CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

RA No.205/1999 in
OA No.898/1998
with
OA No.2433/1998
MA No.2573/1998

48

New Delhi this the 7th day of May, 2004.

HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

RA No.205/1999 In
OA No.898/1998

Shri Arunesh Awasthi & 4 others

-Applicants

-Versus-

1. The Director of Education,
   Directorate of Education
   Govt. of NCT of Delhi,
   Old Secretariat, Delhi.

2. Lt. Governor
   Govt. of NCT of Delhi
   Raj Niwas, Old Secretariat,
   Delhi.

-Respondents

OA No.2433/1998

G.S. Sharma & 8 Others

-Applicants

Versus

1. Govt. of NCT of Delhi
   through its Chief Secretary,
   5, Sham Nath Marg, Delhi

2. The Director of Education,
   Govt. of NCT of Delhi,
   Old Secretariat, Delhi.

-Respondents

(By Advocate: Shri R.M. Sinha, for applicants
Shri Mohit Madan, proxy for
Mrs. Avnish Ahlawat, for respondents
in OA-898/1998
Shri G.D. Gupta Sr. counsel with
Shri Vijender Nigam, in OA-2433/1998
Shri Anurag Sharma, proxy counsel for
Shri George Paracken, for respondents)

O R D E R

By Mr. Shanker Raju, Member (J):

As identical facts and question of law are involved, RA and OAs are disposed of by this common order.

2. A brief factual matrix is relevant to be reproduced for effective adjudication.

3. Part-time Teachers, i.e, TGTs and PGTs who had been continuing for more than 10 years approached the Apex Court in Writ Petition (Civil) 1350/1990 in S.C. Sharma Vs. Director of Education which was disposed of with the following directions:-

> "This is an application under Article 32 of the Constitution on behalf of some of the part-time teachers said to be 22 in all who have raised objections against their being continued as part-time teachers for more than 8 to 10 years. These teachers are of two categories - Trained Graduates and Post Graduates. After hearing Mr. Ramamurthi for the petitioners, we suggested to Mr. V.C. Mahajan for the respondents that these teachers may be regularised and it is now agreed by counsel for both sides and we dispose of the Writ Petition with the following directions:-
>
> (1) Within three months hence, the respondent-Director of Education shall hold a selection test for these 22 teachers with a view to regularising them.
>
> (2) The question of bar of age shall not be raised against them in view of the fact that they have been already in employment.
>
> (3) Those of them who are found successful at the selection test shall be forthwith regularised and in regard to others, they may be continued in service provided there is temporary vacancy."

4. In pursuance thereof 22 Part Time Teachers who have been regularised by subjecting them to a selection on attainment of qualifying marks of 33% one Daya Nand TGT on securing 33% marks in written test held in 1992 has been regularised. In so far as applicants in OA-898/98 are concerned, they approached the Tribunal through an Association in OA-1879/1994 and by an order dated 31.1.1997 the following directions have been issued:-

50

"Therefore, in the light of the Supreme Court judgement, the respondents ought to consider the applicants also for regularisation in the vacant posts of teachers after holding suitable selection test as they have held in the other cases, with relaxation of age, if necessary, as they are already in employment. In other words, the respondents ought not to discriminate against the applicants, when in all other aspects they fall on all fours with the applicants in Subhash Chandra Sharma's case (supra). The respondents shall hold the selection test for regularisation of the applicants within a period of three months from the date of receipt of a copy of this order and in the meantime the applicants shall be continued on the same terms and conditions. Those who are not successful in the test may be continued in service provided there are vacancies for them."

5. A selection test was held for regularising applicants which was challenged in CP-301/97 which was disposed of on 23.3.1998. Respondents have sought disclosure of the selection process.

6. By an order dated 31.3.1998, applicants have been declared unsuccessful, giving rise to the present OAs.

7. During the course of hearing in OA-898/98 by an order dated 26.11.1998, respondents have been directed to produce copies of the guidelines and policy showing cut off marks, which was complied with on 21.12.98. Applicants' counsel was granted permission to file an additional affidavit.

