

(2011) 11 KL CK 0043

In the High Court Of Kerala

Case No : O.P. (Cat.) No. 20 of 2010 and connected cases

Bharat Sanchar Nigam Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-11-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2011) 4 KLT 804

Hon'ble Judges : P.S. Gopinathan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : I. Sheela Devi, for the Appellant; O.V. Radhakrishnan (Sr. Advocate), K. Radhamani Aroma, K. Ramachandran (Thykooodam), Gens George Elavinamannil, Susheel Joseph Cyriac, T.P.M. Ibrahim Khan and P. Parameswaran Nair (Asst. Solicitor Generals of India), for the Respondent

Judgement

P.S. Gopinathan, J.—These petitions are preferred against the common order of the Central Administrative Tribunal, Ernakulam Bench, in T.A.Nos.44, 46, 47, 48 of 2008 and O.A. No. 100/2009. The petitioners in O.P.(CAT) Nos.20, 21 and 142/2010 and in W.P.(C) No. 29029/2010 (hereinafter referred to as the official petitioners) are the respondents 2 and 3 in all the applications before the Tribunal. Petitioner (hereinafter referred to as the party petitioner) in O.P.(CAT) No. 319/2010 is the 1st applicant before the Tribunal in O.A. No. 100/2009. The 1st respondent, Union of India, in all these petitions are the Ist respondent before the Tribunal. Respondents 4 to 14 in O.P.(CAT) No. 319/2010 (hereinafter referred to as the party respondents) are the applicants in T. As before the Tribunal. They are also arrayed as respondents 2 onwards in the other petitions in the respective order. Since the issues involved are the same, these petitions are disposed of by this common judgment. Party respondents originally approached this Court with Writ Petitions under Art.226 of the Constitution of India. While the petitions were pending before this Court the jurisdiction of the Administrative Tribunal was extended to service matters pertaining to the official petitioners. Consequently, those petitions were transferred to the Tribunal which

renumbered all the petitions as Transferred Applications.

2. The party respondents entered the service of the erstwhile Telecom Department as the Hindi Translators on various dates. While so, the Bharat Sanchar Nigam Ltd. (BSNL), the 1st petitioner except in O.P. (CAT) No. 319/2010 was constituted with effect from 1.10.2000. Consequently, the party respondents were absorbed into the service of the party petitioners. Some of the party respondents were even provisionally promoted while in the Telecom Department as Assistant Director Official Languages (AD(OL)) as early as on 15.5.1994. Whatever may be reasons known to the Department Heads, they were not regularised till the Constitution of the BSNL Ext. P6 in W.P.(C) No. 29029/2010, the order of the Tribunal in O.A. No. 5/98 would show that the petitioner in W.P. (C) 142/2010 approached the Tribunal, even before the constitution of BSNL seeking order for regularisation. The Department submitted that proposal relating to the revision of the Recruitment Rules for the post of AD(OL) was in progress for promulgation and once the matter was finalised, promotion would be effected in accordance with the rules. Recording that submission, the application was disposed with a direction to the Department Heads to complete the process of finalisation without undue delay. The 1st applicant in T.A. No. 46/2008 after the constitution of the BSNL represented for regularisation of the adhoc service. By Ext.P5 reply dated 1.4.2002 it was informed that the Recruitment Rules for the post of AD(OL) was being finalised and that her request for regularisation would be considered as and when the rules were notified. However, nothing materialised. Later, the Recruitment Rules of AD(OL) were published on 24.12.2002. Ext.P7 in T.A. No. 44/2008 is the copy of the Rules (hereinafter it is referred to as "the Rules 2002"). R. 10(iii) of the Rules 2002 reads as follows:

There are many Sr.Hindi Translators/Jr.Hindi Translators and Group "C" officials who have been given ad hoc promotions to the grade of AD (OL) in field formations of BSNL. In order to avoid legal and administrative complications, as a one time measure, it is provided that all the vacancies in the grade of AD(OL) in the first year of recruitment, irrespective of vacancies earmarked for promotional quota or direct quota, shall be filled up by promotion on seniority-cum-fitness basis, by following due procedures, amongst those officials who have been officiating as AD(OL) in BSNL, subject to their fulfilling the basis qualifications and experiences as prescribed in column 12 of the Schedule annexed to these Rules.

