
(2001) 10 CAL CK 0041
In the Calcutta High Court
Case No : Writ Petition No. 158 of 1999

Smt. G. Mallicka

APPELLANT

Vs

The Municipal Council and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 1 CALLT 289 : (2002) 94 FLR 711

Hon'ble Judges : Pratap Kumar Ray, J

Bench : Single Bench

Advocate : Mr. T. Mukherjee, for the Appellant; P.S. Biswas and Mr. Krishna Rao, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Ray, J.—In this application under Article 226 of the Constitution of India, the petitioner has challenged the office order No. 2956 dated December, 14, 1998 issued by the Secretary, Municipal Council, Port Blair whereby and whereunder the petitioner was appointed as Workcharged Mazdoor in the pay scale of Rs. 2550-3200/- with basic pay of Rs. 2550/- under certain terms and conditions with immediate effect. The petitioner's grievance against that order is namely on the point that in terms of the earlier order dated September 18, 1998 passed in WP. 63 of 1995 by Shyamal Kumar Sen, J (as His Lordship then was) her case was not considered for absorption in the post of Lower Grade Clerk (hereinafter referred to as Clerk for brevity).

2. The petitioner's further grievance is relating to non reservation of 1% for the post of clerks by the Municipal Council (hereinafter referred to as the council for brevity) in terms of the reservation rule as applicable under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the said Act of 1995 for brevity).

3. This writ application has been opposed by the respondents, council.

4. This writ application has a chequered career. Originally the issue relating to reservation of vacancies for the handicapped candidates in terms of the said Act of 1995 was not raised. The writ petition was dismissed by Samaresh Banerjia, J by a reasoned judgment holding, inter alia, that the petitioner was not entitled to be absorbed. Challenging that, an appeal was preferred and registered as MAT No. 10 of 2001. Before the Appeal Court, the application for amendment of the writ application was sought for to assail the in actions of the respondent council in the matter of non reservation of vacancies under the said Act of 1995. Such amendment was allowed and the matter was remanded back for hearing.

5. It appears from the writ application that the petitioner initially appointed as unskilled Mazdoor under handicapped quota by the said council on a pay of Rs. 37/- per day for a period of 3 months w.e.f. 10.2.1995 by an order dated 8.2.1995 issued by the Secretary of the said council. By subsequent order dated 23.12.1996 issued by the said council the petitioner's such service was extended till 28.2.1997. subsequently by another order dated 20.11.1997, the said service was further extended to 1.12.1997. Another order of extension of service of the petitioner was issued on 17.2.1998 till afternoon of 31.5.1998 being order dated 17.2.1998. Thereafter petitioner got further extension of service. At this juncture the petitioner moved a writ application being WP. 63 of 1995 praying necessary relief of permanent absorption in the said post as well as for regularization of her service in the post of Clerk. By a judgment and order dated September, 18. 1998 Shyamal Kumar Sen, J. (as His Lordship then was) disposed of the writ application in the following terms:

".....considering all aspects of the matter, it is directed that the respondent authority will absorb the writ petitioner on regular basis in the appropriate category, where she has been working and if she is found suitable in the post of Lower Grade Clerk, she may be absorbed in such post or in other grade commensurate with her qualifications, but Mr. Parekh, learned advocate assures that as to the promotional avenue, the petitioner will not be debarred from her promotion in service.

It is made clear that the petitioner will not be given any strenuous work, since she is a physically handicapped lady....."

6. In terms of the said order passed by Shyamal Kumar Sen. J. (as His Lordship then was) the said council considered the matter of appointment of the petitioner and accordingly regularized her service in the post of workcharged Mazdoor permanently upon fixation of pay scale by an order dated 14.12.1998.

