy Registrar but this was subject to final outcome of the present writ petition but not appointments.

12. It may be pertinent here to mention that if one sees the stay application of the Petitioner the prayer of the Petitioner in CM No. 11746/2008 at the time of filing of the writ petition was that the interviews to the post of Deputy Registrar itself should be stayed which the Court was not inclined to do so in order to balance the equities. The Court permitted the selection process to continue subject to the final outcome of the writ petition. Today, admittedly the selection process has culminated in certain recommendations which are kept in a sealed cover and they have also produced in Court. The question which needs to be considered at this point of time is as to whether the Respondent No. 2 should be permitted to make the appointments to the post of Deputy Registrar on the basis of the said selection subject to the protection of interest of the Petitioner or whether the interim order which has been passed on 25.8.2008 should be continued and made absolute till the disposal of the writ petition which obviously may take some time. It may also be pertinent here to mention that Respondent No. 2 has already filed an application for vacation of the interim order granted on 25.8.2008 in which the aforesaid pleas have been taken in modification of the interim order. The Petitioner has also filed the reply to the said application and reiterated the stand which was taken in the petition and which in nutshell is given hereinbefore.

13. Before an interim order is passed or confirmed in favor of a party, three things have to be established. These are that the Petitioner has prima facie a very good case, the balance the convenience should be in his favour and that the Petitioner must suffer an irreparable loss in case the interim order is not granted to him.

14. Coming back to the facts of the present case though the Petitioner may have been able to show that prima facie case as the petition cannot be said to be without any merit with regard to the ban which has been imposed by the Union

of India on creation of a new post and the fact that up gradation of a post has been observed to be Tanta mounting to create a new post, the question which arises for consideration is as to whether even in such contingency the same would entitle the Petitioner to put the entire functioning of the Respondent No. 2 to a grinding halt. I am tempted here to refer to the stand of the Respondent No. 2 which is at variance with regard to the factum that the instructions of the Govt. of India to ban is not applicable to the Respondent No. 2 and the up gradation of the post by it does not require any prior permission of the UOI. So far as the plea of the Petitioner that the resolution with regard to the up gradation or rationalization of cadre has to be taken by the Council it had been submitted by counsel for Respondent No. 2 that there is only one Council for governing all the seven II Ts and there has been only one meeting in the last six years of the Council. Therefore, to assume that the power of rationalization of cadre is vested with the Council is not correct. In the instant case by conversion of three posts of Assistant Registrar to the post of Deputy Registrar by the Board which functions individually for each IIT's in terms of Section 6 read with Section 13 (2) (a) & (d) seems to be perfectly prima facie in order. In any case, these rival contentions can be left to be analyzed and adjudicated only after a detailed hearing not at the threshold when the application for stay is being considered. For the present, the Petitioner has to show a serious prejudice and the balance of convenience as well as the irreparable loss which he will suffer in case the Respondents are permitted to give effect to the recommendations of the Selection Committee.

15. This Court is of the opinion that since the Petitioner is yet to get selected as an Assistant Registrar therefore, it is too farfetched to assume that conversion of three posts of Assistant Registrar to the post of Dy. Registrar will cause serious prejudice to him or would diminish chance of getting selected as Assistant Registrar. In any case, it has been pointed out by the learned Counsel for the Petitioner that the Petitioner has already been not found to be suitable on two occasions when he was not considered for promotion as Assistant Registrar and the third time his name is still not considered. Though this aspect that the rejection of the Petitioner on two earlier occasions has been attributed by the learned Counsel for the Petitioner on account of the fact that the Petitioner was on deputation and his entire C Rs were not considered at the time of promotion.

16. Be that as it may, the fact of the matter remains that on two occasions, the case of the Petitioner has been considered for promotion to the post of Assistant Registrar and has not been found to be fit and since he did not assail the same, therefore, today when the 3 posts of Assistant Registrars have been converted, upgraded to the post of Dy. Registrar, it cannot be said that the Petitioner is being prejudiced in the light of the fact when he has yet to put in eight years of service for getting promoted to the post of Deputy Registrar as a direct recruit and even as a candidate departmentally he has to put in 16 years of service to the said post of Asstt. Registrar before being considered as Deputy Registrar. However, still in order to balance the equities, the appointment to the post of Dy.

Registrar can be made subject to the Respondent No. 2 to make it clear in the appointment orders of the recommendees that their appointment is subject to the decision in the writ petition. Since the balance of convenience is being held not to be in favor of the Petitioner or is rather in favor of the Respondent No. 2, I am of the opinion that the Petitioner will not suffer an irreparable loss in case the interim order dated 25.8.2008 is modified on the lines stated above.

17. For the reasons mentioned above, the interim order dated 25.8.2008 is modified so as to permit the Respondent No. 2 to make appointment to the post of Deputy Registrar with the condition that in the appointment letter, it will be specifically mentioned that the appointment is subject to the decision in the writ petition.

18. With these directions, the present applications are disposed of.