(In the schedule R. 10(iii) is reiterated as Special Provision)

Even after promulgation of the Rules 2002, no order was issued for regularisation/promotion. Being aggrieved, the party respondents approached this Court with the Writ Petitions, which were transferred to the Tribunal and renumbered. R. 10(iv) of the Rules 2002 stipulates that the Rules would be subject to review after a period of three recruitment years. Readily, after three recruitment years, a review was conducted and Rules 2005 was notified, in

supercession of the Rules 2002, on 5.8.2005 with immediate effect. Under the Rules 2005, AD(OL) was redesignated as Rashtrabhasha Adhikari. Rule 2005 provides a Limited Internal Competitive Examination (LICE) for appointment by promotion to the post of Rashtrabhasha Adhikari. Those who are working on ad hoc basis also have to undergo LICE. After the promulgation of the Rules 2005, notification was issued inviting application for LICE. The party petitioner, who is working as Senior Hindi Translator, and others applied and they turned out qualified in the LICE. In the application before the Tribunal (O.A. No. 100/2009) the party petitioner and other applicants sought for a direction to the official petitioners to appoint them as Rashtrabhasha Adhikari as per the Rules 2005. In the T.As, claiming that there were 120 vacancies while the Rules 2002 were in force and therefore, the party respondents were entitled to be regularised/promoted as AD(OL) as per the special provision under the Rules 2002 without undergoing any other test, those party respondents, who were not promoted, sought for promotion to the existing vacancies and those were working on ad hoc basis to be regularised after declaring that they are entitled to be promoted/regularised as per the Rules 2002.

3. The Tribunal below heard all petitions jointly. The only point that was argued and considered by the Tribunal is that whether the party respondents are entitled to regularisation/promotion as per the Rules 2002 to the then existing vacancies. By the common order impugned, the Tribunal arrived at a finding that the party respondents are entitled to be regularised/promoted as AD(OL) as per the Rules 2002 to all the vacancies existing while the Rules 2002 were in force. Consequently, while allowing the T.As, the official petitioners were directed to regularise/promote the party respondents on regular basis. The claim of the party petitioner and other applicants in O.A No. 100/2009 for appointment on the basis of LICE under the Rules 2005 was declared applicable to the vacancies arisen after the promulgation of the Rules 2005. Now these Writ Petitions. While W.P.(C)29029/2010 is filed under Article 226 of the Constitution of India, other petitions are under Article 227.

4. We have heard the learned counsel appearing on either side and perused the order impugned as well as the documents. The learned counsel appearing for the official petitioners as well as the party petitioner produced a copy of the judgment of the Apex Court in Civil Appeal No. 1405/2007 dated 15.4.2011 with an argument that there is a finding by the Apex Court that Rules 2002 were never in operation at any point of time. Therefore, according to them, the order impugned is not sustainable. Per contra, learned counsel appearing for the party respondents submitted that the dispute before the Apex Court in that case was whether the Rules 2005 is legal, valid and enforceable and that the observation regarding the Rules 2002 is only a casual observation without regard to the plea of the parties and pertains to a fact which was not in dispute in that case. In the case on hand also, neither the official petitioners nor the party petitioner have a case that the Rules 2002 was not in force. Therefore, according to the party respondents, the defence now set up by the petitioners is not entertainable.

5. In the light of the dispute now raised, the following points would arise for consideration.

1. Whether Rules 2002 was in force ?

2. Whether the party respondents are entitled to have regular appointment as AD(OL) now re-designated as "Raj Bhasha Adhikari" as per Rules 2002?

6. Point No. 1. We have carefully gone through the judgment of the Apex Court in Civil Appeal 1405/2007. It would show that a Division Bench of the Allahabad High Court, even without giving an opportunity to the appellants, quashed the Rules 2005, that too, at the stage of admission on the basis of an alleged statement of a counsel who did not have any authority and vakalathnama in his favour or any instruction to appear on behalf of the appellants. It is that judgment of the Allahabad High Court was under attack in C.A. 1405/2007. Though the validity/commencement of the Rules 2002 was not an issue in that case, while allowing the appeal, in para 10 of the judgment, it is observed as follows:

There were some objections to the Recruitment Rules of 2002 which had been circulated departmentally, but allegedly these Rules were never in operation at any point of time. Accordingly, the revised Recruitment Rules 2005 were formulated and issued on 5.8.2005 whereby 120 posts were classified as Executive with the nomenclature of Raj Bhasha Adhikari. While the educational qualifications remained the same as before, the mode of recruitment was totally changed in the Recruitment rules of 2005. The entire cadre was to be filled up by a Limited Internal Competitive Examination, It is these Rules which have been struck down by the High Court.