7. From the affidavit in opposition filed by the said council it appears that the petitioner's case was considered for absorption in the post of Clerk but in view of the Recruitment Rules, petitioner was not eligible for promotion to the post of Clerk as she was lacking the qualifications as prescribed under the recruitment rules namely passing 12th standard or equivalent examination from the recognized University/Board for the said post. Accordingly, the said council

opposed the writ application. In the recruitment rules the said post has been termed as selection grade post and for direct recruitment, the qualification prescribed namely "passed in 12th standard or equivalent examination from the University/Board and passing of written examination as to be conducted by the council and should be able to type 30 words per minute in English/Hindi-Desirable-Computer knowledge". The method of recruitment as prescribed namely "90% by direct recruitment and 10% by promotion on the basis of departmental written test". Further in case of recruitment by promotion, the rule prescribes as follows:--

"Promotion from amongst the last grade Group--D employee of the council with 5 years regular service in the grade and possessing the educational qualification applicable to direct recruitment (12th standard passed)."

8. The learned advocate for the petitioner submits that in terms of the earlier judgment of S.K. Sen, J., the case of the petitioner was required to be considered for absorption in the post of clerk but such was not considered and on the contrary petitioner's service was only regularized in the post of work-charged Mazdoor. He further contended that the concerned rule as annexed and relied upon by the said council has yet not been given effect to by proper notification in the Gazette and accordingly consideration of the candidature of the petitioner for absorption in the post of clerk on the basis of the said rule is contrary to the judgment passed by the Division Bench of this Court in the case of V. Ramarao v. Municipal Council and Ors. reported in ILR 2000 AN 1; relying upon the said judgment it is further contended that the petitioner's case was to be considered in terms of the old recruitment rules and the draft rule which has not yet been notified/gazetted cannot be given effect to. It is further contended that in terms of the old recruitment rules the qualification prescribed for the said post of Clerk was 10th standard which the petitioner does possess.

9. The learned advocate for the respondents submit that there was not discrimination made in deciding the case of the petitioner in terms of the judgment passed earlier by this Court. The allegations of the petitioner that other candidates with less qualifications were appointed was denied positively. It is contended that the draft rule as was approved by the said council in the year 1991 was referred to the Lt. Governor for approval and such approval was accorded as per the communication dated 24.6.1998. After approval of such, the draft rule was placed for notification in the gazette in the Andaman and Nicobar Extraordinary Gazette in the year 1998. Hence under the present state of affairs the petitioner is not qualified to be absorbed in the said post in question not only for lacking educational qualifications but also for other aspects of the rule namely the recruitment in the post was not automatic but depends upon qualifying of the petitioner in the written test as would be conducted by the council and on satisfying the desirable qualifications of having knowledge in computer education. For the consideration of petitioner's case as a promote from group-D post in which her service was regularized with effect from 14.12.1998, petitioner

was also not eligible as she did not complete 5 years regular service in the said grade in addition to possessing 12th standard passed qualification as was fixed under the Recruitment Rules. Furthermore, it is contended that in terms of the Act of 1995, the council has already marked the post which would be revealed from the fact that initially petitioner was appointed under "handicapped quota" in the post of Workcharged Mazdoee. It is further contended that even in case of direct recruitment of petitioner by way of absorption in terms of the Act of 1995, the absorption of the petitioner cannot be automatic as under the said Act, posts are only reserved for the disabled candidates and in those circumstances, the petitioner's selection depended upon merit test on satisfaction of the desirable qualifications of having knowledge in computer education.

10. After hearing the learned advocates for the parties, the following points emerge for decision:

(a) Whether by an order dated 18.9.1998 passed in W.P. 63 of 1995 by Shyamal Kumar Sen, J. (as His Lordship then was), petitioner got a right to be absorbed automatically without consideration of her qualifications and whether the council acted in terms of the order or not?

(b) Under the Act of 1995, whether the petitioner would be benefited by automatic absorption as prayed for? Whether non-reservation of post of clerk, under the said Act, has caused prejudice to the petitioner?

(c) Whether the draft Rule of 1991 as approved and Gazetted in the year 1998 would be considered as effective rule in adjudicating the case of the petitioner?

