ANIL KUMAR GUPTA AND ORS. A

v.

MUNICIPAL CORPORATION OF DELHI AND ORS.

NOVEMBER 24, 1999

[S.B. MAJMUDAR, M. JAGANNADHA RAO AND M. SRINIVASAN, JJ.] B

Service Law:

Appointment—Eligibility—Essential qualifications—Two years professional experience and degree in Civil Engineering—Diploma holder—Whether experience includes experience gained before acquiring degree—Held, experience gained before acquiring degree can also be counted—Whether experience gained after examination and before publication of results should be excluded—Rival pleas of consent before High Court—No argument raised before High Court on the issue—Held, under the facts and circumstances, experience gained after examination and before publication of results cannot be excluded. C D

Practice and Procedure—Adverse finding by High Court–Opposite party coming in appeal—No separate appeal filed against adverse findings—Whether adverse findings can be attacked in appeal of opposite party—Held, adverse findings can be attacked in appeal of opposite party. E

Essential qualifications prescribed for the post of Assistant Engineer (Civil) in MCD were (i) degree in Civil Engineering and (ii) two years' professional experience. Norms for making selection prescribed greater weightage for higher marks in degree examination and higher experience. Selections made by MCD were challenged in writ petitions by some unsuccessful candidates which was dismissed by the Single Judge. In appeal, the Division Bench passed an order referring to Justice G.C. Jain the question whether allocation of marks by MCD to various candidates was in accordance with the norms fixed. Justice Jain prepared list of first 100 candidates on the basis of marks awarded by him and held that some candidates, ineligible on account of age or professional experience, were wrongly included in MCD list and some eligible candidates were not included in MCD list. Parties before Division Bench arrived at a consent and such ineligible candidates were allowed to continue. The Division Bench held that candidates found eligible F G H

A by Justice Jain should be appointed against existing vacancies provided they had approached court within reasonable time and such candidates should be treated as appointed in 1989 but without arrears of pay; that inter-se-seniority of candidates should be based on their ranking in the merit list as prepared by Justice Jain. Against the judgment of the Division Bench some selected candidates have filed the present appeals.

B

The appellants contended that consent between parties before High Court related merely to continuance of respondents found ineligible by Justice Jain and there was no consent regarding granting seniority to these candidates and they should be placed at the bottom of the list; that pre-degree experience C of respondents could not be taken into account while calculating professional experience; and that the finding of Division Bench that appointment of respondents were irregular or tainted was not challenged by filing S.L.P. and therefore, the said finding could not be assailed.

The respondent contended that pre-degree experience was rightly taken D into account by Justice Jain; that experience gained before date of issuance of marks/certificates or before actual announcement of degree results should have been taken into account while calculating experience; that there was consent with regard to granting seniority to candidates found ineligible by Justice Jain; and alternatively the respondents were fully qualified and their E appointments were not irregular nor tainted as observed by High Court.

Disposing the appeals, the Court

HELD: 1. It is open to the respondents to attack the adverse findings arrived at or observations made by the High Court, even if the respondents F had not filed a separate appeal against that part of the judgment. [560-C-D]

Ravinder Kumar Sharma v. *The State of Assam,* [1999] 7 SCC 435, relied on.

2. The provision regarding experience speaks only of "professional G experience" for two years and does not, in any manner, connect it with the degree qualification. Therefore, on the language of the notification dated 30.6.89 inviting application for the said post, the 2 years professional experience need not entirely be experience gained after obtaining the degree. Thus, the service rendered by the Diploma holders before obtaining degree H can also be counted. [561-A; 562-C]

Subhash v. *State of Maharashtra,* **[1995] Supp. 3 SCC 332;** *M.B. Joshi* v. *Satish Kumar Pandey* **[1993] Supp. 2 SCC 419 and** *D. Stephen Joseph* v. *Union of India* **[1997]4 SCC 753, relied on.**

N. Suresh Nathan v. *Union of India,* **[1992] Supp. 1 SCC 584, distinguished.**

3. The words used in the rules and notification are professional experience' of two years. In the context of the advertisement in the case and the facts—including the rival pleas as to 'consent' in the High Court, the experience rendered before actual announcement of result but after final examination cannot be excluded. Also, no argument of this nature was raised before the High Court on this issue. [564-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6728 of 1999.

