

(2008) 09 DEL CK 0323

In the Delhi High Court

Case No : Writ Petition (C) No. 2069 of 2004 and CM Appls. No's. 1902 of 2004 and 5251 of 2005

Vinay Bhushan Bhatia

APPELLANT

Vs

Bharat Sanchar Nigam Limited

RESPONDENT

Date of Decision : 05-09-2008

Acts Referred:

Citation : (2008) 09 DEL CK 0323

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Party-in-Person, for the Appellant; Sameer Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The question involved in this writ petition is whether the Respondent Bharat Sanchar Nigam Limited (BSNL) has acted arbitrarily or unreasonably for fixing the maximum qualifying age limit for the post of Director General Manager (Law) [DGM (Law)] as 50 years.

2. The Petitioner who raises this question in the present petition joined the Department of Telecommunication (DOT), Government of India on 26th March 1973. He obtained a law degree in July 1988. He was selected for the post of Assistant Director, General (Vigilance Training) in the DOT in May 1993. He secured an LLM degree from Delhi University in July 1993 and was conferred the Ph.D in Law by the same University on 31st December 1998.

3. On 28th February 2000 the Petitioner was appointed as Deputy Legal Advisor in an ex cadre post in the scale of Rs. 12,000/- to Rs. 16,500/- in the DOT. On 1st October 2000 the DOT was corporatized with the formation of the BSNL. According to the Petitioner, his services were requisitioned for the newly constituted BSNL. On 10th July 2001 he submitted his application to the Chairman and Managing Director (CMD), BSNL being appointed in the BSNL for a

period of two years was approved by the Director (HRD) and forwarded to the Director (Finance).

4. Further according to the petitioner the Secretary DOT in the meanwhile approved the continuation of the Petitioner's appointment in the post of Deputy Legal Advisor in the DOT till 28th February 2002. The Petitioner on 30th November 2001 applied to the DOT seeking voluntary retirement. On 23rd February 2002 he was informed of the approval granted by the Director (Finance) to his appointment in the BSNL. Accordingly on 25th February 2002 he sought to withdraw his notice to the DOT for voluntary retirement. On 28th February 2002 the petitioner was appointed in the BSNL for two years on deputation basis and the post of Deputy Legal Advisor in the DOT was transferred to the BSNL. Simultaneously with effect from 1st March 2002 the post of Deputy Legal Advisor in the DOT was abolished.

5. The version of the Respondent BSNL in reply to these assertions is different. In an affidavit dated 23rd March 2004 the BSNL states that the Petitioner was substantively holding the post of Section Officer (a Group B Post) of the Central Secretariat Cadre in the DOT and is presently holding the post of Under Secretary (in-situ) in the DOT. It is stated that the petitioner made a representation on 30th July 2001 to the CMD, BSNL for appointment as an Advisor in the Legal Cell of BSNL. A request was made to the DOT by the BSNL on 28th February 2002 to make available the services of the Petitioner to the BSNL on deemed deputation basis for a period of two years along with the post of Deputy Legal Advisor existing at that time in the DOT. In response to the above request, the BSNL was informed by the DOT that the post of Deputy Legal Advisor stood already abolished and there was no question therefore of diverting or transferring the said post to the BSNL nor posting of the Petitioner against the said post. According to the BSNL, action was thereafter initiated for creation of a suitable post in the BSNL and the Board of Directors in January 2003 approved the creation of a temporary post of DGM (Law) in the BSNL Corporate Office at New Delhi. It is further stated that for filling up the post of DGM (Law) by transfer or by promotion on immediate absorption basis from amongst the internal Officers of the BSNL, including the Officers posted in the DOT (Headquarter), a circular was issued on 1st May 2003.

6. It is not in dispute that the circular dated 1st May 2003 issued by the BSNL for filling up the post of DGM (Law) by transfer or by promotion on immediate absorption basis did not prescribe an upper age limit for eligibility for appointment to the post. The eligibility conditions stated in the said circular included a degree in Law, five years experience in handling various service as well as legal and legislative matters in a Government Ministry or Department and current experience in the grade of either JAG or an Under Secretary in the pay scale of Rs. 10,000-15,200 on regular or in-situ basis.