11. With reference to the point (a), it appears from the order passed by Shyamal Kumar Sen, J. (as His Lordship then was) that the said order never vested the petitioner with any right for being absorbed in the post of Clerk without consideration of her qualifications. In the said order, this Court directed in the following terms:

"If she is found suitable in the post of LGC, she may be absorbed in such post or any other grade commensurate with her qualifications".

12. Hence from the said order it is clear that Shyamal Kumar Sen, J., (as His Lordship then was) directed absorption of the petitioner in the post of Clerk or any other similar grade in the event she was found suitable and was qualified for the said post. Hence on a bare reading of the said order it is clear that the absorption of the petitioner in the post of Clerk was never directed to be made as automatic but the same was subject to finding of her suitability in the post in question by the said council and also subject to fulfillment of the qualifications by the petitioner as prescribed for the said post.

13. Hence, the point (a) is answered against the petitioner, holding that "absorption" in the post of clerk was not automatic.

14. So far as the point (b) is concerned namely reservation of post for the

disable candidates in terms of the said Act of 1995, it appears from the initial order of appointment as issued in favour of the petitioner in the post of Workcharged mazdoor, that the council initially appointed her under "handicapped quota". Hence, it is clear, that the petitioner got the benefit of appointment under "handicapped quota" and the said council had already implemented the provisions of the said Act of 1995 regarding reservation of the post for disable candidates. Furthermore, for the post of clerk where 90% is reserved for direct recruitment petitioner would not be entitled to get automatic absorption with the help of the said Act of 1995. since in terms of the said Act, only 1% posts of clerk was required (o be reserved in respect of the candidates similar to petitioner who are suffering from locomotor disability or cerebral palsy. Petitioner is a disable person in terms of locomotor disability, hence out of 90% reservation for direct recruitment. 1% post was required to be ear marked in respect of the candidates having locomotor disability or cerebral palsy. However, in this point, the council has not urged anything and has not filed any opposition of the amended application. But the question is whether for consideration of the matter afresh on the basis of the reservation of the post, the case would be referred back. In the instant case as it appears, petitioner's absorption was not directed to be made automatically but subject to suitability as well as subject to the qualifications. Hence even if any post is reserved in that category, petitioner cannot claim straightway absorption under the reservation mode for "handicapped quota" unless and until the petitioner satisfies the tests namely suitability and the qualifications in terms of the rule as prescribed. Hence even if there was no reservation of any post under "handicapped quota" petitioner has not been prejudiced unless and until petitioner satisfies the condition that she is suitable and qualified for the post in question namely in terms of the recruitment rules as is applicable in this case.

15. Hence the concerned point is decided holding that for non reservation of the post ipso facto did not cause any prejudice to the petitioner as the petitioner's suitability and qualification as prescribed for the post in question were not satisfied in view of determination of point "c" against the petitioner.

The point No. (c) which is vital one for adjudication of this case is now dealt with.

16. It has been contended by the petitioner that Draft rules of 1991 has not yet been notified after the approval of the same by the Lt. Governor and accordingly such draft rule of 1991 cannot be applied in respect of the case of the petitioner. Hence it is contended that since by application of the said rule, petitioner's candidature was rejected only on the ground of lacking qualification of 12th standard pass, necessary prayer has been made for directing the respondent council to adjudicate the case of the petitioner for approval in the post of Clerk with reference to the rule as was existing prior to draft rule 1991 and in terms of the Judgment passed by S.K. Sen J. (as His Lordship then was) as was passed in the earlier writ petition. On the contrary it is submitted by the learned counsel appearing for the council that the draft rule was approved by the Lt. Governor

and such approval was communicated by the Assistant Secretary (LSG) by his communication dated 24.6.1998 to the said Municipal Council. In terms of such approval order of Recruitment rules for Group C and D categories employees of the Municipal council, it appears under Sl. No. 18 of the said communication the said post of Clerk has been mentioned. Further from that communication it appears that the filling of the vacant posts were directed to be made in terms of the recruitment rules as was approved upon pointing out *infer alia*, that the same is in inconformity with the recruitment rules for similar posts in the Government. Since this letter is a vital one the relevant portion is quoted herein below:

No. 21-120/93-LSG ANDAMAN AND NICOBAR ADMINISTRATION
SECRETARIAT Port Blair dated the 24th June, 1998.