WITH

C.A. Nos. 6729-30/1999; 6731-34/1999 and 6735/1999.

From the Judgment and Order dated 12.5.98 of the Delhi High Court in L.P.A.No. 95 of 1994.

Rakesh Dwivedi, Ravinder Sethi, S.B.Sanyal, P.P. Rao, Ejaz Maqbool, Braj K. Mishra, Ms. Aparna Jha, Sunit Bansal, Tarun Johri Ms. S. Janani, Ms. Rukhsana Chowdhary, Ms. Niranjana Singh, (Ms. Madhu Tewatia) for C.S. Ashri, R.K. Kapoor (Sumit Kumar)for Anis Ahmed Khan, Rajiv K.Garg, N.D. Garg, Ms. Manjula Gupta, Raj K. Gupta A.N. Bardiyar and S. Ravindra Bhat (M/s. Saharya & Co. (N.P.) for the appearing parites.

The Judgments of the Court was delivered by

M. JAGANNADHA RAO, J. Delay condoned in all the Special Leave petitions. Leave granted. Transposition application in SLP(C) Nos. 289- 292/ 99 allowed.

In all these appeals, the correctness of the judgment of the Delhi High Court in L.P.A. 95/94 and Writ petitions batch dated 12.5.1998 is involved. The appellants (except in SLP(C)..CC.3960/99) are the various candidates seeking appointment as Assistant Engineer (Civil) in the Municipal Corporation of Delhi (hereinafter referred to as MCD) and whose claims for appointment have been accepted by the High Court. We shall describe them as "appellants" in

this judgment. The Civil Appeal arising out of SLP(C)..(CC. 3960/99) is filed by the contesting respondents in the above appeals. These are those whose selections have been upheld by the High Court though there was some "irregularity" but whose seniority is in question now. We shall call them 'respondents' for convenience.

A brief resume of the events which have led to the filing of these appeals is necessary. On 30.6.1989, the MCD invited applications for filling up 60 posts of Assistant Engineer (Civil) in the Engineering Department of the MCD. The applications were to be received before 31.7.89. The essential qualifications for appointment were (a) degree in Civil Engineering and (b) two years' professional experience. Age was not to exceed 30 years (relaxable for government servants and MCD employees). 412 applications were received from the departmental candidates as well others.

The Selection Board of the MCD had to follow the following norms for awarding marks:

1. For Qualifications :	10 marks
Break up	
Upto 50% marks	5 marks
51% to 60% marks	6 marks
61% to 70% marks	7 marks
71% to 80% marks	8 marks
81% to 90% marks	9 marks
91% to 100% marks	10 marks
2. For Experience	
Break up	5 marks
(i) Upto two years' experience	Nil
(ii) 3 to 12 years and above experience at the rate of 1/2 marks i.e. for 10 years	5 marks
(iii) Viva-voce	15 marks

The MCD prepared a list of Sixty candidates and all of them had scored 16 marks or more. 44 were placed in the waiting list. Some of the candidates who were not selected, filed writ petitions and the said petitions were dismissed by a learned Single Judge of the Delhi High Court by common judgment dated 10.8.94. (Only one WP (by S. Negi) was allowed). Letters Patent Appeals were preferred. Some fresh Writ petitions were also filed by candidates not selected

and these petitions were tagged along with the appeals. A

On 23.11.95, the High Court passed an order referring to Justice G.C. Jain, Retired Judge of the Delhi High Court the question whether the allocation of marks by the MCD to the various candidates was in accordance with the norms fixed. Justice G.C. Jain gave hearing and finally prepared a list of first 60 candidates and also a list of next 40 candidates. He also prepared a list B of those who became eligible after the cut-off-date (i.e. 17.7.89) and before 31.7.89, the last date for receipt of application. He also prepared a list of candidates who enrolled after 1.7.89 and 31.7.89.

