

DELHI SUBORDINATE SERVICES SELECTION BOARD

v.

PRAVEEN KUMAR

(Civil Appeal No. 10824 of 2016)

NOVEMBER 11, 2016

[A. K. SIKRI AND R. BANUMATHI, JJ.]

Service Law:

Recruitment – Eligibility – Age limit – Appellant board issued advertisement for the post of Teacher (Primary) in Municipal Corporation of Delhi ('MCD') schools – As per advertisement, the age limit for candidates for the post of Teacher was 20-27 years – When the final result of selected candidates was published in public domain, respondent's name also appeared declaring him 'not eligible' and the reason for ineligibility was 'over age' – Following the judgment of Delhi High Court in Sachin Gupta case, the Central Administrative Tribunal ('CAT') as well as High Court directed the Appellant board to give age relaxation to the respondent – On appeal, held: It is the employer's prerogative to decide the age limit and academic suitability of candidates which they wish to employ and so long as the same are not contradictory to the academic eligibility as prescribed by the NCTE Act, any challenge to the same, merely because it renders some candidates ineligible, ought to be rejected – On facts, High Court's judgment in Sachin Gupta's case cannot be applicable for all times, as that was one time relaxation given for the examination which was conducted in the year 2008, in order to ameliorate the hardship – On contrary, respondent applied for the post pursuant to the advertisement published in the year 2009 – Therefore, the judgment of High Court as well as of CAT set aside.

Allowing the appeal, the Court

HELD: 1. It is the employer's prerogative to decide the age limit and academic suitability of candidates which they wish to employ and so long as the same are not contradictory to the academic eligibility as prescribed by the NCTE Act, any challenge to the same, merely because it renders some candidates ineligible, ought to be rejected. Fixing of such age limit for a

A given post is a matter of policy. [Para 9] [152-G-H; 153-A]

2.1. In the judgment passed by the Delhi High Court in Sachin Gupta case, after rejecting the contentions on merits and upholding the validity of the Recruitment Rules, the Court went into the issue of hardship because of sudden reduction in the upper age limit and only on that ground one time relaxation was given to the petitioners in the said petition. A direction was given to permit all those candidates who had completed the ETE course either in the year 2006 or 2007 or 2008 to appear in the examination. Thus, this was one time relaxation given for the examination which was to be conducted in the year 2008, in order to ameliorate the hardship. [Para 10] [153-A-C]

2.2. On perusal of the contours and scope of the judgment and directions, it becomes abundantly clear that the said judgment of the High Court in Sachin Gupta's case cannot be made applicable for all times. The respondent was not the candidate in the recruitment to the said post in the year 2008. On the contrary, he applied for the post pursuant to the advertisement published in the year 2009. In the impugned judgment the High Court has failed to consider the aforesaid analysis of its earlier judgment in Sachin Gupta's case. [Para 11] [154-C-E]

E *Union of India & Ors. v. Shivbachan Rai* 2001 (9) SCC 356 – relied on.

Sachin Gupta v. DSSSB & Ors. (decided on 28.08.2008 by Delhi High Court) – held inapplicable.

F Case Law Reference

2001 (9) SCC 356 relied on Para 9

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10824 of 2016.

G From the Judgment and Order dated 20.07.2016 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 3104 of 2016.

Chander Uday Singh, Ajit Kumar Sinha, Sr. Advs., Chirag M. Shroff, Rishi Kumar Singh Gautam, Vaibhav C., Ms. Neha Sangwan, R. K. Rathore, B. K. Prasad, D. S. Mehra, Advs. for the Appellant.

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Ashwani Bhardwaj, Amit Kumar, Advs. for the Respondent. A

The following Judgment of the Court was delivered

J U D G M E N T

1. Heard learned counsel appearing for the parties.

2. Leave granted. B

3. The Delhi Subordinate Services Selection Board (hereinafter referred to as the 'Appellant Board') seeks to impugn the legality of the judgment and order dated 20.07.2016 passed by the High Court of Delhi in Writ Petition No. 3104 of 2016 whereby the High Court has affirmed the order of the Central Administrative Tribunal (CAT) which directed the Appellant Board to consider the candidature of the respondent for selection and appointment as Teacher (Primary) in MCD Schools by giving him age relaxation upto 32 years, provided he does not exceed the upper age limit of 32 years as on the cutoff date, i.e. 15.01.2010, and he fulfills all other eligibility conditions as stipulated in the advertisement. C

