
(2006) 09 DEL CK 0008

Delhi High Court

Case No: LPA. No. 2233 of 2005 with CM 14395 of 2005 (stay) and LPA. No. 2083 of 2005

Municipal Corporation
of Delhi Slum and J.J.
Department

APPELLANT

Vs

Ashok Kumar

Ashok Kumar Vs Slum
and J.J. Department
(MCD)

RESPONDENT

Date of Decision: Sept. 18, 2006

Citation: (2006) 91 DRJ 215

Hon'ble Judges: Mukul Mudgal, J; Dr. S. Muralidhar, J

Bench: Division Bench

Advocate: Vinay Sabharwal, in LPA. No. 2233 of 2005 and CM 14395/2005stay, P.R. Agrawal, Anju Bhushan and Neeru Sharma, in LPA No. 2083 of 2005, Sushmita Lal, Malabiha Sarkar and Shyam Narain, in LPA Nos. 1874, 1875, 1876 and 1877 of 2005 and V.K. Shali, in LPA No. 2031 of 200, for the Appellant; P.R. Agrawal, Anju Bhushan and Neeru Sharma, in LPA. No. 2233 of 2005 and CM 14395/2005(stay), Vinay Sabharwal, for Respondents 1-2, Umesh Sharma and Sunita Bhardwaj for Respondents 3-14 in LPA Nos. 1874, 1875, 1876, 1877, 2031 and 2083 of 2005, for the Respondent

Judgement

S. Muralidhar, J.

These 7 appeals are directed against the impugned order dated 11.8.2005 passed by the learned Single Judge in Writ Petition (Civil) No. 242 of 2003. LPA. No. 2233/2005 filed by the Municipal Corporation of Delhi ("MCD") is taken as the lead case.

2. The dispute in the present case concerns the appointments to the post of Head Clerk in the Slum and JJ Department of the MCD. This post is to be filled up by promotion from the post of Upper Division Clerk ("UDC") by way of a departmental examination.

3. The Slum and JJ Department of the MCD was earlier under the Delhi Development Authority ("DDA"). At that point in time the departmental examination had two papers. Paper No. 1 had two parts carrying a total of 150 marks. Part I was on General English/Hindi carrying 100 marks and Part II on "general awareness/general knowledge" carrying 50 marks. Likewise, there were two parts to Paper 2; Part I on Management and Disposal of Land and Part II on "Service Regulations" carried 75 marks each. Paper No. 3 on "Computer Literacy" carried 100 marks.

4. By an order dated 26.8.1992 issued by the Government of India, Ministry of Urban Development and an order dated 1.9.1992 issued by the Government of NCT of Delhi, the Slum and JJ Department was transferred from the DDA to the MCD. For the first time thereafter, on 18.4.2001, a Circular was issued by the MCD announcing the departmental promotional examination to be held for promotion to 11 vacant posts of Head Clerk. The UDCs who figured at positions 1 to 11 in the merit list, after having cleared the exam, included the appellants in five of the appeals here. They were declared successful on the basis of the total aggregate marks secured by them in the examination.

5. The Respondent No. 1 in the appeal by the MCD, Shri Ashok Kumar, was placed at the 12th position and was accordingly not promoted to the post of Head Clerk. He made a representation on 29.1.2002 to the Additional Commissioner, Slum and JJ Department (MCD) claiming that he had obtained the pass marks in all the 4 papers whereas the 11 selected candidates have been promoted as Head Clerks on the basis of the total aggregate marks despite four of them not having passed in all the four papers, i.e., they have not obtained at least 33 marks in each and every paper. On 6.9.2002 Shri Ravinder Kumar who was at the 16th position in the merit list was promoted as Head Clerk.

6. Thereupon, the Respondent No. 1 filed Writ Petition (Civil) No. 242 of 2003 in this Court praying for the following reliefs:

[i] to issue direction to the respondents No. 1 and 2 to promote the Petitioner from the date when his juniors have been promoted as Head Clerk;

[ii] Call for the records of the case lying with the Respondent No. 1 at the time of hearing of this petition;

7. The specific case of the Respondent No. 1 in his aforementioned writ petition in paras 13, 14 and 18 may be first noticed:

13. That the Respondent No. 1 displayed the Merit List of Head Clerks on Notice Board in the month of December, 2001 after giving promotion to the Respondent Nos. 3 to 14 way back on 5.7.2001. Where the Petitioner came to know that in one paper he has got 38% marks and other that papers he got more than 50%.