8. By an order dated 15.4.99 in OA-898/98 up-holding the criteria of fixing cut off marks in the selection, the OA was dismissed.

9. CWP-4101/99 preferred by applicants was dismissed on merit on 14.7.99.

57

10. Applicants filed RA-62/99 in CM-4101/99 before the High Court of Delhi wherein by an order dated 28.5.99 RA was withdrawn with liberty to approach the Tribunal.

11. Accordingly, RA-205/99 was filed by applicants which was dismissed in circulation on 25.10.99.

12. Applicants challenged the orders passed in RA before the High Court of Delhi in CWP-7153/99 and by an order dated 28.1.2003, CWP was allowed with the following directions:-

"We are of the view that learned counsel for the petitioners is quite right in submitting that the cumulative effect of the orders dated 12th October, 1998, 26th November, 1998 and 21st December, 1998 is that the petitioners were given the liberty of raising additional contentions after having inspected the records of the respondents. The petitioners availed of this liberty by filing an additional affidavit in which it was brought out that the respondents did not have any policy for selection based on the written test and that in the absence of any policy, the selection process was vitiated. Taking the background facts into consideration, the Tribunal ought to have permitted the petitioners to challenge the selection process even in the absence of a specific prayer having been made by way of an amendment to the OA. If a contrary view is taken as has been done by the Tribunal it will only mean that the permission given to the petitioners to inspect the records of the respondents and liberty given thereafter to file an additional affidavit becomes merely an exercise in futility. Surely, this could not have been the intention of the Tribunal while passing the orders dated 12th October, 1998, 26th November, 1998 and 21st December, 1998. These orders passed by the Tribunal have to be given some meaning and the only possible interpretation is that the petitioners were given the liberty of bringing on record the selection process and if possible, challenging its legality and validity. As already mentioned above, the petitioners did precisely this.

32

It is not for us to say whether the allegations made by the petitioners are substantiated by them or not but, in any case, the petitioners are entitled to be heard on this aspect of the matter and to contend before the Tribunal that the selection process is vitiated. This opportunity was erroneously not granted to the petitioners by the Tribunal. We are of the view that the Tribunal did not give full effect to its own orders and this resulted in miscarriage of justice in so far as the petitioners are concerned. Consequently, we have no option but to set aside the impugned order dated 29th October, 1999 and we do so. The Writ Petition is allowed but with no order as to costs.

The parties will appear before the Tribunal on 4th March, 2003 for further proceedings."

13. In this backdrop, learned counsel of applicants Shri R.N. Sinha addresses arguments on behalf of applicants in review and stated that the cumulative effect of the orders passed by the Tribunal on 12.10.98, 26.11.98 and 21.12.98 is that the additional contentions have been allowed to be brought on record and would be deemed amendment pertaining to the selection process. Accordingly, it is stated that practically the review has been allowed as the findings of the Tribunal resulted in miscarriage of justice.

14. After the RA is allowed, OA is to be re-opened and the criteria adopted by the respondents is discriminatory, violative of Article 14 & 16 of the Constitution of India. Once, in pursuance of the directions of the Apex Court in S.C. Sharma's case, a past percentage of 33% has been observed to be cut off marks for success in the selection and similarly circumstance have been regularised, change of the criteria treating applicants as distinct class does not pass the test laid down under Article 14 in so far as equality is concerned. In this

manner, the criteria adopted has been assailed with direction to the respondents to regularise applicants on securing minimum qualifying percentage of 33% marks.

15. In OA-2433/98, applicants who are Part-time TGTs and PGTs in different subjects have sought for regularisation and challenged the cut off marks. Relying upon the decision in OA-898/98, the OA was dismissed.

16. Applicants G.S. Sharma, R.K. Pawar and V.K. Gautam being aggrieved with the order have not approached the High Court of Delhi and were not parties to CWP-1516/2002. Learned senior counsel appearing for respondents Shri G.D. Gupta with Shri V. Nigam abandoned the claim of these applicants.

