

(2001) 09 DEL CK 0189
In the Delhi High Court
Case No : C.W. No. 5666 of 2000

G.D. Gaiha

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Civil Service Regulations — Regulation 38

Citation : (2001) 09 DEL CK 0189

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : C.S. Vaidyanathan, Rakesh Gosain and Shivram, for the Appellant; Harish Salve, Solicitor General of India, U. Hazarika, Prem Prakash, Public Prosecutor Rao, Arun Kathpalia, Raj Birbal and Deepali Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—By filing the present petition the petitioner has challenged the appointment of respondent No. 4 to the post of Chairman-cum-Managing Director of Mahanagar Telephone Nigam Limited. The aforesaid challenge is made on the ground that the respondent No. 4 is not eligible as per the eligibility criteria/job description laid down in the aforesaid circular dated 19.1.2000 issued by the Public Enterprises Selection Board, respondent No. 3.

2. It is stated in the petition that as the respondent No. 4 did not satisfy the aforesaid eligibility criteria as laid down his appointment as CMD, MTNL is void ab initio and non est. In view of the aforesaid challenge it is necessary to extract below the relevant clause of the eligibility criteria:

" The post carries Schedule "A" scale of pay of Rs. 13,000-500-15000 (revised). Public Sector executives should be holding posts in the pay scale of atleast Rs. 8,250-9250 (pre-revised)/ Rs. 11,500-13,500 (revised)/ with industrial DA or Rs. 7300-7600 (pre-revised) with Central DA or equivalent posts atleast for two years. In the case of internal candidates, the minimum experience required in

the above grade will be one year."

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Government Officers in the scale of pay of Additional Secretary to the Government of India of holding posts in the equivalent scale of pay with adequate experience in the relevant field will be eligible for consideration on immediate absorption basis. The date for determining the eligibility of candidates will be the date of occurrence of the vacancy i.e. 30.6.2000.

3. Mr. Vaidyanathan, Senior Counsel appearing for the petitioner relied on the aforesaid clause of the eligibility criteria and submitted that from a bare perusal of the aforesaid clause it is clear that a person intending to be a candidate for the aforesaid selection/appointment for the post of CMD, MTNL has to satisfy the criteria - (i) he should be a person belonging to any of the three categories of persons namely - Public Sector Employees, internal candidates and Government Officers; and (ii) if he is a Government officer he must be in the scale of pay of Additional Secretary to the Government of India or hold the post in equivalent scale of pay and (iii) that crucial date for determining the eligibility of candidate will be 30.6.2000. It was submitted by him that the eligibility conditions as set out in the job description are cumulative and non-fulfilment of any of them would render the very consideration of the candidate to the said post as grossly illegal, void and non est. It was also submitted by him that if the candidate is a Government Officer, he must be in the substantive scale of pay of Additional Secretary to the Government of India or if he is holding the post in equivalent scale of pay the said holding of the post must also be in a substantive capacity of the equivalent scale of pay. He vehemently contended that the respondent No. 4 on the crucial date for determining the eligibility of the candidates i.e. 30.6.2000 was not holding a substantive post in the scale of pay of Additional Secretary to the Government of India and Therefore, not eligible to be considered.

4. He also submitted that a rank outsider could but be appointed to the post of CMD, MTNL and if such an interpretation is sought to be given the same is absurd and is liable to be rejected. It was stated by him that on the crucial date for determining the eligibility of the candidate i.e. on 30.6.2000 the petitioner was on a foreign service having been sent on deputation to Telecom Regulatory Authority of India (TRAI) and his substantive post was Joint Secretary with the Department of Telecom of the Government of India where he was drawing a lower scale than what was prescribed in the eligibility criteria. It was stated by him that the respondent No. 4 was initially an officer of the Indian Telecom Service in the Senior Administrative Grade Level, Group A which is equivalent to the rank of Joint Secretary in the Department of Telecommunication, Government of India and while working as such on 4.4.1997 he went on deputation as ORD, TRAI and later on was appointed as Secretary, TRAI w.e.f. 4.4.1997. It was stated by him that TRAI being an independent and autonomous body unilaterally

granted him on step higher pay scale of what he was drawing as Joint Secretary in the Department of Telecommunication in the Government of India, prior to which the respondent No. 4 was drawing substantive pay scale of Joint Secretary only from the Department of Telecom, Government of India and his salary was fixed as that of a Joint Secretary as late as on 3.1.2000 by respondent No. 1. It was also stated that in spite of the aforesaid fact the respondent No. 1 has withdrawn its aforesaid order of pay fixation and respondent No. 1 is unable to fix his salary in the scale of Additional Secretary on 30.6.2000 which is the crucial cut off date for eligibility to the post of CMD, MTNL.