14. That on 29.1.2002 the Petitioner made representation before the concerned authorities. On the ground that he obtained 38% in one paper out of four papers being 2% less than the 40% of qualifying marks whereas four other persons who obtained much below the qualifying marks of 40% in one paper were given promotion as Head Clerk is highly discriminatory, arbitrary, illegal and unjustified. A copy of the letter dated 29.1.2002 is being filed herewith vide Annexure-P-5. ½

18. That the submission of the Petitioner is that the respondent No. 1 has deliberately not granted 2% grace marks in one paper subject just to obtain the qualifying marks of 40% marks in granting him promotion as Head Clerk is arbitrary, illegal and unjustified.

8. Therefore, the specific case of the Respondent No. 1 in the writ petition was that he had got 38 per cent marks in one paper and more than 50 per cent in the other papers. Further, his case was that if he were to be given two grace marks in one paper, he would have passed in all the four papers whereas the other candidates had not got pass marks in each of the papers. The Respondent No. 1 asserted in para 10 of the writ petition that a candidate was required to obtain 40 per cent marks in each paper and 45 per cent in the aggregate.

9. In the counter affidavit filed before the learned Single Judge, the MCD explained that Shri Ravinder Kumar had been promoted by virtue of his being a Scheduled Caste candidate on the basis of the reserved Point No. 7 in the roster and, Therefore, the said promotion, was valid notwithstanding the fact that Shri Ravinder Kumar was placed at the 16th position. As regards the promotion of the other candidates who figured at the 1st to 11th positions above the Respondent No. 1, the MCD stated as under:

...The candidates who were placed higher in the merit list than the Petitioner, had obtained higher marks in aggregate in all the subjects, than the Petitioner. It is, Therefore, wrong to allege that by not promoting the Petitioner as Head Clerk the Respondent No. 1 has acted discriminatory, arbitrarily or illegally, as alleged or at all

However, in para 10 of the counter affidavit, it was stated as under:

10. In reply to para 10, it is not disputed that a candidate was required to obtain 40% marks in each paper and 45% in aggregate. It is however, further submitted that the Departmental Promotion Examination Committee prepared panel of merit by adopting criteria of merit on the basis of aggregate marks obtained in all the subjects, which was a real reflection of overall merit in all the subjects. It is submitted that the said criteria being the most fair and reasonable, is not liable to be impeached on any ground whatsoever

10. The learned Single Judge proceeded on the basis that the statement made in para 10 of the counter affidavit filed by the MCD, as extracted hereinabove, represented the correct position. The learned Single Judge also referred to a note dated 29.6.2001 prepared by the Assistant Director (Recruitment) in which it was recorded that the pattern followed earlier when the examinations were conducted by the DDA required obtaining 40

per cent marks in each paper and 45 per cent in the aggregate. In the said note, the officer observed "this issue needs clarification, before the result is made public and promotion orders are issued." However, as noticed by the learned Single Judge, the Director took the view that the marks obtained in individual papers need not be determinative and this view was concurred with by the Superintending Engineer (QC). This view was based on the practice followed in the exams conducted by the Union Public Service Commission ("UPSC"). The learned Single Judge concluded that the view taken by the Director and the Superintending Engineer was not based on any provision, rule or circular. The learned Single Judge then concluded as under:

...The norm which existed, in the form of a practice, was the requirement of candidates having to qualify with 40% in each paper. The MCD did not formulate its own norm. The decision to deviate, without formulation of a fresh policy or norm, was taken at the fag end of the process, when the select list had to be drawn up. The rationale for that decision is an assumption, viz that the UPSC follows such a pattern, and that the total marks are relevant. These in my considered opinion, betray both arbitrariness, as well as non-application of mind. Arbitrariness, because the existing norm in the form of a practice was never changed; a decision was taken to discard it at the end of the process. That is opposed to well settled law that the norm governing selections are rules or norms prevailing at the commencement of the recruitment process. Non-application of mind, since the competent authority nowhere discloses the source of the impression that UPSC follows the pattern of qualifying on the basis of aggregate marks, without insisting upon minimum marks in each paper

