(2013) 09 DEL CK 0156

In the Delhi High Court

Case No : Writ Petition (C) 2040 of 2012

MCD APPELLANT

Vs

C.M. Vij and Another RESPONDENT

Date of Decision : 23-09-2013

Acts Referred:

Delhi Municipal Corporation Act, 1957 — Section 200, 478, 59, 89, 90

Citation : (2013) 09 DEL CK 0156

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Gaurang Kanth, for the Appellant; Moni Cinmay and Sh. Saurav Suman, Advocates, Party in Person and Sh. M.P. Singh, Advocate, for UOI, for the Respondent

Judgement

S. Ravindra Bhat, J.—This writ petition preferred by the Municipal Corporation of Delhi is directed against a judgment of the Central Administrative Tribunal ("CAT") dated 11.11.2009 in T.A. No. 1060/2009, and the subsequent judgment dismissing the review application (No. 267/2011) dated 01.12.2011. The facts of this case are not in dispute between the parties. The Respondent, Sh. CM Vij-held the post of Superintending Engineer (Civil) with effect from 08.08.1987 (though it became regularized only on 04.10.1996), and the post of the Chief Engineer (Civil) with effect from 07.2.1994. Subsequently, through an order dated 26.08.1997 (No. F.8(15)/CED(II)/86/Pt.II/43/22297-368), he was appointed as a Municipal Engineer/Engineer-in-Chief on ad-hoc or temporary basis (the Office Order, in fact, notes that Vij will hold the post ".......... till such time the post is filled up on regular basis...... " Vij''s post-either as Chief Engineer (Civil) or as Engineer-in-Chief, the latter being a Category A post-was never regularized. It is also appropriate to note here that in compliance with certain directions issued of this Court in W.P. (C) No. 3164/1987, (the details of which do not concern the present case) the seniority list was reissued, in which Vij was promoted as Engineer-in-Chief notionally from 01.11.1995. But even under that reordering (in MCD Order No. F.33/CED/4221/C&C), dated

15.01.1998, the post was only held on ad-hoc basis. Indeed, as the CAT also noted, ".... in the instant case, it is undisputed that the Applicant''s promotion is not on current charge basis.... "

2. In this background, the CAT was faced with two questions: first, what was the pay scale of an Engineer-in-Chief, and secondly, whether Vij was entitled to the pay of an Engineer-in-Chief. On the first question, the CAT held that an Engineer-in-Chief was entitled to a pay scale of Rs. 22,400-24,500 (as opposed to the MCD''s argument that claimed that the relevant pay scale was Rs. 18,400-22,500) based on Resolution No. 428 of the MCD dated 30.12.2002, and the related minutes, which are read as follows:

Having considered the recommendations made by the Standing Committee vide it Resolution No. 649 dated 23.10.2002 and the Commissioner''s Supplementary letter No. F33/CED/2437/C&C dated 2.11.2002, resolved further that the pay scale of Engineer-in-Chief, MCD be upgraded from the existing pay scale of Rs. 18400-500-22400 to R.22400-525-24500 w.e.f. 1.1.1996 ON THE ANALOGY OF THE PAY SCALE OF THE Engineer-in Chief, Public Works Department, Govt. of National Capital Territory of Delhi and in view of the existing dispensation that the pay scale of Engineer-in Chief and the Chief Engineers are the same notwithstanding the cardinal fact that being the principal Head of the Department, Engineer-in Chief is saddled with high and arduous responsibilities being performed his subordinate Chief Engineers, which post also comprises the channel of promotion to that of the Engineer-in-Chief, for which the pay scale of Engineer-in-Chief was also got revised from Rs. 5900-6700 to Rs. 5900-7300 after 4th CPC to remove the anomaly among the Chief Engineers and Engineer-in-Chief.

The motion was carried.