The result was that the Court had before it two select lists, one C prepared by the MCD and another by Justice Jain. There were candidates whose names were found in the MCD select list as also in the list prepared by Justice G.C. Jain. Justice Jain had held that, in his view, some candidates who were ineligible by the cut off date or the last date for receiving application, were wrongly included in the MCD list. Some other persons who were not eligible according to the MCD list were found to be eligible D by Justice G.C. Jain.

After receiving the report of Justice G.C. Jain, the Division Bench of the High Court went into various issues. We are now concerned only with those who have been held eligible by the MCD but who, according to the appellants, are not eligible on the relevant date. In the High Court the question E arose whether those who were selected in spite of crossing the age limit or because of not having necessary experience, should be dropped. The appellants contended that the names of these irregularly selected candidates should not have been included in the main select list. The Division Bench, when it decided the appeals, observed that if these selected candidates were to be F asked to go home, they would suffer serious prejudice inasmuch as most of them had been in service for nearly ten years and had even got promotions. The Division Bench felt that this was a humanitarian issue. The Court then put the matter before the parties. It appears that there was 'consent' between the parties that the services of these candidates need not be terminated but could be continued. The Division Bench observed: G

> "Keeping in view, the human problems involved in the case, learned counsel for the parties consented to an order being made disposing of these appeals/Writ petitions on the basis of the following criteria:
>
> (a) Candidates, who were earlier found eligible and appointed by the H

A MCD and are later found by Mr. Justice Jain to be ineligible for appointment may be allowed to continue in service.

(b) Candidates, who were really found ineligible by the MCD and are later found by Mr. Justice Jain to be eligible for appointment and who have approached the Court within reasonable time, should be B accommodated by giving them employment against existing vacancies.

(c) Candidates, who are found by Mr. Justice Jain to be ineligible for appointment on the ground that they had obtained employment by producing false/fictitious certificate, should be cashiered."

C

The High Court then took up certain cases of candidates who fell under category (c) and found that Sunil Tyagi was eligible as the certificate of experience produced by him could not be termed as false or fictitious. Dalip Ramnani was also to be treated as having requisite experience as the certificate produced by him could not be treated as fictitious. Mahabir D Prasad and Ajay Gautam were also similarly declared as eligible. The High Court, to that extent, differed from Justice Jain.

So far as candidates who were found entitled to selection on the basis of marks as awarded by Justice Jain were concerned, it was declared that E though they could now be appointed, they were to be treated as appointed in 1989 but without arrears of pay. Inter-se-seniority of the candidates now selected as per Justice Jain's list and in respect of those whose names were common to that list and the MCD list, was to be based on their ranking in the merit list as prepared by Justice Jain and this was to be done after giving due opportunity to the affected candidates. That was how the Letters Patent F Appeals and Writ petitions were disposed of by the High Court.

In these appeals by some of the selected candidates, it was contended by learned senior counsel Sri Rakesh Dwivedi, Sri Ravinder Sethi and Sri S.B. Sanyal and others that Justice Jain was wrong in taking into account the pre-degree experience of respondents and that the candidates who were ineligible G either on account of age or on account of not having experience as on the cut-off date - even if continued in service - should not be ranked in the merit list as per their marks but ought to have been placed at the bottom of the list. There was some argument before us whether the 'consent' between the parties related not merely to the continuance of the respondents who were H "irregularly" selected by the MCD but who were given ranking as per their

marks. The appellants contended that there was no 'consent' regarding the grant of seniority to these candidates. The respondents contended otherwise. A

Be that as it may, in the end it has become unncessary to decide the question as to the extent of the 'consent'. This was because learned senior counsel for the contesting respondents, Sri P.P.Rao contended alternatively that so far as the contesting respondents in regard to whom the appellants raised the question of their ineligibility and their seniority, they were all fully qualified and their appointments were not "irregular" nor "tainted" as observed by the High Court. They had the necessary degree qualification or experience of two years by the due date and they were fully eligible. The observations of the High Court about their ineligibility or their appointments being "irregular or tainted" was, according to learned senior counsel, wholly unwarranted. So far as their age was concerned, it was agreed before us that there was 'consent' to that extent. Sri P.P.Rao contended that in case of diploma holders, Justice Jain rightly took into account the experience of the respondents gained before they obtained the degree. But Counsel argued that Justice Jain went wrong in omitting the experience gained before the date of issuance of the marks certificates or experience gained before the actual announcement of degree results. B C D