11. The learned Single Judge then relied upon the judgment of the Hon"ble Supreme Court in [Director-general, Telecommunication and Another Vs. T.N. Peethambaram](#), and concluded as under:

The pitfalls and palpable absurdity of a mechanical assumption that aggregate marks in a recruitment process is a preferable method of selection, as opposed to a norm where minimum marks in individual papers, and minimum aggregate marks, have been exemplified in the above observations. The facts of this case reveal that such observations are not groundless; at least one candidate secured only 16 marks in Paper no 1, which relates to the Delhi Slum Clearance Act. The department in question for which MCD held the examination is the Slum wing; the candidates were all existing employees, with some knowledge of the enactment. Hence, the rationale, of the respondent MCD, that the aggregate marks was preferable, and individual paper marks were not relevant, is also unsupported by law

12. However, the learned Single Judge declined to give any relief to the Respondent No. 1 herein (the writ petitioner) since he too had not scored 40 per cent marks in one of the papers. The learned Single Judge, however, quashed the appointments of Respondent Nos. 9 to 13 to the writ petition (each of whom has filed an appeal here) as Head Clerks. The writ petition was accordingly partly allowed.

13. The main contention of the appellant MCD before us is that the learned Single Judge proceeded on an erroneous basis that the past practice adopted by the DDA in requiring the candidates for the departmental examination to obtain 40 per cent marks in each of the paper and 45 per cent marks in the aggregate, continued by the MCD. It is urged that after the MCD took over, the pattern had changed and the merit of the candidate was adjudged only on the basis of the aggregate marks.

14. Pursuant to an order dated 1.2.2006 passed in the present appeal, the appellant filed a supplementary affidavit filed on March 4, 2006 explaining that after the transfer of the Slum and JJ Wing from the DDA to the MCD, a separate Departmental Promotion Examination Committee was constituted for conducting the departmental examinations, and a new pattern of examination was brought into effect. Paper No. 1 was bifurcated into two separate question papers. The first question paper was on the subject of "Slum Areas (Improvement and Clearance) Act". The earlier Part I of Paper No. 1, which was prescribed when the DDA conducted the exam, was altogether removed. The paper No. 2 was bifurcated and re-numbered as paper Nos.3 and 4 both carrying 100 marks each. The earlier paper No. 3 on computer literacy was removed altogether.

15. The said affidavit pointed out that a significant change that ushered was that while in the earlier pattern when the DDA was conducting the exam, there was a requirement of obtaining a minimum pass mark in each of the papers. That requirement stood removed and it was enough to get the minimum marks in the aggregate. It was further stated that this is a uniform standard for all the candidates and that Therefore there is no arbitrariness in applying such a uniform standard across the board. It is further submitted that since this was the first time a selection was being held for promotion to the post of Head Clerk in the MCD after the Slum and JJ Wing was transferred from the DDA, there was no question of the continuation of any past practice in the MCD, as erroneously presumed by the learned Single Judge. It is, however, fairly conceded by the learned Counsel for the appellant before us that the true position regarding the changed pattern of examination after taking over the Slum and JJ Wing by the MCD from the DDA was not brought to the notice of the learned Single Judge.

16. The learned Counsel, appearing for the other individual appellants whose selection and promotion to the post of Head Clerk had been quashed by the learned Single Judge, adopted the arguments advanced on behalf of the learned Counsel for the Appellant-MCD.

17. Mr. P.R. Agrawal, the learned Counsel, appearing for Shri Ashok Kumar who was the writ petitioner before the learned Single Judge, countered this argument by pointing out that these facts were not brought to the notice of the learned Single Judge and that what was stated in para 10 of the counter affidavit filed by the MCD before the learned Single Judge, represented the correct picture. He also pointed out that he had also filed a separate appeal being LPA. No. 2083/2005 to the extent that the learned Single Judge had declined to grant any relief to Shri Ashok Kumar. A prayer in this appeal (LPA No.

2083/2005) was that a direction ought to have been issued by the learned Single Judge to the MCD to add two grace marks in one paper in which Shri Ashok Kumar he did not pass. The prayer in the said LPA No. 2083/2005 reads as under:

Set aside the order dated 11th August, 2005 in so far as it does not grant grace marks to the Appellant and promote the Appellant to the post of Head Clerk from the date his juniors have been promoted

18. Upon a consideration of the submissions of the learned Counsel appearing for the parties and after perusing the records of the case, we are of the view that the present appeals by the MCD and the selected candidates ought to be allowed.