4. The facts giving rise to filing of this appeal can be summarized as under: D

5. The Appellant Board has been incorporated with the purpose of recruiting competent individuals by conducting written tests, personal interviews etc. for the user departments. In the present case, on the request of the Municipal Corporation of Delhi (MCD), an advertisement for the post of Teacher (Primary) in MCD Schools, along with other posts, was published on 07.11.2009 by the Appellant Board. As per the advertisement, the age limit for candidates for the post of Teacher (Primary) was 20-27 years and relaxations were applicable as per rules. Subsequently, the Appellant Board issued addendum of advertisement on 13.09.2011 informing that pursuant to the directions of the CAT dated 20.07.2010, the Recruitment Rules for the said post have been modified by the MCD and the cutoff date was stated to be 15.01.2010 for calculating the age limit. The Appellant Board prepared the Marks List of 20,014 candidates and uploaded the same on its website on 08.07.2014. On the basis of the Marks List, the MCD, being the user department, approved the checklist as per Recruitment Rules and classified all cases as provisionally selected. Final result was published in public domain on 05.12.2014, in respect of candidates being selected, rejected or whose candidature was kept pending while mentioning the reason thereof. The E
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- A Appellant Board also published the names of ineligible candidates wherein the respondent's name also appeared, declaring him as 'not eligible' and the reason for his ineligibility was mentioned as 'over age'.

6. In the instant case, the respondent claimed eligibility before the CAT by filing an Original Application for the post of Teacher (Primary) in the MCD Schools challenging the reject notice dated 05.12.2014. The respondent herein sought relief from the Courts below relying upon the judgment of the Delhi High Court in the case of Sachin Gupta vs. DSSSB & Ors. decided on 28.08.2008. Following the said judgment, the CAT as well as the High Court directed the Appellant Board to give age relaxation to the respondent. The Appellant Board, being aggrieved by the impugned order dated 20.07.2016 passed by the High Court, is before us in this appeal.

7. If one goes strictly by the eligibility conditions stipulated in the advertisement or the Rules for recruitment to the post of Teacher (Primary), it cannot be disputed that the upper age limit for consideration to appointment to the aforesaid post is 27 years. It means that any person who has attained the age of 27 years renders himself/herself ineligible to apply for the said post. Notwithstanding the same, benefit of age relaxation was given to the respondent herein relying upon the judgment of Delhi High Court in Sachin Gupta's case. Therefore, the first question for consideration is as to whether that judgment can be made applicable in the case of the respondent as well.

8. A copy of the said judgment dated 28.08.2008 passed in Sachin Gupta's case was produced before us and we have gone through it. On going through this judgment, one finds that, in that case, challenge was made to the Notification dated 13.07.2007, vide which Recruitment Rules for the appointment to the post of Assistant Teacher (Primary) in the Government of NCT, Delhi or Municipal Corporation of Delhi, as being unconstitutional, illegal and arbitrary. These rules were promulgated by exercising the power by virtue of proviso to Article 309 of the Constitution. Insofar as the Government of NCT, Delhi is concerned, it exercised power under Section 98 read with Section 480(2) of the Delhi Municipal Corporation Act, 1957, qua MCD. Vide these rules minimum and maximum eligible age for the candidates to the said post was fixed at 20-27 years respectively. However, before the promulgation of these Rules, as per the earlier Rules the upper age limit was 32 years for male candidates and 42 years for female candidates. The main ground of the

challenge was that by notification of such Rules petitioners therein had lost their chance as there was legitimate expectation given to them that they would be eligible till the age of 32 years. It was argued that the prospectus of the two years Elementary Teachers Education course expressly professed that it was “*carefully designed to prepare teachers at elementary level in Delhi*” and contained a minimum and maximum age of enrollment as 17 and 30 years respectively, thereby representing that aspirants between 19 to 32 years would be eligible for appointment to the post of teachers in Delhi. The High Court rejected the aforesaid contention and even other contentions raised by the petitioners. It was further held that the Rules were statutory and had legislative character and such Rules could not be challenged on the ground of mala fides. It was also held that the doctrine of legitimate expectation has no application. Following portion of the judgment of the High Court discussing these aspects is worth a mention and the same is re-produced as under:

“45. Since the impugned RRs have been notified by the MCD and Government of NCT of Delhi by virtue of power conferred under Section 98 of DMC Act and by virtue of proviso to Article 309 of the Constitution respectively, we are of the view that the impugned RRs are statutory and legislative in character. In V.K. Sood Vs. Secretary, Civil Aviation & Ors. Reported in (1993) Supp 3 SCC 9 the Apex Court recognized this legal position when it held:-

“3.....It would thus be clear that the rules made by the President or authorized person under proviso to Article 309 are subject to any law made by the Parliament and the power includes rules regulating the recruitment and the conditions of service or post. They are statutory and legislative in character. The statutory rules thus made are subject to the law that may be made by the Parliament.....”