In reply to the said contentions, learned senior counsel for the appellants contended that the respondents had not filed any Special Leave petition in time to attack the finding of the Division Bench that the respondents' appointments were "irregular" or were "tainted". It was argued that respondents could not be allowed to contend that they had the necessary experience of two years. To get over this argument, the respondents have preferred an independent appeal, i.e., Civil Appeal arising out of SLP(C)..(CC.3960/99), with an application to condone delay. It was of course also submitted for respondents that even without filing an appeal they could attack the adverse observations made by the Division Bench of the High Court. E F

On those contentions, the points that arise for consideration are as follows: G

(1) Whether the respondents can justify the final order of the High Court on other grounds upon principles referable to Order 41, Rule 22 of the C.P.C. without filing an appeal in time?

(2) Whether, while deciding whether the respondents had two years' experience, the experience gained while holding diplomas could H

A also be counted in addition to the experience gained after obtaining degree?

(3) Whether, in some cases, Justice Jain was right in excluding the period of experience gained before the publication of result, or experience gained before issuance of the certificate of experience?

B

(4) Whether, on the basis of the answers to Points 2 and 3, the respondents were eligible for appointment as Assistant Engineers?

Point 1:

C In view of the recent judgment of this Court in *Shri Ravindra Kumar Sharma* v. *The State of Assam,* [1999] 7 SCC 435, it is, in our opinion, open to the respondents to attack the adverse findings arrived at or observations made by the High Court, even if the respondents had not filed a separate appeal against that part of the judgment. Hence, the respondents can contend that the finding or observations that their appointments were tainted was not D correct. We have also condoned the delay in filing the Special leave petition (CC. 3960/99) and therefore, for both reasons, it will be open to them to attack the said finding in the appeals of the appellants or as appellants in their own Civil appeal arising out of SLP (CC. 3960/99). Point 1 is decided accordingly.

E *Point 2:*

On this question, the learned senior counsel Sri P.P.Rao for the selected candidates contended that the experience of the respondents while holding Diploma has to be counted in addition to the period of experience which they obtained after getting their degrees. Reliance in this behalf was placed upon F *M.B. Joshi* v. *Satish Kumar Pandey,* [1993] Supp. 2 SCC 419 and *D. Stephen Joseph* v. *Union of India,* [1997] 4 SCC 753. On the other hand, learned senior counsel for the appellants, Sri Rakesh Dwivedi, Sri Ravinder Sethi and Sri S.B. Sanyal contended that the experience of the respondents while holding diploma, could not be counted. They relied upon *N. Suresh Nathan* v. *Union* G *of India,* [1992] Supp. 1 SCC 584.

We may point out that in the present case, the relevant provisions applicable and the notification dated 30.6.89 inviting applications refer to essential qualification as (i) Degree and (ii) 2 years' 'professional' experience. As stated earlier, experience upto 2 years is the minimum and those above H 2 years, get 1/2 marks each year's experience ranging between 3 to 12 years,

the maximum marks being 5 for experience. A

We may at the outset state that the provision regarding experience speaks only of "professional experience" for two years and does not, in any manner, connect it with the degree qualification. In our view, the case on hand is similar to *Subhash* v. *State of Maharashtra,* [1995] Supp. 3 SCC 332 where, while considering Rule 3(e) of the relevant Recruitment Rules, namely, the Maharashtra Motor Vehicles Department (Recruitment) Rules, 1991, this Court pointed out that the rule 3(e) which required one year experience in registered Automobile Workshop did not make any difference between acquisition of such experience prior to or after the acquisition of the basic qualification. It is true, in N. Suresh Nathan's case, the experience of a candidate while holding diploma was not counted. There the relevant rules stated: B C

