

(2019) 03 GUJ CK 0031

In the Gujarat High Court

Case No : R/Special Civil Application No. 2146, 2461, 2463, 2464, 2466, 2470, 2472, 2475, 2476, 2477, 2480 Of 2019

Chaudhary Rameshbhai Devjibhai

APPELLANT

Vs

Ahmedabad Municipal Corporation

RESPONDENT

Date of Decision : 14-03-2019

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 465(1)

Citation : (2019) 03 GUJ CK 0031

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Chinmay M Gandhi, Mb Gandhi, Trusha M Gandhi, Rumi M Gandhi, Hs Munshaw

Judgement

The present eighteen petitions, though in group, stood in shambles in terms of the pleadings. The petition which was projected and insisted as the main was Special Civil Application No.2146 of 2019. However affidavit-in-reply was found to be have been filed by the respondent in another Special Civil Application No.2476 of 2019, as the respondent selected that petition to be the lead petition by taking liberty to exercise its own option in that regard. The rejoinders were placed in all the petitions though there was no affidavit-in-reply on record of these petitions. It necessitated surgical efforts of intrusion into all petitions to weed out impropers and to gather the relevants, out of the plethora of facts pleaded unnecessarily, so as to cull out the requisites in the rival merits.

1.1 It was amidst such dismal state that this Court heard at length, learned advocate Mr.M.B. Gandhi for the petitioners and learned advocate Mr.H.S. Munshaw for the respondent - Ahmedabad Municipal Corporation in each of the petitions.

2. The petitions have a common thread of the following prayers.

(i) issue direction to stop and cancel the interview which is fixed on 04.02.2019

and 07.02.2019 and further to hold and declare that the post of Station Officer is to be filled in only by seniority and the various tests which the Corporation has added are illegal;

(ii) issue direction to the Corporation to appoint the petitioner on the said post of Station Officer and to declare that no procedure is required to be undergone.

3. Noticing the facts of the case of Special Civil Application No.2146 of 2019 to be the representative facts, it is the case of the petitioner that the post of Station Officer and several other posts in the Fire Brigade Department of the Corporation have been vacant since long and that the posts of Station Officer have not been filled up since last about 15 years. Advertisement dated 26th October, 2018 published revealed that the Corporation is going to fill up the posts. The petitioner's on- line application was registered, whereafter he was called for the trade test. It was stated that the tests including 800 meter run in five minutes and 100 meter swimming in five minutes were fixed on 07th January, 2019, however the same were cancelled by the Corporation. Date of 04th February, 2019 was announced for test for 800 meter running. For the swimming test, the date announced was 07th February, 2019.

3.1 The petitioner stated that he is due to retire, and also that he is the senior most member holding the post of Fireman. According to the petitioner from the post of Fireman, he is entitled to be promoted to the post of Station Officer. It was pleaded that only one year of service was left for the petitioner before he would reach the age of retirement and at this stage and age, the trade test or stress tests contemplated for recruiting on the post of the Station Officer was harsh and uncalled for.

3.2 It was submitted that the Corporation had accepted the policy of seniority for filling up the posts, therefore subjecting the petitioner and other candidates, who were already in service in the Fire Brigade Department of the Corporation, to the direct recruitment process was not necessary and that seniority ought to have been followed in filling up the post of Station Officer. It is the case put-forth that the Fire Brigade Department has internal rules for recruitment to the various posts. In the Fire Department, there are different posts like Chief Officer, Deputy Chief Officer, Second Officer, Station Officer, Sub Officer, Motor Driver, Nayak, Fireman, etc. It is the case that except for the post of Fireman, for no other post, direct recruitment is made.

3.3 It is next stated that the Ahmedabad Municipal Corporation Servants Mandal which is a recognised union, made representation to the Corporation raising 16 demands and a Committee was constituted. It is stated further that as per demand No.10, various posts in the Fire Brigade Department are required to be filled in as per seniority from amongst the employees in the Department. Posts of Station Officer are also to be filled in only by seniority, it is contended.