Going by the judgment as a whole, we find that before the Apex Court the legality or the commencement or the enforcement of the Rules 2002 was not disputed or that it was an issue for adjudication. But in the course of the judgment, the Honourable Supreme Court observed that it was alleged that the rules were never in operation. Regarding that allegation, the Apex Court has not gone into. It was not considered as to whether the allegation was correct or not. Neither is there any adjudication or finding regarding the commencement or validity of Rules 2002. A casual observation that allegedly the Rules were never in operation is not a finding at all. Therefore, we find that the above quoted observation in para 10 of the judgment is not at all pertaining to the commencement or validity of the Rules 2002. Here, in this case, we find that neither of the petitioners has a plea that the Rules 2002 has not come into force or it was never in operation. In the absence of specific pleading, the argument now raised for the first time is not entertainable.

7. Learned counsel appearing for the party respondents in O.P. (CAT) 20/2010 canvassed our attention to Ext.P15 produced before the Tribunal, Ext.P15 would show that the Rules 2002 was acted upon. Ext.P15 is a corrigendum issued in respect of the party respondents. It is mentioned in Ext.P15 as follows:

The clause of "restriction of pay under FR-35" as given in the memos of local officiating promotion ordered in respect of the undermentioned Junior Hindi Translators as officiating AD(OL) is hereby removed with effect from the dates noted against each, as per the revised eligibility conditions given in the Recruitment Rules of AD(OL) dated 24.12.2002.

It would show that party petitioners had issued orders as per the Recruitment Rules 2002 and Ext.P15 is one of such order. In the light of Ext.P15, what can be inferred is that the present plea that the Rules 2002 were never in force is devoid of bona fide and merits. Adding to the above, Ext.P2 produced in these petitions is the copy of the counter affidavit filed by the then Assistant General Manager, on behalf of the official petitioners. There is no mention in the counter affidavit that the Rules 2002 was never in force. On the other hand, it was averred that owing to difficulty in implementation of the Recruitment Rules 2002, the official petitioners had formulated the revised Recruitment Rules in supercession of the earlier Recruitment Rules. What is the difficulty in implementing the Rules 2002 is not at all disclosed in the counter affidavit. Therefore, we have to conclude that there was no difficulty in implementing the Rules and the official petitioners have no plea before the Tribunal that the Rules 2002 were not in operation or in force. Whereas the Rules 2005 was framed in supercession of Rules 2002. We find from the Rules 2002 that there is specific provision namely, Clause 10(iv), that the Rules would be subject to review after a period of three recruitment years. Supercession of the Rules 2002, which was in force for the three recruitment years by the Rules 2005 itself would show that the Rules 2002 was in force. Rules 2005 was not brought in to force with retrospective effect but with prospective effect. It indicates that the Rules 2002 was in force for three recruitment years and in supercession of the same, the Rules 2005 was notified with prospective effect. Therefore, the legal conclusion that could be arrived at is that the Rule 2005 is in continuation of the Rules, 2002. To say otherwise, after three recruitment years, Rules 2002 was reviewed in terms of Clause 10(iv) and with necessary modifications, the Rules 2005 was promulgated and brought into force from the date of notification, i.e. on 5.8.2005. It is plain that from 24.12.2002 to 5.8.2005, the Rules 2002 were in force and thereafter, the Rules 2005 is in force. The plea that the Rules 2002 were not in force is devoid of any merit or bona fide as stated earlier.

8. As mentioned earlier, Ext.P15 in O.P. (CAT) 20/2010 also would show that the official petitioners were acting upon and had been periodically issuing orders under the Rules 2002.