Sub: Finalisation of recruitment rules for Group A.B.C & D in respect of Municipal Council, Port Blair--Regarding:

Sir.

I am directed to refer to your letter No. 1821 dated 7th April, 98 on the subject mentioned above and to convey the approval of Hon'ble Lt. Governor for adoption of Recruitment Rules for the following posts in the Municipal Council which are similar to posts in Government Departments.

GROUP "A" & "B"

GROUP "C" & "D"

18. Lower Grade Clerk/Record keeper.

I am, therefore, to request that vacant posts of the above mentioned categories may be filled on the basis of the Recruitment Rules prepared by you which are in conformity with the RR's for similar posts in the Government. Copy of the finally approved RR's is annexed. Action is being taken to frame special Recruitment Rule for the remaining posts for which Recruitment Rule does not exist in the Administration.

Yours faithfully,

Sd/-Assistant Secretary (LSG)"

17. The learned counsel for the respondent-council has further placed a printed book containing 61 pages which starts with the word "The Andaman and Nicobar Extraordinary Gazettee, 1998. Recruitment Rule for the post of Group "C" "D" born on the Establishment of Municipal Council". Under Schedule XI at page 10, the post of Lower Grade Clerk/Record Keeper has been mentioned. The number of post as was sanctioned was 29 upon fixing revised pay scale of Rs. 3050 to 4590/-. Under Sl. No. 11 of the said schedule Method of recruitment has been prescribed by a term "90% by direct recruitment & 10% by promotion on the basis of departmental written test. "Under Sl. No. 8 under the column Educational and other qualification required for direct recruitment it is stated as

follows: "Pass in 12th std., equivalent examination from a recognized university/ board and passing a written examination to be conducted by the council. Should be able to type 30 words per minute in English/Hindi. Desirable--Computer Education." Under Clause 12 of such schedule for recruitment of promotees in the said post it is provided--"promotion from amongst the last grade Group-D employees of the council with 5 years regular service in the grade and possession educational qualification applicable to direct recruitment (12th std. Pass).

18. The relevant portion from the said booklet as produced is quoted hereinbelow:-

SCHEDULE-XI

1. Name of post

Lower Grade Clerk/Record Keeper

2. No. of post subject to variation depend on work load.

29 (Twenty nine)

3. Classification

Group "C" (Ministerial)

4. Scale of Pay (Revised scale)

950-20-1150-EB-25-1500/- 3050-75-3950-80-4590/-

5. Whether selection or Non-selection post

Selection

6. Whether Benefit of added years of Service admissible under the Municipal Council pension rule 1992

Not applicable

7. Age limit for direct recruitment.

Between 18-30 years for male and 18-35 years for female candidate.

8. Educational and other qualification required for.

Pass in 12th std. Or equivalent examination from a recognized University/Board and

Whether age and educational qualification prescribed For direct recruitment will Apply in the case of promotees.

Age not applicable. Educational qualification as prescribed in column 8.

10. Period of probation if any

2 years.

11. Method of Recruitment

12. In case of Recruitment by Pro-motion/deputation/Transfer grade from which Promotion/ deputation/Transfer to be made.

Promotion from amongst the last grade Group-D employees of the Council with 5 years regular service in the grade and possessing educational qualification applicable to direct recruitment (12th Std. Pass).