3.4 Special Civil Application No.2476 of 2019 wherein affidavit-in-reply is filed, is by a petitioner who raised his contentions on the same lines. This petitioner inter

alia submitted stated that exigencies in cases of fire in the City of Ahmedabad rendered it necessary to fill up the posts of Station Officer and other posts in the Fire Brigade Department immediately, but since long years, despite representations, no action was taken by the Corporation and the posts remained to be filled up. It was contended that inaction on part of the Corporation in filling up the posts was in violation of rules and regulations as well as agreement entered into between the union and the Ahmedabad Municipal Corporation.

3.5 It was contended that in the advertisement now issued to recruit on the posts of Station Officer, the requirements were changed. It was submitted that 100 meter running in five minutes and 100 meter swimming in five minutes and rope climbing in six minutes in three attempts were removed. This petitioner contended that he was eligible to be considered for the post of Station Officer on the basis of his seniority and that the posts were required to be filled up by resorting to the criteria of seniority.

3.6 In all the petitions the facts ran parallel and the issues arise are identical. Therefore facts of each case is not repeated.

3.7 The principal contention of the petitioner and other petitioners to challenge the recruitment to the post of Station Officer is that the appointment to the said post ought to have been done on the basis of seniority.

4. Learned advocate harped that the post of Station Officer has not been filled in since long and that the same is required to be done on the basis of the seniority amongst the employees in the Fire Brigade Department. It was highlighted that a demand was raised by the union in that regard and the same was accepted. He submitted that agreements were entered into for filling up the posts on the basis of the seniority. Learned advocate for the petitioner also took exception to the change of dates in conducting of the trade or stress tests and further submitted that initially three tests were provided, out of which the Corporation, without notice, curtailed and cancelled some of the tests and also changed its duration.

4.1 According to submission of the learned advocate for the petitioners, all posts in the Fire Brigade Department of the Corporation except the post of Fireman, are required to be filled in by applying criteria of seniority. It was submitted that because of the policy adopted by the Corporation, petitioner and other similarly situated persons are the real sufferers. He further submitted that policy of the State Government for providing reservation is required to be applied to give benefit to the petitioners.

4.2 Learned advocate for the petitioners relied on decision of the Apex Court in case of *Lila Kanta Barua v. Collector of Customs and Central Excise, Shilong* [AIR 1980 SC 444]. Next reliance was on *H.L. Trehan v. Union of India* [AIR 1989 SC 568]. Thirdly pressed into service was yet another decision of the Apex Court in the case of *Vinod Kumar Sangla v. Union of India* [1996 AIR SCW 58]. Finally referred to was decision of this Court in *Nanlal Amardas Nimavat v. State of Gujarat* [1978 GLR 863].

4.3 In *Lila Kanta Barua* (supra), the question was about fixation of seniority after absorption of staff from princely State in the service of Union Government after conferment, which had nothing to do with the controversy in the present case. Decision in *H.L. Trehan* (supra) was regarding order altering the condition of service vis-a-vis opportunity of hearing to be given for that. In *Vinod Kumar Sangla* (supra), the Apex Court dealt with the case of delinquent who was reverted back to original post for having not been selected for promotion on regular basis. Paragraph 4 from the said judgment was relied on. All these citations pressed into service by learned advocate for the petitioners were besides the points and had no application to the facts of the case. Similarly, was not applicable the decision of this Court in *Nanlal Amardas Nimavat* (supra).

4.4 In the affidavit-in-reply filed by the respondent, it was stated inter alia that at present there are in all 18 Fire Stations, out of which 16 are in operation and are under administrative control of the Ahmedabad Municipal Corporation. Each such Fire Station is to be headed by Station Fire Officer. It was further stated that so far there were nine sanctioned posts in the cadre of Station Officer, however considering the total number of Fire Stations which were 18, nine new posts came to be sanctioned by the General Board of Ahmedabad Municipal Corporation by Resolution dated 27th June, 2014.