7. It is stated that in response to the said circular, only four applications were received. A meeting of the Selection Committee was held on 13th October 2003

to consider these applications. However, the Selection Committee felt that the post of DGM (Law) should be re-advertised so that a wider choice of candidates was available for selection. The Selection Committee had also recommended that there should be an upper age limit of 55 years for applying for the post of DGM (Law).

8. In its affidavit dated 22nd March 2004 the BSNL informed this Court that an upper age limit of 50 years was thereafter prescribed for the post of DGM (Law) on the sole criterion that the person so appointed to such an important post must have sufficient numbers of years of service in hand before superannuation from the service. It is stated that a circular was issued on 13th January 2004 inviting applications to the post of DGM (Law) from amongst the serving officers of BSNL and the last date of such application on 27th February 2004. It was stated that the candidates who had applied earlier pursuant to the said circular would be required to apply afresh, in case they fulfilled the eligibility conditions prescribed for the post.

9. The grievance of the petitioner in these proceedings is that on 1st May 2003 there was an admittedly no upper age limit for the post of DGM (Law). According to him, the Selection Committee which met on 13th October 2003 had in fact adjudged him to be the best candidate. The Selection Committee had recommended an upper age limit of 55 years which if accepted would make the Petitioner eligible for the post of DGM (Law) since he was only 52 years at that time. According to the petitioner, the notings on the file would show that contrary to the recommendation of the Selection Committee, the Director (Finance) proposed that the upper age limit should be 50 years. It is submitted that this age limit was approved only by the CMD and the Director (HR) and not the other three members of the Board of Directors of the BSNL. It is sought to be submitted that the fixing of the upper age limit was done malafide with an ulterior motive in order to ensure that the petitioner somehow does not qualify for the post. The Petitioner also urges mala fides against the CMD.

10. The other submission on behalf of the Petitioner is that the post of DGM (Law) is equivalent to the post of Joint Deputy Director General (Welfare and Sports) [Jt.DDG (WandS)] and Joint Deputy Director General (Departmental Exams) [Jt.DDG (DE)] and since these equivalent posts had an upper age limit of 56 years, the post of DGM (Law) should not be treated any different. By an order dated 22nd November 2004 while issuing Rule, this Court passed the following order:

22.11.2004

Present: Petitioner in person.

Ms. Shalini Kumar for the respondent.

WP(C) 2089/2001

The attention of the petitioner has been drawn to the extracts of the minutes of

7th meeting of the Management Committee of BSNL held on 20th September 2004 By the said decision, the uniform age at 50 years has been fixed for DGM (Law), Jt. DDG (Welfare and Sports) and Jt. DDG (DE) and the representation for having the age of 56 years for Jt. DDG (Welfare and Sports) and Jt. DDG (DE) was not accepted. Petitioner alleges mala fide. He submits that reduction in age from 56 to 50 was brought out to exclude him, who had applied in response to the invitation for selection on 1.5.2003. Petitioner had been adjudged as No. 1 on 13.10.2003. However, on the plea that there were only four candidates and a wider spectrum was required, it was re-circulated. While process of re-circulation was on, respondents arbitrarily and mala fide reduced the age learned Counsel for the respondents refutes this. The matter requires consideration.

Rule. Hearing expedited.

CM 1902/2004

It is not clear whether the selection process that had been initiated while inviting applications on 1.5.2003 has been completed and whether petitioner has been found eligible, since amendment came into effect on 13.1.2004 Let the respondent file a short affidavit within four weeks from today. Renotify on 22.2.2005 for directions.

11. Pursuant to the aforementioned order, the respondent filed an affidavit dated 13th January 2005 in which the proceedings that took place at the Meeting of the Selection Committee on 13th October 2003 are explained thus:

3. In this regard it is submitted that a Meeting of the Selection Committee was held in the BSNL on 13.10.2003 to consider selection to the post of Deputy General Manager (Law) from amongst the candidates who had applied for selection on the basis of the circular dated 1.5.2003.

4. In the said meeting it was recommended by the Committee that the post may be re-circulated to have wider choice of candidates for selection. It was also recommended by the Committee that the proposed eligibility conditions for the post may be got approved from the Management Committee of the Board of Directors of BSNL, before issuing a revised circular.

5. That as no age limit was inadvertently mentioned in the circular issued on 1.5.2003, the Selection Committee also recommended prescribing the age limit while issuing the revised circular.