13. If a DPC exist what is its composition.

DPC consisting of: Chairman

1. Chairperson. M/Council Members

1. Representative of Secretary (Perl) /Secretary (LSG), A&N

Administration,

2, Secretary, M/Council

19. By submitting those documents, it is contended by the learned counsel for the respondent council that the draft rules of 1991 was gazetted in the year 1998 but in absence of noting of any positive date in the booklet aforesaid, he could not submit whether such notification was made prior to 14.12.1998 when the case of the petitioner was considered or thereafter. However, the learned advocate for the petitioner on perusal of those documents expressed view that the draft rule of 1991 got approval of Lt. Governor in terms of the letter dated 24.6.1998 issued by the Assistant Secretary (LSG) but was not notified in the gazette. Under such state of affairs this Court cannot conclude as to whether the draft rule of 1991 was notified prior to 14.12.1998 for having the binding effect regarding consideration of the candidature of the petitioner in the post in question. But another aspect of the matter to be looked into in this case namely prior to the draft rule of 1991 what was the position prevailing in the office of the respondent regarding recruitment rules applicable for selecting candidates in the post of LGC. It has been contended by the learned counsel of the council that prior to draft rule of 1991 which has got approval of the Lt. Governor, there was also a draft rule without any approval of the Lt. Governor and without any notification and at that time there was no Municipal Council but a Municipal Board. Such submission is also not denied by the learned Advocate for the petitioner. Hence, considering this fact, it is clear that prior to draft rule of 1991 which has got approval of the Lt. Governor in 1998 and was notified sometime in the year 1998 after the approval order, there was no draft rules with proper approval of the Lt. Governor but only the draft rule as was framed and constituted by the erstwhile Municipal Board. The learned advocate of the petitioner strongly relied upon the judgment of the Division Bench of this Court i.e. V. Ramarao (supra) to contend that in terms of the judgment of the Division Bench, the case of the present petitioner also to be considered in terms of the

rule as was prevalent prior to 1991 and contended inter alia, that the said judgment has a binding effect on the issue in question. However, a bare reading of the said judgment of the Division Bench it appears that in the said case the present facts and situation namely approval of the draft rule of 1991 by the Lt. Governor and the copy from the Extraordinary Gazette of 1998 was not placed and accordingly, the said Division Bench had no occasion to consider this aspect of the matter.

20. Regarding the binding effect of the aforesaid decision of the Division Bench the principles have now to be considered. It is now a settled legal position that a judgment is a precedent on the point of law as decided with reference to the facts as considered. In the case of *The Regional Manager and Another Vs. Pawan Kumar Dubey*, , it is held by the apex Court that "It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusion in two cases even when the same principles are applied in each case to similar facts." Further now it is well settled that even slight distinction in fact or additional fact may make a lot of difference in decision making process. Reliance may be placed in the judgment in the case of *Kuawin Lethan* reported in (1990) All ER. 1 , the case of *Krishena Kumar and Others Vs. Union of India and others*, , the *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, , *Municipal Corporation of Delhi Vs. Gurnam Kaur*, and *The Regional Manager and Another Vs. Pawan Kumar Dubey*, .

21. Further it is a legal position that a decision is not an authority on the point which was not argued. Reliance may be placed of *Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut*, .

22. The parameter for judging a decision as "per incuriam" also was held in the case of *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, , wherein the Court referred to and relied upon the views of several English judgments as well as the apex Court judgments. Considering those aspects, it is clear that before the Division Bench in the case of *V. Rama Rao (supra)* this point was never urged that the draft rules of 1991 got its approval of the Lt. Governor on 24.6.1998 and such was, notified in the Andaman and Nicobar Extraordinary Gazette in the year 1998. Further before the said Division Bench, the *A&N Islands (Municipal) Regulation 1994* (hereinafter referred to as the said Regulation. 1994 for brevity) was also not placed. Under Regulation 2(1) "Administration" has been defined as Lieutenant Governor of the Andaman and Nicobar Islands appointed by the President under Article 239 of the Constitution of India. Under Regulation 203(1) and (2), the Administrator may subject to the condition of previous publication by notification make rules to carry out the provisions of that Regulation. The relevant provision is set out in extenso for proper adjudication of the case:

"203. (1) The Administrator may prescribe forms for any proceeding of Municipalities, for which he considers that form should provided and may, subject

to the condition of previous publication, by notification make rules to carry out the provisions of the Regulation.