> "Section Officers possessing a recognised Degree in Civil Engineering or equivalent with three years' service in the grade failing which Section Officers holding Diploma in Civil Engineering with six years' service in the grade". D

This Court based its decision initially on the practice obtaining in the department over a long number of years when the rules were understood as requiring full service of three years after obtaining the degree. On that basis it was held that service was not to include service while holding a diploma. Suresh Nathan's case was, however, distinguished in M.B.Joshi's case. In the latter case the relevant rule referred to (i) Diploma holder Sub Engineers completing 12 years of service 35% (ii) Draftsman & Head Draftsman completing 12 years of service (iii) Graduate Sub-Engineers completing 8 years of service 10%. The Court was concerned with category (iii). It was pointed out that the Rule did not contemplate any equivalence between a degree with particular number of years of service as in N.Suresh Nathan's case. It was observed that the Rules in M.B.Joshi's case "clearly provide that the diploma holders having obtained a degree of engineering while continuing in service as Sub-Engineers shall be eligible for promotion to the post of Asst. Engineer in 8 years of service and quota of 10 per cent posts has been earmarked for such category of persons". The judgment in M.B.Joshi's case supports the case of the respondents. E F G

The above ruling in M.B. Joshi was followed in *D. Stephen's* case. In that case, this Court again distinguished *N. Suresh Nathan's* case. This Court however cautioned that any practice which was *de hors* a Rule could be no H

A justification for the department to rely upon. Such past practice must relate to the interpretation of a rule in a particular manner. This Court then followed M.B.Joshi's case as being one where the language of the rule was specific that "if a particular length of services in the feeder post together with educational qualification enables a candidate to be considered for promotions, it will not be proper to count the experience only from the date of acquisition B of superior educational qualification because such interpretation will violate the very purpose to give incentive to the employee to acquire higher education". This decision in *D. Stephen's* case also supports the case of the respondents.

C Therefore, on the language of the notification dated 30.6.89, we are of the view that the 2 years professional experience need not entirely be experience gained after obtaining thedegree.

It is true that in one of the counter-affidavits in CWP 606/1985, the MCD took the view that the experience ought to be after acquiring degree. D But the clarification of the UPSC dated 13.9.85 addressed to the MCD made it clear that the entire service including the service rendered before obtaining degree was to be taken into consideration. This letter has, in fact, been relied upon by the learned Single Judge of the High Court for holding that service rendered before acquiring the degree was to be counted. For the aforesaid E reasons, we hold that the service rendered by the Diploma holders before obtaining degree can also to be counted.

Point 3 & 4:

The dispute regarding ineligibility centres round 18 candidates before F us. Here, there are two categories. In regard to some of them, Justice Jain held that they were beyond 30 years by the cut off date while in regard to others he held that they did not have the required professional experience of two years.

G So far as the first category is concerned, they were all MCD employees earlier and age was relaxable as per the advertisement. Further, in view of the 'consent' between parties in the High Court and before us, those who were selected by the MCD in spite of exceeding 30 years and who otherwise were held by Justice Jain as having secured the necessary marks, are to be retained. There is no difficulty so far as these persons are concerned.

H

Coming to the second category, so far as Dalip Ramnani was concerned, rejection of his case by Justice Jain was based mainly upon the suspicion regarding the genuineness of two certificates of ICMCP Ltd.,Gurgaon as regards his experience. Now, the High Court has held that Justice Jain was wrong in suspecting these certificates. On that finding of the High Court, the position will be that he will have to be treated as having more than two years experience, for the entire period of ten months from 1.4.86 to 31.1.87 in ICMCP will have to be counted rather than only two months and 14 days in ICMCP as done by Justice Jain. According to Justice Jain, his experience otherwise came down to 1 year, 7 months, 1 day. If, therefore, the entire ten months and not merely 2 months, 14 days period is taken into consideration, that will add up 7 months, 16 days, more making the experience 2 years, 2 months, 17 days.