6. It is pertinent to mention here that the Selection Committee had not at all considered the candidature of the petitioner or any other candidate for selection to the said post in its meeting held on 13.10.2003 and hence the contention of the petitioner that he was selected by the Selection Committee is totally baseless and untrue.

7. That Selection Committee had also recommended that all those who had applied earlier in response to the Circular dated 1.5.2003 should also apply

again, if eligible, and willing as per the revised eligibility conditions.

8. That from the facts stated above it can be seen that the selection process which was initiated in pursuance of the Circular dated 1.5.2003 came to an end with the recommendation of the Selection Committee to re-initiate the process afresh, by re-circulating the post after taking the approval of the competent authority viz., the Management Committee of the Board of Directors, BSNL on the revised eligibility conditions, including the age limit, for selection to the said post.

9. That recommendations of the Selection Committee were considered by the Management Committee of the Board of Directors of BSNL. While approving the said recommendations it was directed by the Management Committee that the age limit for the post of DGM (Law) should be prescribed as 50 years.

10. That after taking the approval of the Management Committee, a fresh circular dated 13.1.2004 was issued by the respondent inviting applications from the eligible candidates for considering selection to the post of DGM (Law). It was clearly mentioned vide para 1(v) of the said circular that all those who had applied earlier in response to the earlier circular dated 1.5.2003 would also be required to apply again, if eligible and willing.

12. Thereafter it is stated in the aforementioned affidavit that although the petitioner's application was considered pursuant to the order of this Court, it was found that he did not fulfill the eligibility condition regarding the maximum age limit of 50 years as he had already crossed the said age limit on 18th January 2001. Accordingly, it has been stated that the petitioner is ineligible for consideration for the post of DGM (Law).

13. The contention of the petitioner that in regard to the other ex cadre posts of Jt. DDG (WandS), Jt. DDG (DE) and Jt. DDG (PR), which were equivalent to the post of DGM (Law), the maximum age limit was 55 years was noticed by this Court in its order dated 29th April 2008 which reads as under:

1. The petitioner has raised two contentions in the present writ petition. Firstly, pursuant to advertisement dated 1st May 2003 the petitioner was selected by the Selection Committee to the post of DGM (Law). This contention is not correct in view of the minutes of the meeting of the Selection Committee dated 13th October 2003. In the said minutes it was recorded that only four applications had been received and the post should be re-circulated for wider publicity.

2. The second contention raised by the petitioner is in respect of maximum age bar. It is the case of the petitioner that this was deliberately done to oust the petitioner and to debar him. He states that at the relevant point of time there were no recruitment rules and the position was fluid, with the management having rights to fix their own eligibility criteria. I may note here that the Selection Committee had recommended upper age limit of 55 years, but Director (Finance) in his note dated 18th December 2003 had recommended reduction of

the maximum age limit to 50 years and the above amendment was approved by CMD/ Board. No reason and justification for the said reduction from 55 years to 50 years has been mentioned.

3. Learned Counsel for the respondent justified maximum age limit of 50 years on the ground that there are four ex cadre posts viz., Joint DDG (Welfare and Sports), Joint DDG (Departmental Exams), Joint DDG (PR) and DGM (Law) and all the four posts have similar criteria i.e. the candidate should be not more than 50 years of age on the date of advertisement. The petitioner states that this is factually incorrect as on 18th December 2003 the maximum age limit prescribed by the management for the post of Joint DDG (Welfare and Sports), Joint DDG (Departmental Exams) and Joint DDG (PR) was 55 years and this was the basis on which the Selection Committee had fixed the upper age limit of 55 years. The respondent will file an affidavit stating the maximum age limit prescribed for the three posts of Joint DDG as on 18th December 2003 when advertisement published inviting applications for these posts as well as the age of the candidates, who were considered by the Selection Committee and appointed to the said posts. The aforesaid affidavit will be filed within a period of three weeks from today.

4. It is made clear that other aspects and contentions raised by learned Counsel for the respondent have not yet been examined by this Court.