Relying on the aforesaid position he submitted that respondent No. 4 was never in the substantive scale of pay of Additional Secretary and accordingly, the selection of respondent No. 4 was de hors the norms laid down in the job description/circular dated 19.1.2000 and Therefore, the appointment of respondent No. 4 as CMD, MTNL should be declared as void, ab initio and non est and should be quashed.

He also contended that the respondent No. 4 on his repatriation from TRAI was posted against the post of Senior DDG (CS), TCHQ on 22.9.2000 with the Department of Telecom & that respondent No. 4 was not a Additional Secretary with the Government of India and proposal for appointment of respondent No. 4 to the grade of Additional Secretary was sent by respondent No. 1 to ACC. The ACC however, approved the appointment of respondent No. 4 in the grade of Additional Secretary for one day i.e. 22.9.2000 only purely on ad hoc basis but categorically refused the proforma promotion of respondent No. 4 as Additional Secretary. In support of his contention the counsel referred to the order dated 23.4.2001 issued by respondent No. 1 whereby the President appointed Shri Narinder Sharma (respondent No. 4) and officer of Indian Telecom Service Group A in the CGM's Grade of ITS Group "A" in the pay scale of Rs. 22,400 - 24,500 purely on ad hoc basis for one day i.e. 22.9.2000 on repatriation from TRAI. Relying on the same the counsel submitted that had the respondent No. 4 been an Additional Secretary with the Government of India the entire aforesaid exercise was unnecessary and unwarranted which proves and establishes that respondent No. 4 was never an Additional Secretary with the Government of India on or before the cut off date i.e. 30.6.2000. It was also submitted by him that one of the eligibility criteria to the post of CMD, MTNL mandates that the selected candidate had to join the said post on immediate absorption basis whereas in the present case the respondent No. 4 even after expiry of almost one year since he was appointed as CMD, MTNL, has not resigned from the Government and continues to hold lien with the Government which is in violation of the aforesaid condition laid down in the job description itself.

In support of the aforesaid contentions counsel appearing for the petitioner also relied upon the communication dated 24.5.2000 from the Joint Secretary (Estt.) DOPT to the Secretary, PSEB which is quoted in the body of the petition. It was submitted that since one of the wings of the respondent had specifically stated

that the service rendered on ad hoc/deputation basis cannot be considered for determining eligibility apart from being legally untenable it would have wider repercussions and also reflects the consistent policy of the Government which has not been followed for appointment of respondent No. 4 to the post of CMD, MTNL and Therefore, the appointment being in violation of the aforesaid norms, is illegal and without jurisdiction.

5. Mr. Harish Salve, Solicitor General of India, appearing for respondents No. 1 to 3 and Mr. P.P. Rao, Senior Advocate, appearing for respondent No. 4, while refuting the allegations and the submissions of the counsel appearing for the petitioner submitted that on a plain reading of the language of the eligibility criteria laid down by the Board which is in the nature of a guideline only, it is proved and established that the respondent No. 4 was not in any manner disentitled for applying as also for his appointment to the post of CMD, MTNL. It was submitted by them that the Board who is entrusted with the job of selecting a suitable candidate for appointment as CMD of a Public Sector Undertaking has the power and authority to formulate appropriate guidelines for short-listing candidates for the purpose of selection and that the said guidelines are not in any manner statutory and were merely guidelines formulated by the Board. It was submitted by them that the construction sought to be given by the petitioner to the eligibility criteria is far fetched and untenable on a plain reading of the aforesaid guidelines. They submitted that the aforesaid eligibility criteria should be given plain and the natural meaning which it depicts on the face of it and nothing could be added and inserted to the aforesaid clause as the meaning is plain and clear and because there is no ambiguity therein. They submitted that if the interpretation sought to be given by the petitioner is accepted the same would amount to adding the word "substantive" into the words and expressions used in the job description. They further submitted that even if two interpretations of the said clause are possible then the one given by the author of the said guidelines should be accepted. They also stated that the views expressed by one of the officers of the department of Personnel and Training could not be final and binding on the respondents, but the said view was taken notice of by the Public Enterprises Selection Board and thereafter by ACC and that the said interpretation was found to be not valid and unwarranted.

6. It was also submitted on behalf of the respondents that the dispute raised by one of the officers of the DOPT was not relating to the policy and the interpretation of the guidelines relating to eligibility criteria framed by the PSEB but the said officer recommended a change in the guidelines suggested by the PSEB, but that the Board however, differed from the recommendation of the DOPT and stuck to its own interpretation and views on the subject and a final decision thereon was taken at level higher than either of these two departments whose decision is the final decision of the Government of India.