3. Basing its decision on Resolution No. 428, which, the CAT noted "was not contested" by the MCD, the pay scale of an Engineer-in-Chief stood enhanced to Rs. 22,400-24,500. On the second question, the CAT observed that

8... Any employee promoted on ad hoc basis would be eligible to the pay scale of the higher post to which he is promoted. One of the serious evils prevalent in the Respondent-MCD is promotion of employees to higher posts on current-charge basis, in which case the employee holds the charge of a higher post but is not eligible to draw salary in the higher scale of pay. However, in the instant case, it is undisputed that the Applicant''s promotion is not on current charge basis. He has been promoted on ad hoc basis and he would be eligible for the prescribed scale of pay in the post of E-in-C ...

4. Thus, given the valuation of the pay scale of an Engineer in Chief as Rs. 22,400-24,500 along with the finding that an ad hoc employee not promoted on a current-charge basis is entitled to the pay scale of the post he/she is promoted to, the CAT directed the MCD that it:

9... would pay to the Applicant the arrears of pay and allowances in the scale of Rs. 22,400-24,500 with effect from 01.09.1997 to 31.07.2000 and also revise his pension and other benefits of retirement..."

5. Both findings of CAT are disputed by MCD in the present proceedings as unfounded. On the first question as to the pay scale of an Engineer in Chief, learned counsel for the MCD argued that the CAT''s reliance on Resolution No. 428 was incorrect, since it was passed without the concurrence of the Commissioner. According to MCD, the resolution had no effect. Learned counsel argued that this traced to Section 59 of the Delhi Municipal Corporation Act, 1957 ("DMC Act") that made the Commissioner the executive head of the MCD, and unequivocally prescribes his power with respect to appointment of officers/ employees in clause (b). It was, therefore, argued that through his letters dated 08.10.2002 and 22.11.2002, the Commissioner had noted that the recommendation of upgrading the pay scale of the Engineers-in-Chief was contrary to the recommendations of both the Fifth Pay Commission as well as recommendations of the Ministry of Home Affairs (through its letter dated 16.08.2002). Accordingly, learned counsel argued that Resolution No. 428-given the absence of the Commissioner''s consent (which, in the learned counsel''s submission, was mandatory)-did not carry any weight, and, therefore, could not be the basis of the decision of the CAT. Essentially, the argument was that given that the Commissioner is the executive head and when a power has been prescribed to that office, the Corporation cannot-as a matter of law-bypass that requirement. In support of the contention, learned counsel placed reliance on the decision of the High Court of Moti Ram Vs. Municipal Corporation of Delhi and Others, as also the decision of the Supreme Court in Sh. B.S. Khurana and Ors. v. Municipal Corporation of Delhi and Ors., SLP(C) No. 13639/2000, and decisions of this Court in Ashima Securities Pvt. Ltd. Vs. Municipal Corporation of Delhi, and Nirmal Kumar Jain and Others Vs. Municipal Corporation of Delhi and Others,

6. In response, counsel for Sh. Vij argued that the present writ petition ought to be dismissed at the outset as the MCD is seeking to urge new issues which were never raised before the CAT. On the merits, learned counsel submitted that the CAT correctly ruled that the MCD had enhanced the scale of pay of Engineers-in-Chief by its Resolution No. 428, and as it had not contested that fact, its acquiescence was tantamount to acceptance of this increase, by which it is now bound. Learned counsel submitted that it was the Commissioner himself, through letter No. F/33/CED/9/0/C&C dated 02.12.1999, who sought the approval of the Corporation through the Standing Committee for the upgradation of the post of Engineer-in-Chief to the pay scale of Rs. 22,400-24,500 for Vij (the then incumbent), with the pay scale reverting back to the original (Rs. 18,400-22,400) after his superannuation, or retirement.

7. Learned counsel noted that the letter was followed by a supplementary letter (No. F.33/CED/1073/C&C) dated 16.12.1999 to the Corporation through the Standing Committee that the upgradation may be effected from 01.09.1997,

instead of 01.01.1996, and the Standing Committee, it is argued, through Resolution No. 339 dated 22.12.1999 recommended to the Corporation that upgradation should be approved. Learned counsel submitted that this matter was then considered by the Corporation as Urgent Business No. 97 on 10.07.2000 and the proposal of the Commissioner, contained in his earlier letter was approved. Learned counsel argued that after this decision was taken, it was altered, contrary to the terms of the statue and referred instead to the Director of Personnel and Training, Government of India (DOPT), for approval.