14. Pursuant to the aforementioned order a further affidavit has been filed on 17th July 2008 by the BSNL. The position has been clarified thus:

3. The deponent further states that it is incorrect on the part of the petitioner to contend before this Honourable Court that on 18.12.2003 advertisements were published inviting applications for the posts of Jt. DDG (Welfare and Sports), Jt. DDG (Departmental Exms) and Jt. DDG (Public Relations). The correct position is that it was for the first time in the month of March 2004 that Circular inviting applications and prescribing the maximum age limit for the above mentioned three posts was issued by the BSNL. This was done only after the finalization of the recruitment rules. It is respectfully submitted by the deponent that for the post of Jt. DDG (Welfare and Sports) the RRs were issued on 5.3.2004 and the Circular inviting applications for filling up the post was issued on 10.3.2004 For the post of Jt. DDG (PR) the RRs come into effect on 12.3.2004 and circular issued on 12.3.2004 and for the post of Jt. DDG (DE) the RRs were issued on 16.3.2004 and applications were invited on 16.3.2004 and 29.12.2004 Thus, it is a false statement which has been made by the petitioner before this Honourable Court on 29.4.2008 that applications for the above three posts were invited on 18.12.2003.

4. The deponent most respectfully submits that an incorrect and false statement has been made by the petitioner that as on 18.12.2003 the maximum age limit prescribed by the management for the posts of Jt. DDG (Welfare and Sports), Jt. DDG (DE) and Jt. DDG (PR) was 55 years. In the respectful submission of the

deponent, except for the post of Jt. DDG (PR), the prescribed age limit as per the PRs issued by BSNL was 50 years. The circulars inviting applications for filling up the posts of Jt. DDG (Welfare and Sports) and Jt. DDG (DE) issued on 10.3.2004, 16.3.2004 and 29.12.2004 clearly prescribe the maximum age limit as 50 years. As the upper age limit for the post of Jt. DDG (PR) was different, in order to maintain uniformity in the selection process and maximum age limit, the Management Committee of the BSNL in its meeting held on 20.9.2004 decided that the maximum age limit for all the posts, inter alia, Jt. DDG (Welfare and Sports), Jt. DDG (PR), Jt. DDG (DE) and DGM (Law) would be 50 years.

5. The deponent further most respectfully submits that neither any meeting of the Selection Committee for filling up the posts of Jt. DDG (Welfare and Sports) and Jt. DDG (DE) was held nor any selection to these posts has till date been made by BSNL. For the post of Jt. DDG (PR), the same was filled on the basis of applications invited by the circular dated 12.3.2004 and a candidate Shri S.K. Sinha, aged 44 years, has since been selected and appointed to the said post.

15. From the aforementioned clarification of the BSNL the factual position that emerges is that there was no upper age limit for the DGM (Law) at the time the circular dated 10th May 2003 was issued. Pursuant to the said circular four candidates including the Petitioner had applied. These applications were considered by the Selection Committee. However, the Selection Committee did not actually select persons at its meeting and instead recommended that a wider choice of candidates may be made available through a fresh advertisement. However, the Selection Committee recommended an upper age limit of 55 years for the post. The BSNL after considering the recommendation of the Selection Committee decided to prescribe a maximum qualifying age of 50 years for the post of DGM (Law). The upper age limit for the Jt. DDG (Welfare and Sports), Jt. DDG (Departmental Exams) and Jt. DDG (Public Relations) was subsequently reduced to 50 years pursuant to a decision dated 20th September 2004 by the Management Committee of the BSNL. Therefore, it is wholly incorrect on the part of the Petitioner to contend that the upper age limit for the DGM (Law) which is equivalent to the Jt. DDG was 55 years at any point. As regards the Jt. DDG (PR), the said post has been filled up by Shri S.K. Sinha, aged 44 years. The posts of Jt. DDG (Welfare and Sports) and Jt. DDG (DE) have not been filled up since no selection was made. The DGM (Law) post has also not been filled up.

16. The Petitioner who appears in person first submits that the Selection Committee in its meeting held on 13th October 2003 had in fact adjudged him to be the best candidate. The Petitioner sought to place reliance on the minutes of the Selection Committee and notes on file prepared by the officers of the BSNL for the meeting of the Selection Committee. The CSS Section notes pertaining to the convening of the Selection Committee Meeting in response to Circular 1.5.2003 notes that Dr. V.B. Bhatia, the petitioner, who was an Under Secretary (in-situ) in the DOT was on long leave with effect from 1.3.2002. It proceeds to state that Dr. Bhatia fulfills all the aforementioned eligibility qualifications and