Coming to Sri R.K. Ailawadi, Justice Jain held that he got his degree on 29.7.87, the marks sheet is dated 24.7.87. Justice Jain considered his experience in Bhasin Construction Co. for the period 2.7.87 to 22.8.88 as 1 year, 1 month, 22 days and as JE in MCD from 23.8.88 to 31.7.89 as 11 months, 9 days, in all 2 years, 1 month, 1 day. Justice Jain excluded the experience prior to 24.7.87. Similarly, in the case of Naresh Gupta, the marks certificate is dated 24.7.87 and the service in Aggarwal & Co. is from 15.6.87 to 30.11.88 (1 year, 5 months, 16 days) and as JE in MCD is from 1.12.88 to 31.7.89 (8 months). If the service from 15.6.87 to 23.7.87 is not to be considered, the candidate will be ineligible.

The issue relating to Mr. Ailwadi and Mr. Naresh Gupta is a common issue. In the case before us, the words used in the rules and notification are 'professional experience' of two years. The narrow question is whether the experience gained after the examination and before the publication of results, can be taken into account. We may point out that this issue does not concern itself with a question sometimes raised in relation to cases where the result of the examination is not declared before the date of advertisement or last date of receipt of application and is announced after such date. Such cases may stand on a different footing. We are aware that, in regard to those cases, there are various rulings of this Court as to which is the crucial date. Here we are not concerned with such an issue because the advertisement is of 1989 and long before that in all the cases, the degree results were announced and degree certificates/marks sheets were also obtained. We are here concerned with a limited question as to whether the experience gained after campus selection, i.e., after final examination in BE was over and before publication of result of BE examination/or marks certificate, could be treated

A as 'professional experience'.

In the context of the advertisement in this case and the facts - including the rival pleas as to 'consent' in the High Court, we are disinclined to hold that the experience rendered before actual announcement of results is to be excluded. We are dealing with a case in which no argument as the one raised B before us was advanced in the High Court on this issue. Added to this, the rival claims as to 'consent' of parties in the High Court remain. We are, therefore, not inclined to disturb the conclusion of the High Court so far as these two officers are concerned.

C Justice Jain has found Sri Dinesh Yadav, Sunil Kumar, Saminder Negi, Ramesh Kumar, A.K. Mittal and S.K. Mehta eligible by counting their experience while they held Diploma. These officers passed BE or AMIE later but long before the advertisement. Our decision on Point 2 holds good and Justice Jain was right in counting their pre-degree service.

D As regards Dalip Ramnani, we have upheld the view taken by the High Court that he had the requisite experience for appointment. But at the end of the judgment, the High Court has observed that the inter se seniority of the candidates will be according to their ranking in the merit list prepared by Mr. Justice Jain. Mr. Justice Jain has not given any rank to Dalip Ramnani as he E suspected his certificates and held him to be ineligible, though he was awarded 18½ marks by the Selection Board. Now that the High Court has accepted the certificates and he becomes eligible, we direct that the seniority given by Justice Jain will stand amended by placing Dalip Ramnani at the relevant place treating him as having secured 18½ marks.

F So far as Girish Chand, D.S. Danda, M.S. Rana, Manohar Diwani, S.N. Gupta, S.K. Sindhwani, N.K. Gupta, Pushkar Sharma are concerned, Justice Jain held that they were above 30 years and hence their appointments were irregular. But, in view of the fact that they were already working in MCD and for such candidates the age was relaxable and there was 'consent' in the High G Court for their continuance, the appellants cannot raise any dispute in this Court, so far as these candidates are concerned. No specific argument was advanced in respect of other respondents.

For the aforesaid reasons, we hold in favour of the respondents and H against the appellants on Points 3 and 4.

The appeals arising out of S.L.P.(C) Nos.14160/98, 287-288/99, 289-292/99 are dismissed. Appeal arising out of S.L.P.(C). 17429 (CC 3960) is allowed, subject however to the modification pointed above in respect of the inclusion of Dalip Ramnani in the seniority at the point of 18½ marks. No order as to costs. A

A.K.T. Appeals disposed of. B