7. It was submitted that a challenge based on a view propounded by one of the Ministries at one particular stage is misconceived and that in proceedings by way

of judicial review the court is not sitting in appeal over the wisdom of the Competent Authority as the Court is purely concerned with the decision making process only. It was also submitted that the ACC which is the final decision making authority took a final view of the matter after the relevant points of view were placed before it and in the circumstances differences between the departments were entirely irrelevant since the decision for the appointment of the respondent No. 4 was taken by the ACC and the order has been issued in the name of the President. They also submitted that if a person on the crucial date was holding a post which was carrying the pay scale of Additional Secretary the said person would satisfy the norms and the requirement put up by the Board and in support of their contention they drew my attention to the meaning of the word "held" as given in the Blacks Law Dictionary.

8. In the light of the aforesaid submissions of the counsel appearing for the parties let me examine the merits of this case and scrutinise the issues arising before me.

9. Relevant clause of the eligibility criteria is already reproduced above. It cannot be disputed that the said job description circulated by the Board were mere guidelines and were not statutory in nature. As to whether or not a rank outsider could be appointed to the post of CMD, MTNL which was an issue urged before me by the counsel appearing for the parties, in my considered opinion does not arise for my consideration and would not be necessary and relevant to be decided in this case as in the present case admittedly the respondent No. 4 was a Government Officer and was on deputation to TRAI. His case Therefore, falls within the three categories specifically mentioned in the advertisement giving the job description. Counsel appearing for the parties agreed that respondent No. 4 was a Government Officer but the only dispute which is raised is whether the respondent No. 4 on the crucial date was or was not holding the post in the equivalent scale of pay of the Additional, Secretary to the Government of India. The aforesaid criteria was laid down by the PESB who was entrusted with the duty of laying down the job descriptions, and to do the selection as also to make its recommendation to the Appropriate Authority for appointment to the aforesaid post. Therefore, the Board was the author of the aforesaid guidelines which contained the job description. According to the said Board the job description does not make any distinction between persons holding posts in the prescribed scale of pay on a regular and substantive basis on the one hand and person holding such posts on ad hoc/temporary or any other basis on the other hand. A plain reading of the aforesaid clause of the job description would indicate that a person "holding" (emphasis is mine) posts in the equivalent scale of pay with adequate experience in the relevant field would also be eligible for consideration.

10. In order to appreciate the true meaning of the aforesaid clause reference may be made to the meaning of the word "hold" as appearing in Black's Law Dictionary, 6th Edition at page 731. As stated therein the word "hold" means "to

possess", "to occupy", "to be in possession" and "administration of", "as to hold office". Similarly, Strouds' Judicial Dictionary defines "holding" as holding or exercising an office.

11. A careful reading of the relevant clause would indicate that there is absolutely no requirement in the job description that an intending candidate should hold a post carrying the pay scale equivalent to that of an Additional Secretary to the Government of India on a regular and substantive basis. The petitioner wants to read into the conditions of the eligibility words and stipulations which are not there. If it would have been the intention of the board that holding the post in the equivalent scale of pay on regular and substantive basis, it would have said so specifically in the said advertisement. When a person holds a post he simply holds the office whether by way of temporary, ad hoc or on deputation basis or by way of regular basis. Persons who are also on deputation to such posts also holds the posts being in office of the same and drawing the same scale of pay as an Additional Secretary to the Government of India and they cannot be said to be disqualified to apply for the aforesaid post. It is not disputed that on the crucial date the petitioner was drawing a pay scale which was equivalent to that of Additional Secretary to the Government of India although the aforesaid holding of the post in the said pay scale was on deputation basis. But the same in any manner would not and cannot be interpreted to say that the respondent No. 4 was not eligible to apply for and be considered for the said post. There is no dispute that at the relevant time and on the crucial date the respondent No. 4 was in possession of and holding the office of the Secretary, TRAI which is in the pay scale of an Additional Secretary to the Government of India. Although one of the officers of the DOPT while dealing with the file had given his opinion recommending a change in the guidelines suggested by PESB, the Board did not accept the said view as according to the Board the eligibility criteria as was advertised earlier would continue to remain. According to the Board even a person who is holding a post and administering the office of secretary, TRAI although on ad hoc or on deputation basis was competent and had the eligibility criteria to apply for the said post of CMD.