(emphasis supplied)

46. It is further settled law that the courts must approach subordinate legislative instruments with considerable amount of caution. Presumption of constitutionality and reasonableness ordinarily attached to legislative enactment,

A applies to statutory rules also. In P.V. Mani & Ors. Vs. Union of India reported in AIR 1986 Kerala 86 a Full Bench of Kerala High Court observed as under:-

B “....It is therefore needless to add that the Courts shall approach subordinate legislative instruments with considerable amount of caution and examination for absence of competence or reasonableness or fairness and other invalidating circumstances with almost the same standards as legislative enactments are dealt with by courts. The presumption of constitutionality, competence and reasonableness ordinarily attaches to such instruments just as much as to legislative enactments, as is evident from the following observations from “Administrative Agencies and the Courts” by Cooper:-

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D “ Where the legislature has clearly delegated such authority, the only issue that can normally be raised as to the validity of the rule concern the question whether it is ultra vires as exceeding the scope of the authority delegated, and whether it is violative of due process guarantees. These issues are not often presented and accordingly such regulations are normally treated on the same basis as legislative acts.

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It is not that such instruments are absolutely immune from attacks. But such attacks should be considered only on production of prima facie proof as to such invalidating circumstances. The Court shall not assume that a subordinate legislative instruments is invalid for absence of competence or bona fides or fairness or reasonableness and cast the negative burden on the rule-making authority. It should be just the other way; the person who challenges the vires of a rule has to prove his challenge just as much as a person who challenges a legislative enactment. If he fails in such attempt the challenge can only be thrown out.....”

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(emphasis supplied)

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47. In *Khoday Distilleries Ltd. v. State of Karnataka* reported in (1996) 10 SCC 304 para 13 it has been held that the test of the arbitrariness applicable to the delegated legislation is different from the one applicable to executive actions. The relevant portion of the said judgment is reproduced for ready reference:-

“13. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1)(g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of *Indian Express Newspaper (Bombay) (P) Ltd. V. Union of India* (SCR at p.243) this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; “unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary”. Drawing a comparison between the law in England in India, the Court further observed that in England the judges would say, “Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires”. In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it

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A would not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.”

B 48. Further, as the Rules are legislative in character they cannot be challenged on the grounds of malafides. In Capt. B.D. Gupta V. State of U.P. reported in 1991 Supp(1) SCC 1 para 1 of the Supreme Court held:-

C “17....If the Rules were framed for making regular appointments in the Civil Aviation Department, there was no reason why they should have been confined only to three posts which included the post of Director. Secondly, he pointed out that whereas the post of Director was not a promotional one earlier and was, therefore, open to external candidates as well, it was made promotional to suit Captain Singh. These circumstances according to us do not prove the mala fides. Admittedly, the Rules are made under Article 309 of the Constitution of India and are, therefore, a piece of legislation. It is well settled that no legislation can be challenged on the ground of mala fides.....”

E 49. In our opinion, the doctrine of legitimate expectation, referred to by the petitioners, has no application to the present case as the Respondents have never represented or held out to any student entering into an ETE course, that he would be given employment with the Respondents. In fact, ETE is a professional training course and the candidates securing such degrees are free to pursue other career options all over India with other agencies as well. The course does not confer any vested rights or employment with either the Government or MCD. In view of the absence of any representation regarding employability with the Respondents alone upon completion of a qualifying course, the petitioners’ plea of legitimate expectation merits no acceptance.”

G 9. The High Court also accepted the well recognized principle that it is the employer’s prerogative to decide the age limit and academic suitability of candidates which they wish to employ and so long as the same are not contradictory to the academic eligibility as prescribed by

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the NCTE Act, any challenge to the same, merely because it renders some candidates ineligible, ought to be rejected. Fixing of such age limit for a given post is a matter of policy as held by this Court in Union of India & Ors. vs. Shivbachan Rai reported in 2001 (9) SCC 356. A

10. After rejecting the contentions on merits and upholding the validity of the Recruitment Rules, the Court went into the issue of hardship because of sudden reduction in the upper age limit and only on that ground one time relaxation was given to the petitioners in the said petition. A direction was given to permit all those candidates who had completed the ETE course either in the year 2006 or 2007 or 2008 to appear in the examination. Thus, this was one time relaxation given for the examination which was to be conducted in the year 2008, in order to ameliorate the hardship. B
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11. Once, we understand the contours and scope of the judgment and directions, it becomes abundantly clear that the said judgment of the High Court in Sachin Gupta's case cannot be made applicable for all times. The respondent herein was not the candidate in the recruitment to the said post in the year 2008. On the contrary, he applied for the post pursuant to the advertisement published in the year 2009. In the impugned judgment the High Court has failed to consider the aforesaid analysis of its earlier judgment in Sachin Gupta's case. D

12. We, therefore, allow this appeal and set aside the judgment of the High Court as also that of the CAT. E