8. Learned counsel also argued that subsequent to these events, the Commissioner was silent on the matter, and only after receipt of Vij''s notice dated 23.04.2002 u/s 478 of the DMC Act was the advice of the DOPT sought. Subsequently, the response of the Union of India contained in its letter dated 16.08.2002 was placed by the Commissioner through a letter dated 08.10.2002 (No. F.33/CED/2153/C&C) before the Corporation through the Standing Committee for approval, but the Standing Committee vide Resolution No. 649 dated 23.10.2002 recommended to the Corporation that the post of Engineer-in-Chief be upgraded to the higher pay scale. Learned counsel noted that despite the Commissioner''s letter dated 21.11.2002 (No. F.33/CED/2437/C&C) requesting the Corporation to not approve the recommendation of the Standing Committee, the MCD, through Resolution 428 upgraded the pay scale. Accordingly, it was argued that given these events, and in view of Section 98 of the DMC Act, which learned counsel argued categorically vested power in the Corporation to frame regulations on matters enumerated therein, Resolution No. 428 is operative and thus, stands.

9. The question that arises for the consideration of the Court is whether Resolution No. 428-which upgrades the pay scale of Engineers-in-Chief to Rs. 22,400-24,500-can vest the respondent with the right to contend that it is enforceable or whether it falls foul of the DMC Act. Two provisions of the DMC Act are crucial in this case (Section 59 and Section 98), and are produced below:

Section 59 of the DMC Act states:

59. Functions of the Commissioner.-Save as otherwise provided in this Act, the entire executive power for the purpose of carrying out the provisions of this Act and of any other Act for the time being in force which confers, any power or imposes any duty on the Corporation, shall vest in the Commissioner who shall also-

(a) exercise all the powers and perform all the duties specifically conferred or imposed upon him by this Act or by any other law for the time being in force;

(b) prescribe the duties of, and exercise supervision and control over the acts and proceedings of, all municipal officers and other municipal employees other than the Municipal Secretary and the Municipal Chief Auditor and the municipal officers and other municipal employees immediately subordinate to them and subject to any regulation that may be made in this behalf, dispose of all questions relating to the service of the said officers and other employees and their pay, privileges, allowances and other conditions of service;

(c) on the occurrence or threatened occurrence of any sudden accident or any unforeseen event or natural calamity involving or likely to involve extensive damage to any property of the Corporation, or danger to human life, take such immediate action as he considers necessary and make a report forthwith to the Standing Committee and the Corporation of the action he has taken and the reasons for the same as also of the amount of cost, if any, incurred or likely to be incurred in consequence of such action, which is not covered by a budget-grant;

(d) Subject to any regulation that may be made in this behalf, be the disciplinary authority in relation to all municipal officers and other municipal employees.

10. Section 89, which deals with the appointment and conditions of service of certain specific officers, reads as follows:

Chapter VI

Municipal Officers and Other Municipal Employees

89. Appointment of certain officers

(1) The Corporation shall appoint suitable persons to be respectively ***, the Municipal Engineer, the Municipal Health Officer, the Education Officer, the Municipal Chief Accountant, the Municipal Secretary and the Municipal Chief Auditor and may appoint one or more Deputy Commissioners and such other officer or officers of a status equivalent to or higher than the status of any of the officers specified earlier in this sub-section as the Corporation may deem fit on such monthly salaries and such allowances, if any, as may be fixed by the Corporation.

(2) The appointment of the Municipal Chief Auditor shall be made with the previous approval of the *** Government and every other appointment referred to in sub-section (1) except that of the Municipal Chief Accountant and the Municipal Secretary shall be subject to confirmation by that Government:

Provided that the Municipal Chief Auditor shall not be eligible for any other office under the Corporation after he has ceased to hold his office.