12. The ACC which is the higher authority than the aforesaid two departments had the advantage of looking into both the views and had accepted the candidature of respondent No. 4 whose name was recommended by the PSEB as the said recommendation of the PSEB was found to be valid by the ACC. It was also found by the ACC that the respondent No. 4 was eligible for the post of CMD. While coming to the aforesaid decision as disclosed from the additional affidavit filed by respondents 1 to 3 the ACC had the advantage of the view expressed by one of the officers of the DOPT. The PESB, after considering various candidates short-listed respondent no. 4 as the best candidate for appointment to the post of CMD, MTNL. The respondent No. 5, who was junior to the respondent No. 4 in the Indian Telecom Service was placed at serial No. 2 and the petitioner who was junior to both respondents No. 4 & 5 in the Indian Telecom Service prior to his joining service in 1999 was placed at serial No. 3.

While recommending the name of respondent No. 4 the PESB was fully conscious and aware of the eligibility criteria and after fully addressing itself to the aforesaid issue found respondent No. 4 as the best candidate and recommended for his appointment as CMD, MTNL. In my considered opinion, the Board being the author of the job description and having decided to recommend the name of respondent No. 4 after duly considering and discussing the policy preference after rejecting the views of the DOPT as not applicable, or acceptable the said recommendation shall have to be held as a conscious and informed decision. The recommendation of the PESB were put up to the ACC which after considering all the facts and circumstances and after being fully conscious of the views of the DOPT and also of the PESB and also after fully satisfying itself that the respondent No. 4 complied with and satisfied the requirement and the eligibility criteria approved his appointment as CMD, MTNL. It is also brought on record that eligibility criteria for the post of CMD, Videsh Sanchar Nigam Limited, which was circulated twice in 1998 and 1999 contained exactly the same eligibility criteria. In fact the respondent No. 4 was short-listed twice for the said post which is at par with the CMD, MTNL. The same was the case with the Job Description for CMD, Hindustan Zinc Ltd. and CMD, Indian Telephone Industries Ltd.,

13. I have carefully scrutinised the language used in the job description set out by the Board and in my considered opinion, on a plain reading of the expressions used therein it is apparent that a person who was holding the post even on temporary capacity or on deputation basis would come within the ambit of the expressions used in the job description. To give any other meaning to what is expressed above would amount to addition to or inserting certain additional words in the language which is not permissible when the language is clear and plain as per the rules of interpretation of Statutes and documents. Therefore, the contention of the counsel for the petitioners that the respondent No. 4 did not satisfy the eligibility criteria for being a candidate for the post of CMD, MTNL is without any merit.

14. In the present case there is no allegation of malice in fact and the decision taken was an institutional decision. The Board who is the author of these guidelines understood the same in a particular sense. Even assuming that two interpretations in the said expression are possible the one sought to be given by the author of the same which could also be a plausible meaning could be accepted particularly when a recommendation has taken place on the basis of such an interpretation and meaning which was accepted. Consequent to the aforesaid conscious and informed decision an appointment is also made. I find no ground to set aside such a decision by exercising the power of review of administrative decisions.

15. It is also brought on that due to a stay operative on promotions to various grades of Indian Telecom Service issued by the Central Administrative Tribunal no regular promotion could be made in ITS after 2.1.1997. Accordingly the DOPT

agreed for grant of ad hoc promotion to the grade of CGM equivalent to an Additional Secretary of ITS grade A. A DPC was held on 29.10.1997 and 29 officers including the respondent No. 4 were recommended to the grade for promotion to CGM who were then on deputation to TRAI as its Secretary. The panel was duly approved by the ACC on 2.2.1998. The case of the petitioner however, could not be considered as he was on deputation and as on the date he was holding the scale of pay of Additional Secretary in his assignment as Secretary, TRAI. upon repatriation from TRAI and before joining as CMD, MTNL the respondent No. 4 was posted as Senior DDG (CS) for one day which is equivalent to the post of Additional Secretary.

16. Reliance by the counsel appearing for the petitioner on the definition of pay as defined under regulation 38 of Civil Service Regulation of Finance Department and FR.9(31) has no relevance when considered in the light of expressions used in the job description and the same would not in any manner affect the conclusions arrived at in the aforesaid discussions.

17. Another contention that was strenuously urged was that the respondent No. 4 continues to hold lien and has not resigned from the Government and thereby violates the conditions of the job description. Here is a case where the petitioner filed the present writ petition on 22.9.2000, the very day when the order appointing the respondent No. 4 to the post of CMD, MTNL was issued. Notice was issued on the writ petition and Therefore, the matter of appointment of respondent No. 4 became subjudice in this court. Therefore, no adverse inference could be drawn from the fact that the respondent No. 4 has not resigned from the Government. None is expected of take a risk by resigning from the Government when his very appointment is at stake and a sword of Damocles is hanging over his head. The aforesaid contention is also found to be without any merit.

18. In that view of the matter the contentions of the counsel appearing for the petitioner is found to be without any merit and the same are rejected. There is no merit in this writ petition and same stands dismissed but without costs.