also had the experience of functioning as Dy. L.A. (on deputation) in DOT for a period of two years from 28.2.2000 to 28.2.2002. This is only a note prepared by the CSS Section for the Selection Committee. This is certainly not the minutes of the meeting of the Selection Committee. A reference has also been made to 122 C stating that the Petitioner was at Sl. No. 1 in the Tabulation of Candidates for Selection Committee. This again is unhelpful in substantiating the plea of the petitioner. The result is that there is nothing on record to show that the Selection Committee had in fact adjudged the petitioner to be the best among those who applied for the post of DGM (Law). All that can be seen from the notes on file is that in the note sent to the Selection Committee, it has been mentioned that the petitioner fulfills the eligibility requirements. There is nothing brought on record by the petitioner to contradict the averment made by the BSNL on affidavit that the Selection Committee did not take any decision as to the selected candidate. It merely recommended that the post may be advertised afresh to enable a wider choice of candidates. Therefore this Court has no hesitation in rejecting the main submission of the petitioner that he was adjudged to be the best among those who applied for the post of DGM (Law).

17. It is then contended by the petitioner that recommendation of the Selection Committee was that the maximum age limit of 55 years may be prescribed for DGM (Law) and that contrary thereto the Director (Finance) as concurred with by the CMD and the Director (Operations), fixed the age limit as 50 years. It is stated that only three of the six members of the Board have concurred with the aforementioned recommendation and therefore, the decision was invalid.

18. The extracted portion of the aforementioned affidavit dated 17th July 2008 filed by the BSNL indicates otherwise. This Court finds nothing arbitrary in the decision prescribing the maximum age limit for the post of DGM (Law) is 50 years. The rationale that the incumbent ought to have a large number of years of service to streamline the work of the legal department and therefore, a lower age limit is required to be stipulated, cannot be termed as arbitrary or irrational. The assertion of the petitioner that the other equivalent posts have a higher qualifying age of 55 years also stands disproved by the affidavit of the BSNL.

19. It is then sought to be contended by the petitioner that admittedly on the date of the circular dated 1st May 2003 there was no upper age limit and that since the said post is meant to be filled up by absorption the Government of India Notification dated 17th November 1992 would apply. In order to appreciate this contention the said notification is set out in detail, as under:

Deputation should be restricted to officers below 56 years of age The Recruitment Rules in respect of a number of posts provide for appointment to the post on deputation (including short-term contract)/ transfer. The existing instructions relating to cases where this method of recruitment is provided do not provide for any upper age limit for eligibility for appointment by deputation (including short-term contract)/ transfer. This sometimes results in appointment of persons who are left with very short service before retirement. It is desirable

that appointments of such persons are avoided as during this short span they would be unable to contribute effectively to the organization where they are appointed.

2. The matter has, therefore, been examined in consultation with the UPSC and it has been decided that the maximum age limit for appointment by deputation (including short-term contract) and absorption shall be not exceeding 56 years as on the closing date of receipt of applications by the UPSC or the Ministry/ Department/ Office, as the case may be. This fact should, therefore, be clearly mentioned in the circular inviting applications for filling up vacancies by this method of recruitment.

20. The above circular is applicable for appointment to the post by deputation/ transfer or promotion on immediate absorption basis. Secondly, the aforementioned notification only shows that the maximum age limit shall be not exceeding 56 years. This does not mean that no lower qualifying age can be prescribed. Thirdly this notification would apply if in fact no selection has taken place pursuant to the circular dated 1st May 2003. The question of the applicability of the circular requires to be considered only in the eventuality that no selection takes place. Since the post was directed to be advertised afresh, the Government's notification dated 17th November 1992 could not help the petitioner at all.

21. The question as to what should be appropriate maximum age limit for any post is best left to be decided by the authority concerned. The Court will not interfere with that decision unless it is shown to be perverse or mala fide. The petitioner has not brought on record anything worthwhile to substantiate any such allegation of mala fides. No fault can be found with the decision of the BSNL to prescribe the maximum qualifying age for the post of DGM (Law) as 50 years. The admitted position is that the post of DGM (Law) has not been filled up till date particularly in view of the pendency of the writ petition. There is therefore no case made out that any candidate has been favoured to the detriment of the petitioner.

22. In the circumstances, this Court does not find any merit in the writ petition and it is dismissed as such. The interim order stands vacated. The pending applications also stand dismissed.