4.5 All the 18 posts of the Station Officer are vacant and no Fire Station is headed by the officer. The affidavit also mentioned about post in the cadre of Divisional Fire Officer and Sub Officer having remained vacant. It appears that out of 18 posts to be filled up, eleven are in open category, one is for Scheduled Caste whereas for Scheduled Tribe, posts is two and for Socially and Economically Backward Class, four posts are available. Pursuant to the advertisement, 214 applications were received. In all 72 Fireman including the petitioner of Special Civil Application No.2476 of 2019 who is serving in the Fire Brigade Department submitted their applications and they are found eligible. Therefore, it comes out that 72 posts would be filled up amongst the employees of the Fire Brigade Department who were found eligible.

4.6 On the basis of aforesaid position and the figures, learned advocate for the respondent - Corporation submitted that there was urgent need for filling up of the posts of Station Officers who could head the Fire Stations. He further submitted that in Special Civil Application No.20824 of 2015 which was filed by one Rameshbhai Chaudhary, advocate for Ahmedabad Municipal Corporation had assured the court that the process of recruitment to the post would be completed within four months. It was submitted that accordingly the advertisement was issued to fill up the vacant posts and the applications were invited from the eligible employees of the Fire Brigade Department of the Corporation as well as from the other quarters for the district requirement. It was contended that the petitioner who is serving as Fireman in the bottom of the hierarchy cannot be directly promoted as there are several cadres also above the post of Fireman.

4.7 It was stated that three tests for physical fitness was provided earlier, that is

running test of 800 meters within five minutes, swimming for 200 meters in six minutes and rope climbing for six meters. However, representations from the existing Firemen were received, upon which physical test of rope climbing was omitted and the other tests of swimming was made of 100 meter. The candidates are therefore required to undergo the running test of 800 meters within five minutes and the swimming test of 100 meter within five minutes as per the norms fixed by the Corporation. Running test was held on 04th February, 2019 and swimming test was held on 07th February, 2019.

4.8 The status of the different petitioners could be gathered from the affidavits-in-rejoinder filed in respective petitions. Petitioner - Rana Pravinkumar Natverlal of Special Civil Application No.2466 of 2019, stated about himself that he was aged 53 years and was under medical treatment. He appeared for running test on 04th February, 2019 and passed the same successfully but thereafter he was indisposed in health and as per the advice of the doctor, he was required to take rest for three days, therefore, could not take the swimming test. Petitioner - Chavda Dilipsinh Harubhai of Special Civil Application No.2467 of 2019 stated in the rejoinder that condition about fees to be deposited of Rs.112/- came to his notice subsequently and when he went to the authority showing willingness and readiness to deposit Rs.112/-, nobody accepted the amount. Petitioner - Pathan Shamimkhan Aminkhan of Special Civil Application No.2468 of 2019 could not appear as he accidentally fell down to suffer injury on the left hand, therefore could not appear. Case of More Vasantkumar Chanderao of Special Civil Application No.2469 of 2019 was that while he was giving the test, because of his age, he experienced changes in the body and body metabolism, because of which he did not participate.

4.9 Shaikh Mohammed Rafiq who is petitioner of Special Civil Application No.2472 of 2019 stated in his affidavit-in-rejoinder that due to his health he did not appear in the interview. Patel Mustafa Musabhai who is petitioner of Special Civil Application No.2474 of 2019, expressed grievance to complain that he cleared the running test, whereafter went for swimming test on 07th February, 2019 but he was orally informed that he was disqualified as he was not meeting with the physical criteria, in respect of size of the chest etc. It was sought to be contended that such stand was erroneous as the petitioner was permitted in the running event only because he fulfilled the physical criteria. This petitioner stated that he made representation and also obtained certificates from the doctor showing his height, weight and size of the chest. Christian Kiritkumar Shivabhai of Special Civil Application No.2479 of 2019 stated that he did not participate in any of the tests but reiterated that the appointment was required to be done on the basis of seniority. He further stated that he would not be able to run 800 meter in five minutes since he was suffering from cholesterol.

5. At the outset, the contention about the change in the physical tests and alteration in the schedule for taking such tests may be disposed of. It was contended that initially the Corporation announced taking of three tests of 800

meter running, rope climbing and swimming. However, subsequently, the date was changed and further that out of the three tests, one of the tests regarding rope climbing was omitted. This does not give any leverage to the case of the petitioners inasmuch as the Corporation's action of relaxing the conditions by dropping one of the tests which was upon representation made by the union.