19. At the outset, this Court must express its disapproval of the conduct of the appellant MCD in not bringing to the notice of the learned Single Judge, the correct picture in regard to the standard adopted by the Slum and JJ Wing of the MCD in the departmental examination in question. Para 10 of the counter affidavit filed before the learned Single Judge, as extracted above indeed gives an impression that the past practice followed when the DDA conducted the examination, was in fact continued by the MCD as well. It is only pursuant to an order passed by the Division Bench of this Court on 1.2.2006 in this set of appeals that the MCD on 4.3.2006 filed an additional affidavit bringing the correct facts on record. Had these facts been brought to the notice of the learned Single Judge, it is possible that impugned order would have read very different.

20. The facts concerning the merit list prepared by the MCD pursuant to the departmental exam held for the promotion to the post of Head Clerk are not in dispute. Mr. P. R. Agrawal, the learned Counsel, appearing for Ashok Kumar, very fairly states that if one were to proceed only on the basis of the aggregate marks obtained by the candidates in all the papers at the examination, then Shri Ashok Kumar would indeed only figure at Sl. No. 12.

21. Therefore, the only question that requires examination is whether the promotion of the respondents 9 to 13 before the learned Single Judge (each of whom has filed appeals before us), was liable to be quashed only because none of them got 40 per cent marks in each of the papers in the examination.

22. It now transpires that a conscious decision was taken by the MCD to depart from the pattern adopted by the DDA and proceed on the basis of the aggregate marks and not on the basis of the individual marks in each of the papers. This is clear from the affidavit dated 4.3.2006 filed by the MCD before us. It is also reflected in the notes of the Director and the Superintending Engineer which have been referred to by the learned Single Judge. In our view, it is entirely up to an organisation to decide what pattern it wants to adopt in fixing the criterion on the basis on which the merits of individual candidates would be assessed. The limited extent to which such an exercise can be justiciable for the purpose of judicial review is if it is shown to be patently arbitrary or unreasonable and

if it would result in undeserving candidates being selected for promotion. It would have to be shown that the criteria adopted has no nexus to the objective of having the most meritorious candidates promoted to the post of Head Clerk.

23. Applying this test, we are unable to view the criteria adopted by the MCD, of preparing the merit list on the basis of the aggregate marks obtained by the candidates in all the papers as being arbitrary or unreasonable or resulting in any unmeritorious candidate being promoted to the post of Head Clerk. It is not open to the Court to substitute its view as to what will constitute a better criterion as long as the criteria being adopted by the State or an authority of State satisfies the requirement of candidates being chosen for their merit. Also, it requires to be noticed that the criteria being adopted is uniform and there is no selective application of the said criteria to favor one candidate over the other. This being the position, we are unable to agree with the view taken by the learned Single Judge that the criteria adopted by the MCD in the instant case was unsupported by law and suffered from arbitrariness or non-application of mind.

24. We may also observe that Shri Ashok Kumar had gone to the Court essentially claiming the relief for himself as is evident from the prayer in the writ petition, as extracted hereinabove. The learned Single Judge proceeded to quash the selection of Respondents 9 to 13 in the writ petition even while rejecting the only prayer made by the writ petitioner in his writ petition. Clearly the operative direction in the impugned order was beyond the scope of the writ petition. On this ground also, the impugned order of the learned Single Judge requires to be interfered with. The fact that the learned Single Judge travelled beyond the scope of the writ petition is evident in the appeal filed by Shri Ashok Kumar, where he has prayed that the learned Single Judge ought to have directed the MCD to add two grace marks in one of the papers in which he did not pass. We fail to see how the learned Single Judge could have granted such a relief at all. We, Therefore, find no merit whatsoever in the said appeal filed by Shri Ashok Kumar. 25. For all of the above reasons, the impugned order dated 11.8.2005 passed by the learned Single Judge, cannot be sustained and is hereby set aside. LPA. Nos. 2233/2005, 1874/2005, 1875/2005, 1876/2005, 1877/2005, and 2031/2005 are hereby allowed. LPA. No. 2083/2005 filed by Shri Ashok Kumar is hereby dismissed. All applications stand disposed of.