(2) in particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters namely:-

(a) the qualifications requisite in the case of persons appointed by a Municipality to offices requiring professional skill;"

23. Under Regulation 204 Rule has been defined as a Rule made in exercise of powers conferred by this Regulation. Hence, considering this aspect of the matter namely the said Regulation, 1994, the approval of the draft rules. 1991 by the Lt. Governor and the notification of such in the A&N Extraordinary Gazette, it is clear that the factual position regarding applicability of the draft rules, 1991 got a sea change when adjudication of this case is done and the same was never urged before the Division Bench of this Court in V. Rama Rao (supra)'s case and accordingly with due respect to the said Division Bench, it is clear that the said Division Bench got no scope to adjudicate upon the matter about the effective force of Draft rule 1991 in the Present facts and situation as now canvassed and under such state of affairs, the decision as reached by a said Division Bench with due respect can be termed as a decision attracted by "doctrine of per incuriam" and considering the apex Court's Judgment as already dealt with earlier. I am sorry to hold that the said Division Bench judgment of V. Rama Rao (supra) as has been strongly relied upon by the learned advocate for the petitioner cannot be considered as "binding precedent" by this Court.

24. From the aforesaid facts and situation, now it is clear that prior to draft rule 1991 there was only a draft rule prepared by the Municipal Board which is not at all existing at the present moment in view of the repeal of the A&N Island (Administration) Regulation, 1979 under which said draft rule was proposed by the said Regulation of 1994. The said draft rule got no approval of the Lt. Governor in terms of the said Regulation. 1979. In the instant case even if the learned advocate for the respondent council could not submit the positive date of notification but it is clear that sometime in the year 1998, after 24.6.1998, there was a gazette notification of the approved Recruitment Rules. Even if it was notified after 14.12.1998 that is the date when the petitioner's case was considered, still then draft rule of pre-1901 cannot be applied for adjudication of the petitioner's case. The draft rule of pre-1991 was merely a draft rule and the same was never approved whereas the draft rule of 1991 got its approval in June, 1998 and in that view of the matter this Court is of the view, that the draft rule 1991 will be binding rule in respect of the adjudication of the petitioner's case even if it is assumed that same was notified in Gazette after 14.12.1998 when the case of the petitioner was considered by the council.

25. Hence considering that aspect of the matter it is clear that petitioner is not entitled to be absorbed even on reliance of the judgment of Shyamal Kumar Sen, J. (as His Lordship then was). Since by the earlier order Shyamal Kumar Sen, J.

(as His Lordship then was) never directed absorption of petitioner automatically. In terms of the present rule, which got its effect, petitioner is not qualified either as direct recruitee automatically since the qualification is pass of 12th standard exam whereas the petitioner passed 11th standard examination. Furthermore, under the present rule there is a mode of holding written test as well as typing test with desirable qualification of having knowledge in computer education; which also has not been fulfilled by the petitioner. The petitioner's case also cannot be considered as a promotee since the petitioner was never holder of any permanent group D post under the council for 5 years and in that view of the matter consideration of the petitioner's case for her promotional berth is hit by the rule itself. Since the petitioner was not qualified and has no suitability in the post in question, the decision of the Municipal council accordingly, cannot be said as illegal or arbitrary.

26. Hence, considering the entire aspect of the matter, this Court is of the view that the impugned decision of the Municipal Council cannot be said as illegal, arbitrary and/or in violation of any law. Under the said state of affairs this Court is accordingly not inclined to interfere with the impugned decision whereby petitioner was absorbed in the post of work charged Mazdoor permanently and a decision of non absorbing the petitioner in the post of Clerk due to lack of qualification, by exercising the jurisdiction under Article 226 of the Constitution of India exercising the power of judicial review. Hence this writ application is dismissed. But in the facts and circumstances of the case, there will be no order as to costs.