5.1 In any view, changing the time schedule and dropping one of the tests does not create any right amongst the petitioners - candidates. On the contrary, they were subjected to less number of tests in the process of recruitment which was to their benefit and relaxation. No prejudice was caused by such action. When there was no prejudice caused, there was no sufferance of any legal injury. As there was no such sufferance, no right could be said to have been created on this count.

5.2 The contents of paragraphs 4.7 and 4.8 hereinabove which are the facts obtained from the rejoinder affidavits filed by the petitioners concerned, show that several of the petitioners either left the tests in the mid-way or they did not participate at all or they failed in the tests. One of the candidates did not pay up the fees. All such candidates who could not clear the stage of passing of the physical tests in question for whatever reason, ceases to be entitled to be appointed except the petitioner of Special Civil Application No.2474 of 2019, in whose respect directions are given in the operative paragraphs hereafter. Therefore they are not entitled to get any relief in the present petition. Such class of petitioners as well as the rest of the petitioners are all such candidates who participated in the process of recruitment.

5.3 After participating in the process, they have questioned the selection process. The principle is trite and well settled that once the candidate participates and takes chance in the process, subsequently he is estopped from raising a challenge. In the present case, the petitioners invoked writ jurisdiction of this Court only after they found that they are not going to be selected.

5.4 In *Amlan Jyoti Borooah v. State of Assam* [(2009) 3 SCC 227] the principle was reiterated stating that since the appellant had subjected himself to the allegedly faulty selection process without questioning it during the process, he could not question it later on. In *Ramesh Chandra Shah v. Anil Joshi* [(2013) 11 SCC 309], it was held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents. In *Madras Institute of Development Studies v. K. Sivasubramaniyan* [(2016) 1 SCC 454] the very proposition of law was summarised. Other decisions reiterating the very proposition are *Nanak Lal v. Prem Chand Singhvi* [AIR 1957 SC 425], *Prakash Shukla v. Akhilesh Kumar Shukla* [1986 Supp SCC 285], *Manish Kumar Shahi v. State of Bihar* [(2010) 12 SCC 576] and *D. Saroj Kumari v. R. Helen Thilakom*

[2017 (11) SCALE 366].

5.5 There is no gainsaying that the posts of Station Officer to head the Fire Stations in the Fire Brigade Department of the Corporation are important posts to be manned with proper and competent incumbents. The tests of the kind for running, swimming etc. provided for by Corporation in the process of recruitment could be said to be necessary tests to assess the physical fitness of the candidates. Having regard to the nature, work and kind of duties attached to the post in question, physical fitness is inevitable. At the same time, Corporation reduced number of tests and also relaxed the criteria with a view to give fair chance to the employees already working in the Fire Department who could compete out to become Station Officer.

5.6 It was demonstrated from record that the eligibility criteria for the post of Station Officer, Fire Brigade was determined after following the procedure under Section 465(1) of the Bombay Provincial Municipal Corporations Act, 1949. Upon a proposal mooted from the Municipal Commissioner and forwarded to the Municipal Secretary of the Corporation, the Standing Committee of the Corporation accepted the same in its meeting dated 05th January, 1983 by passing Resolution No.2553. Thereafter the General Board of the Municipal Corporation passed Resolution No.1624 on 08th March, 1983 accepting the Resolution No.2553 dated 05th January, 1983 of the Standing Committee.

5.7 Accordingly, the following qualifications were determined for the post of Station Officer in the Fire Brigade Department of the Corporation - (1) the candidate should have passed Matriculation or S.S.C. or its equivalent examination, (2) he should have passed sub officer's course of National Fire Service College, (3) He must have sound knowledge of Gujarati and Hindi language, (4) He should not be more than 35 years and below 20 years of age at the time of appointment. No age limit shall be applicable to employees serving in Municipal Corporation and (5) He must be active, intelligent and possess a good physique with a minimum height of 165 c.ms. (5'-5") and not under 76 cms. (30") round the chest with minimum expansion of 5 cms (2") when inflated and not below 50 kgs. (110 Lbs) in weight. The advertisement came to be published for the instant recruitment process based on the aforesaid eligibility criteria. The on-line advertisement contained the necessary details including the syllabus, physical fitness criteria etc. for the post. The above qualifications are applied in the recruitment process.