11. Finally, Section 98 states:

98. Power of Corporation to make regulations.

(1) The Corporation may make regulations to provide for any one or more of the following matters, namely:

(a) the tenure of office, salaries and allowances, provident funds, pensions, gratuities, leave of absence and other conditions of service of officers and other employees appointed under this Chapter;

(b) the powers, duties and functions of the Municipal Secretary;

(c) the qualifications of candidates for appointment to posts specified in sub-section (1) of section 89 and to posts dealt with in the First Schedule of posts referred to in sub-section (2) of section 90 and the manner of selection for appointments to posts dealt with in the Second Schedule of posts referred to in that sub-section;

(d) the procedure to be followed in imposing any penalty under sub-section (1) of section 95, suspension pending departmental inquiries before the imposition of such penalty and the authority by whom such suspension may be ordered; the officer or authority to whom an appeal shall lie under sub-section (4) of that section;

(e) any other matter which is incidental to, or necessary for, the purpose of regulating the appointment and conditions of service of persons appointed to services and posts under the Corporation and any other matter for which in the opinion of the Corporation provisions should be made by regulations.

(2) No regulation under clause (c) of sub-section (1) for category ''A'' and category ''B'' posts shall be made except after consultation with the Commission and for category ''C'' posts except with the prior approval of the Government.

12. In this case, it is not disputed that Resolution No. 428, passed by the Corporation, recommended the higher pay scale that Sh. Vij claimed. There is no material to show that it received the concurrence or approval of the Commissioner. Although the original proposal to upgrade the pay scale of Sh. Vij emanated from the Commissioner''s office through letter No. F/33/CED/9/0/C&C dated 02.12.1999 (seeking the approval of the Corporation through the Standing Committee), yet, it remained a proposal and was never effected through that office. Quite to the contrary, after receiving the response of the Union of India on this question of upgradation (through the Union Government''s letter dated 16.08.2002), the Commissioner by letter dated 08.10.2002 (No. F.33/CED/2153/C&C) placed the question before the Corporation through the Standing Committee for approval. When the Standing Committee by Resolution No. 649 dated 23.10.2002 recommended that the pay scale be upgraded, the Commissioner (through the letter dated 21.11.2002, No. F.33/CED/2437/C&C) disapproved and requested-as the learned counsel for Sh. Vij agrees-the Corporation to not approve the recommendation of the Standing Committee. Despite this, the Corporation passed Resolution No. 428 upgrading the pay scale.

13. The question that arises, then, is whether the Corporation was competent under the DMC Act to pass Resolution No. 428 in the terms that it did without the concurrence of the Commissioner.

14. There is no doubt that u/s 98 the power to make regulations regarding the salaries, allowances and other conditions of service of officers vests in the Corporation, subject to the conditions of prior consultation and approval, of the

Commission, as the case may be, under clause (2) of that section. However, equally, the mandate of Section 59 is clear in that "any power (of) the Corporation ... shall vest in the Commissioner", the latter being the executive head. Thus, the legal entity that exercises the powers vested in the Corporation is the Commissioner under the DMC Act, who is the designated authority to make such decisions. In such cases, where the statute prescribes that a certain power is to be exercised by an authority, it must be exercised by that authority or not at all. Indeed, in considering the scope of Section 59, the Punjab and Haryana High Court in Moti Ram (supra) noted as follows:

the Commissioner is an authority under the Corporation ... he is the chief executive head and the entire executive power vests in him u/s 59 ...