9. The order impugned would show that the present plea was never raised before the Tribunal below. Therefore, the petitioners are now precluded from raising that argument now. In the event they had such a defence before the Tribunal and it was not considered, the remedy open is to file a review. It is also pertinent to note that the petitioners have no whisper in the petition that such an argument was raised or that the Tribunal omitted to consider the same. Raising a plea,

which was not raised before the Tribunal, is yet another reason that persuades us to find lack of bona fide on the side of the petitioners. We, in these petitions, whether it is under Article 226 or 227, are expected to look into the sustainability of the plea raised, argued and decided by the Tribunal. We don't find any reason to look into a plea that was never argued and decided by the Tribunal so long as there is no case that there is any miscarriage of justice. Therefore, we find that in the given set of pleadings and documents, the plea of the petitioners, both official and party, that Rule 2002 was never in force is liable to be rejected. The observation of the Apex Court regarding the operation of the Rules 2002 was not the subject matter before the Apex Court and it was only a casual observation without regard to the pleadings and the nature of the dispute and not a finding. For the above reasons, we answer this point in favour of the party respondents and against the petitioners.

10. Point No. 2. The very case of the party respondents is that there were 120 vacancies of the AD(OL) when the Rules 2002 was in force. As mentioned earlier, the first petitioner in O.P.29029/2010 has been provisionally working as AD(OL) ever since 15.5.1994. The 4th petitioner has been working as such from 22.3.1996. The petitioner in O.P. 21/2010 has been working with effect from 16.10.1996. In the event there were vacancies for promoting the party respondents to the post of AD (OL), they are entitled to be promoted on the basis of the rules then prevailing, that is as per the Rules 2002. This legal position is now not disputed by the petitioners. The appointing authority was bound to promote in terms of the then prevailing Rules. But there was administrative lapses. Administrative lapses can never be allowed to nullify the right of the parties obtained under a Rule. Service jurisprudence mandates judicial interference whenever and wherever there is administrative lapse taking away the rights of a public servant. In the light of the specific and enabling provision quoted in Para 2 in the Rules 2002, in the first year of recruitment itself, the respondents were entitled to be regularized/promoted as AD(OL). Rules 2005 has not taken away that right, especially when the Rules 2005 has only prospective operation. The Tribunal by the impugned order directed the official petitioners to post the party respondents as per the above provision. We find that the said direction is in no way vitiated but absolutely in tune with the Rules and service jurisprudence. Such an order was necessitated only because of the lapse on the part of the official petitioners.

11. The right of a public servant to get promotion on the basis of the existing rules on the date of arising of vacancy had been to the consideration of the Apex Court in *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, . At para 9, it is held as follows:

.....We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

Again, in the decision in *B.L. Gupta and Another Vs. M.C.D.*, the Apex Court, in Para. 9, after discussing certain other earlier decisions including *Rangaiah's*

case, it is held as follows:

When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has been drawn by Mr. Mehta to a decision of this Court in the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, . In that case after referring to the earlier decisions in the cases of Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, , P. Ganeshwar Rao v. State of A.P. (1988 Supp. SCC 740) and A.A. Calton Vs. Director of Education and Another, it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules, would be governed by the old Rules and not by the amended Rules. Though the High Court has referred to these judgments, but for the reasons which are not easily decipherable its applicability was only restricted to 79 and not 171 vacancies, which admittedly existed. This being the correct legal position, the High Court ought to have directed the respondent to declare the results for 171 posts of Assistant Accountants and not 79 which it had done.

The same issue was again considered in State of Punjab and Others Vs. Arun Kumar Aggarwal and Others, . Following the earlier decisions, it was again held that the vacancies which fell vacant prior to the amended Rules would be governed by the old Rules and not by the new Rules. We find that the Tribunal below is perfectly right in giving directions to the official petitioners to appoint the party respondents under the Rules 2002. The party petitioner can claim appointment only for the vacancies that arose after the Rules 2005. The original petitions are devoid of any merit as the order impugned is no way vitiated, but on well settled legal position. In the result, all the original petitions and writ petition are dismissed. The official petitioners are directed to comply with the order impugned within 30 days. All the vacancies existing during the period when the Rules 2002 was in force shall be filled up in accordance with the Rules 2002. In the remaining vacancies, the party petitioner who has been successful in LICE conducted as per the Rules 2005 also shall be appointed within one month.

There will be no order as to costs.