5.8 It was uncontrovertedly given out that Standing Committee of the Corporation in its meeting dated 04th September, 2004 resolved, by passing Resolution dated 05th January, 2007, to fill up the posts in the ratio of 3:1, that is three by way of promotion and one by way of direct recruitment instead through direct recruitment. However, subsequently, the General Body of the Corporation passed Resolution in its meeting dated 25th July, 2009 and resolved that posts of Fire Station Officer should be filled up as per the existing norms, that is by direct recruitment only. From the said Resolution No.902 it appears

that the Municipal Commissioner is delegated all powers for creation of new posts as well for framing the rules of recruitment and promotion. Thus, it was shown that the posts of Station Officer are to be filled up by way of direct recruitment.

6. In view of all the above facts and the position emerging, the contention of the petitioners that posts of Station Officer could be filled up only on the basis of seniority has no factual or legal merit. The competent authorities of the respondent - Corporation have thus passed necessary Resolutions to prescribe the mode of appointment and have also determined the eligibility criteria as mentioned above. The norms are laid down for the purpose of recruitment of Station Officers in competent manner having derived the powers from the provisions of the Bombay Provincial Municipal Corporations Act, 1949. The advertisement dated 26th October, 2018 contemplated the requisite procedure and disclosed the details about the process of recruitment. The contention of the petitioners that demand was raised for filling up the posts on the basis of only seniority has no enforceability in law. No such right is available. The norms fixed does not permit such a resort. No illegality could be noticed or demonstrated in the process adopted by the respondent - Corporation to fill up the posts of Station Officers in the Fire Brigade Department.

6.1 At this stage, it is to be mentioned and observed that the case of petitioner - Patel Mustafa Musabhai of Special Civil Application No.2474 of 2019 stands alone to be given different treatment. This petitioner was permitted in the running test, however was denied participation in the subsequent stage and was disallowed to take the swimming test on the ground that his height, size of chest etc. did not met with the required size. This petitioner has made representation by producing the relevant medical certificates showing that he meets with the criteria of physical standards and that therefore only he was permitted in the running test. The Corporation is directed to consider the facts of this petitioner and decide his representation. If he is found to be meeting with the requisite physical standards, he will be allowed to undergo all the stages in the recruitment process for the purpose of being selected for appointment to the post in question. This exercise shall be undertaken by the Corporation within three weeks from today. Special Civil Application No.2474 of 2019 stands disposed of in terms of the aforesaid directions.

7. For the foregoing reasons and discussion in paragraphs above except in paragraph 6.1, all other petitioners in this batch of petitions, are not entitled to any relief except that Special Civil Application No.2474 of 2019 would govern by the directions given in the paragraph 6.1 above, all other petitioners are dismissed as meritless. Notice is discharged in all the said petitions. Interim order is vacated. It will be open for the respondent Municipal Corporation to proceed to appoint the eligible selected candidates to the post of Station Officer.

While parting, an expression of hope that henceforth whenever petitions are filed in group which contains the similar facts and identical issues which can be dealt with by common pleadings, learned advocates appearing for the parties would

ensure that the affidavit-in-reply and rejoinder affidavit etc. are filed in one petition to be chosen by them as a main petition, to complete the record in that petition so as to facilitate making of submissions by them and hearing of the cases by the Court.

FURTHER ORDER

At this stage, learned advocate for the petitioners Mr.M.B. Gandhi requested to continue the interim order of keeping the posts vacant which was earlier passed in these petitions.

Learned advocate Mr.Munshaw for the respondent - Corporation objected to the request.

Considering the aspect that the posts of Station Officer in the Fire Brigade Department of the respondent - Corporation has not been filled in since long and it is the case of the petitioners themselves that the posts are required to be filled in in view of fire exigencies and looking to the nature of post to be filled in, when the Court has not found illegality in the process of recruitment, the request of learned advocate for the petitioners is not liable to be exceeded to. Hence, rejected.