This reading was also supported by the Supreme Court in Shri B.S. Khurana and Others Vs. Municipal Corporation of Delhi and Others, , where the Court noted that:

16. The scheme of the aforesaid Sections makes it abundantly clear that the entire executive power for the purpose of carrying out the provisions of the Municipal Corporation Act vests in the Commissioner. His functions and duties are statutorily prescribed. His appointment is also to be made by the Central Government by notification in the Official Gazette. Similarly, the functions of the Standing Committee and other committees are also prescribed. In the light of the aforesaid statutory provisions, we have to consider the scheme of Section 200 which empowers the Commissioner to dispose of the moveable property or grant lease of any immovable property or to sell the same subject to the conditions provided thereunder. On the condition of obtaining sanction of the Corporation, the power to transfer immovable property, the value of which exceeds fifty thousand rupees vests in the Commissioner. Result is-the Commissioner can transfer such immovable property only after obtaining sanction of the Corporation. Obtaining of sanction by the Commissioner is mandatory. The effect of the non-observance of the statutory prescription would vitiate the transfer. This would also mean that the power to dispose of the property would vest in the Commissioner and not in the Corporation. No specific power is conferred upon the Corporation for such transfer. The scheme envisages checks and balances for disposal of immovable property on the power of the Commissioner. In the light of the aforesaid interpretation of Section 200, it is not necessary for us to deal with other contentions raised and dealt with by the High Court. In the facts and circumstances of the case, at no point of time, Municipal Commissioner has decided or agreed to transfer the Municipal quarters in favour of its employees/allottees. There is no legal right to claim ownership on the basis of the resolutions passed by the Corporation as the said resolutions are without any power or authority. Hence, there is no substance in these petitions.

15. The question here is not of the correctness of Resolution No. 428 in terms of its content, as to whether Engineers-in-Chief should be entitled to a higher pay scale, but rather, whether the authority which took this decision possessed the

requisite power under the statute. u/s 98, read with Section 59, for making any alterations to the salaries or service benefits of the employees of the MCD, powers vests in the Commissioner, and it is from that office that any mandate must arise. Resolution No. 428, to the contrary, was a private resolution that did not carry the force of law. Furthermore, the power to appoint Municipal Engineer is subject to confirmation by the Government. Admittedly, the Commissioner did propose originally that such an upgradation may be made, yet, given subsequent consultations with the Union Department of Personnel and Training and the Ministry of Home Affairs, it is clear-as a matter of fact-that, ultimately, Resolution No. 428 did not receive the consent of the Commissioner. He actively opposed it in the light of the Union Government''s refusal. In such a case, to allow the order of the CAT to stand would translate into circumventing the statutory prescription in Section 59, and the balance created in the Act by which all powers-in which the power to decide on the service conditions of employees is undoubtedly included-are vested in the Commissioner, unless otherwise provided (as for example is the case in the proviso to Section 92(1). In fact, the fact that Section 89 grants the power to appoint Municipal Engineers (i.e. Engineers-in-Chief) to the "Corporation" supports this reading, as, if the power to appoint, and to decide the salary of, Engineers-in-Chief, lay with the Standing Committee or any other branch of the Corporation, the same would have been mentioned. In the absence of any such deviation, the default mandate of Section 59 operates in this case, and thus, Resolution No. 428 must be held to be void for being passed without authority.

16. Another way of looking at the matter is that the corporation''s recommendations through its standing committees or other bodies are not final in such matters. The decision making process in matters enumerated in Sections 89 and 98 are subject to the Commissioner''s concurring with the proposal. If he does not approve, or opposes the proposal or the resolution, the matter ends. Until this point, the proposal remains an inchoate and incomplete one, and there is no decision at all.

17. Finally, this issue no doubt was not raised before the CAT; yet, given that the validity and efficacy of Resolution No. 428 goes to the root of the matter, in that it involves a decision on the issue as to whether a decision had been taken at all in terms of the Act, and affects the matter fundamentally, the order of the CAT-by granting relief to Vij on the basis of this resolution-must be held to be indefensible. In the light of the above discussion, the impugned order of the CAT dated 11.11.2009 in T.A. No. 1060/2009, and the subsequent judgment dismissing the review application (No. 267/2011) dated 01.12.2011, are liable to be set aside. Thus, the Respondent is entitled only to the pay, allowance, as well as retirement and other service benefits, in the scale of Rs. 18,400-22,300 from the appropriate date. The Petition is allowed in the above terms. No costs.