17. Against the order passed in OA-2433/98 on 4.12.2001 CWP preferred by applicants was allowed by the High Court of Delhi on 5.5.2003, setting aside the order of the Tribunal and remanding back the case. The learned senior counsel assails the modified criteria on the ground of hostile discrimination and further stated that being similarly circumstance and forming one class the decision in S.C. Sharma's case operates as a judgment in rem and whatever process and cut off marks had been adopted therein should be applied mutatis mutandis to applicants as well. Treating them as a separate class does not pass the twin test of intelligible differentia and objects sought to be achieved. Accordingly, the action of the respondents offends the principles of equality enshrined under Articles 14 and 16 of the Constitution of India.

18. On the other hand, respondents counsel in OA-898/98 vehemently opposed the contentions and stated that the effect of the decision in CWP-7153/1999 is that the order in review has been set aside. On merits, it is contended that direction of the Apex Court was to hold a selection. The criteria has been laid down which was within the knowledge of the applicants. They had participated in the same and having failed to qualify, they are estopped from challenging the same. Apart from it, it is stated that the result of the written test which consisted of 10 marks for General Knowledge, 25 for teaching aptitude and subject competence was 50 marks. The result of written test was prepared by an autonomous body namely, NCERT. The minimum qualifying marks have been prescribed for both TGTs and PGTs which were adhered to. This was as per the prevalent practice. As the PGTs are recruited for teaching class 11th and 12th, appointment of a below standard Lecturer would be loss to the students. It is further contended that fixing of cut off marks by the executive in selection cannot be interfered by the Tribunal in a judicial review. For this, he relies on the decision of the Apex Court in **C.P. Tiwari Vs. Union of India**, (2002) 6 SCC 127.

19. On careful consideration of the rival contentions of the parties, we propose to first deal with the review application.

20. Admittedly, as for all practical purposes, the additional affidavit has assailed the selection criteria in OA-898/98. The Tribunal's ignorance of its earlier orders dated 12.10.98, 26.11.98 and 21.12.98 resulted in miscarriage of justice. The observations of High Court in

CWP No.7153/99 to the effect that technically the OA was not amended but on additional affidavit the petitioner should not, non-suited on such technical ground in this process, High Court has also taken into consideration the decision of another Division Bench in CW-4101/1999 dated 14.7.99 where the decision in OA-898/98 was upheld on merits. We are of the considered view that the decision rendered in RA has an effect of recalling the order of the Tribunal in OA-498/98. In the doctrine of precedent Rule of sub silentio in so far as ratio decidendi is concerned, is settled when a particular point of law is not consciously determined by the court, that does not form part of the ratio decidendi and is not binding. The same has not to be followed. High Court of Delhi in CWP 7153/99 impliedly applied the aforesaid. The Rule of sub silentio is laid down in the Apex Court in Amrit Das Vs. State of Bihar, (2000) 5 SCC 488. Admittedly, despite challenge to the selection process by way of additional affidavit, which was allowed to be brought on record a deemed amendment has taken effect. The aforesaid has not been considered and no reasons have been recorded on this ground of challenge to non-regularisation of applicants. Accordingly, the earlier decision though affirmed is hit by the doctrine of sub silentio. The observation of the High Court in the Writ Petition (supra) wherein miscarriage of justice has taken place and non-consideration of the grounds raised is a valid ground for review. In the light of decision of the Apex Court in Shanker A. Mandal Vs. State of Bihar 2003 (2) SCSLJ 35, we allow the RA and recall our orders dated 15.4.99 in OA-898/98 and allow the deemed amendment bringing in challenge to the selection process to be raised by the applicants.

56

21. In so far as merit is concerned, the genesis of regularisation to part-time TGTs and PGTs has emanated from the decision of the Apex Court in Subhash Chand's case. Applicants are though similarly circumstance but non-parties to the Writ Petition before the Apex Court. A non-party cannot be denied the benefit of a judgment if identically situated and forms a class. The principles of equality were applied. The decision of the Apex Court though pertained to 22 Teachers in so far as ratio decidendi is concerned, a judgement in rem having uniform application to the similarly circumstance. One should not be dragged to file separate cases which would add to the multiplicity and financial burden on the State. Suo moto exercise should be undertaken by the respondents to give similar treatment to the identically situated. Our observations are fortified by the following cases:

1. Inderpal Yadav & Others Vs. Union of India & Others 1985 (2) SLR 248

2. K.C. Sharma & Others Vs. Union of India & Others JT 1997 (7) SC 58.

22. It is also not disputed that applicants 22 in number before the Apex Court who were TGTs and PGTs the selection process evolved comprised of written test. With regard to the findings of the Apex Court that who are found successful shall be regularised. Having laid 33% cut off marks, those who have acquired it have been regularised. The uniform criteria has not been followed in subsequent process of regularisation. The percentage has been raised to 62% and more for these classes. Admittedly, applicants are part-time Teachers continuing for several years. They were identically situated with those Teachers before the

Apex Court. The change in criteria on 31.3.1998, which is established to be on the intelligible differentia of educational standard does not pass the test of equality. Those Teachers after regularisation and selection on the basis of 33% cut off marks are also teaching classes 11th and 12th. They are no better than applicants. A policy decision and criteria regarding short listing and cut off marks in selection though not ordinarily amenable in judicial review but can be successfully challenged if laid down in gross violation of principles of equality enshrined under Articles 14 and 16 of the Constitution.

23. A Constitutional Bench of the Apex Court in D.S. Nakara v. Union of India, 1983 (1) AISLJ 131 observed as under:

> "Thus the fundamental principle is that Art. 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.
>
> As a corrolary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved? The thrust of Art.14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals a welfare State Welfare State will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic inequality in the society may be bridged. This would necessitate a legislation applicable to a group of citizens otherwise unequal and amelioration of whose lot is the object of state affirmative action. In the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Art.14. The Court realistically appraising the social stratification and economic inequality and keeping in view the guidelines on which the State

58

action must move as constitutionally laid down in part IV of the Constitution, evolved the doctrine of classification. The doctrine was evolved to sustain a legislation or State action designed to help weaker sections of the society or some such segments of the society in need of succour. Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate it to the objects sought to be achieved. This approach is noticed in Ramana Dayaram Shetty V. The International Airport Authority of India and Ors.(7) when at page 1034, the Court observed that a discriminatory action of the Government is liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

24. If one has regard to the above, the action of the respondents in evolving different selection method does not pass the twin test. Admittedly applicants form one class, i.e., part time TGTs and PGTs working for a long seeking regularisation. The object sought to be achieved is welfare and regularisation to accord them the service benefits at par with regular Teachers who had been performing the identical functions. The qualifying test and selection described to by the Apex Court is to see the fitness. Immediately after the Apex Court decision the selection test comprised of written test. Those who have acquired the cut off marks percentage of 33% have been regularised. Enhancing the criteria when the objects sought to be achieved has not altered, we neither find intelligible differentia nor any reasonable nexus with regularisation of the changed criteria and enhanced percentage. The aforesaid decision of the respondents certainly offends the mandate of Articles 14 and 16 of the Constitution of India and as applicants had been discriminated the criteria adopted through a policy decision is unsustainable in law.

59

25. Accordingly both the OAs are allowed. Impugned orders are quashed and set aside. Respondents are directed to consider applicants for regularisation on the basis of their securing the minimum qualifying percentage of 33% marks as done in the case of applicants (S.C. Sharma's case) one of which is Sh. Dayanand. The applicants shall also be entitled to all consequential benefits. The above directions shall be complied with by the respondents within a period of three months from the date of receipt of a copy of this order. No costs.

(Shanker Raju)
Member (J)

(V.K. Majotra)
Vice-Chairman(A)

'San.'