

CASE NO.:
Appeal (civil) 4760 of 2007

PETITIONER:
Trivedi Himanshu Ghanshyambhai

RESPONDENT:
Ahmedabad Municipal Corporation and Ors.

DATE OF JUDGMENT: 10/10/2007

BENCH:
TARUN CHATTERJEE & P. SATHASIVAM

JUDGMENT:
J U D G M E N T
[Arising out of SLP (C) No.13941 of 2006]

TARUN CHATTERJEE, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 5th of July, 2006 passed by a Division Bench of the High Court of Gujarat at Ahmedabad affirming the order of the learned Single Judge holding that the appointment of the appellant as an Assistant Manager in Ahmedabad Municipal Corporation [for short \021the Corporation\022] was bad, illegal and invalid and accordingly, liable to be quashed.

3. Before we deal with the question raised before us, we may narrate the facts involved in the present case leading to the filing of this appeal.

4. The appellant was appointed as an X-Ray Technician in Beherampura Referral Hospital, run under the supervision and control of the Corporation on 1st of February, 1988. In the Referral Hospital, there was no post of clerks since 1983. Since 1984, the appellant, apart from discharging his duty as an X-ray Technician was also, regularly and compulsorily, carrying out the clerical and administrative work connected therewith. According to the appellant, the administrative activities carried out by him, inter alia, included: [i] taking X-ray of the patients; [ii] collecting fees for X-ray; [iii] entering the amount received in the cash book; [iv] preparation of the case papers; [v] maintaining of the register of the patients whose X-ray is taken; [vi] maintaining the record of the purchase of X-ray films; [vii] purchase of X-ray films; [viii] to fill in the octroi forms and \022forms; and [ix] maintain X-ray date stock register and audit the same and several such activities which were purely administrative in nature. On 13th of November, 1997, a circular, viz., Circular No. 80 was issued by the Corporation inviting applications for 19 posts of Assistant Manager from amongst the qualified existing employees of the Corporation. The aforesaid circular clearly specified that an eligible candidate should be a graduate with second class from any recognized university with ten years of administrative experience. The circular also provided that preference would be given to candidates holding a degree in law or any other higher degree. The appellant, in pursuance of the aforesaid circular of the Corporation dated 13th of November, 1997, applied for appointment to the post of Assistant Manager in the prescribed form, which was forwarded through the Medical Officer of the Corporation under whom he was working. The

said form, filled in by the appellant, was duly scrutinized and after it was found that the appellant was eligible, the same was sent to the Corporation for consideration. Accordingly, the Corporation, thereafter, directed the appellant to appear for a written test. A mode of selection was prescribed by the Corporation, which comprised a two-tier system, namely a written test of 150 marks and a viva-voce test of 50 marks. The written test was conducted under the supervision of Indian Institute of Management, Ahmedabad. On the basis of performance and marks scored, 58 candidates, including the appellant and respondents 2 and 3 were selected and asked to appear for an oral interview. The oral interview was conducted by a Five Member Interview Committee comprising (i) Municipal Commissioner, Ahmedabad; (ii) Prof. Pestonjee, Indian Institute of Management, Ahmedabad; (iii) Dr. N.R. Dixit, Director, Som Lalit Institute and visiting faculty of Indian Institute of Management, Ahmedabad; (iv) Deputy Municipal Commissioner [Finance]; and (v) Chief Auditor, Municipal Corporation, Ahmedabad. From the above, it would be evident that barring two members, the remaining members of the Interview Committee were the employees of the Corporation. Therefore, it cannot be said that all the members of the interview committee were under the employment of the corporation. The Corporation prepared a merit list of the candidates, with their qualifications and date of appointment in the Corporation, on the basis of their performance in the oral interview before the aforesaid Committee and also in the written examination. The appellant figured at Sl. No.4 in the merit list and was shown to possess degrees in B.Sc. and LLB and his date of appointment in the Corporation was shown as 17th of May, 1984. On 22nd of December, 1999, a resolution was adopted by the Corporation, whereby, it was communicated to the selected candidates that they had been appointed as Assistant Managers on probation for a period of one year in the scale of Rs.8000-275-13500 and that after completion of the probation period, their appointments would be made acting on the basis of report of their performance. As the appellant was figuring at Sl. No.4 of the said resolution, he was posted in the engineering department against the vacancy of one Lokendre Singh Rathod. Challenging the legality and validity of the appointments, to the post of Assistant Manager, made by the Corporation by its resolution dated 22nd of December, 1999, a writ petition was filed by the respondents 2 and 3 in the High Court of Gujarat at Ahmedabad wherein, the appellant was arrayed as respondent No. 3. Since, in this case, we are concerned only with the appointment of the appellant, which has been set aside by the High Court by the impugned judgment, we feel it proper to refer only to the case of the appellant. In the writ petition, it was, inter alia, alleged, by respondents 2 and 3 herein, against the appellant that he was working as an X-ray Technician which is purely a technical post having nothing to do with administrative work and accordingly, the requirement as to ten years experience on the administrative side for appointment to the post of Assistant Manager was not fulfilled. In view of the aforesaid, the respondents 2 and 3 herein prayed for setting aside the appointment of the appellant to the aforesaid post of Assistant Manager. A learned Single Judge of the High Court allowed the writ petition, which was affirmed by the Division Bench, thereby quashing the appointment of the appellant to the post of Assistant Manager in the Corporation.

5. The core question that needs to be decided in this appeal is whether the appellant fulfilled the requirement of ten

years experience on the administrative side for appointment to the post of Assistant Manager. As noted herein earlier, according to respondents 2 and 3, the appellant was not qualified for being appointed to the post of Assistant Manager in as much as he was working in the technical department as a technical hand and accordingly, the condition of ten years administrative experience could not be said to have been fulfilled in his case.

6. Before we deal with this question, we may state that respondents 2 and 3, who had challenged the appointments of the appellant and other selected candidates, were themselves unsuccessful and their names did not figure in the merit list as they had failed to pass the oral interview. Therefore, it is an admitted position that challenge to the appointment of appellant, to the post of Assistant Manager, was made by candidates who were themselves unsuccessful in the examination. Keeping this fact in mind, let us now proceed to consider whether the High Court was justified in setting aside the appointment of the appellant as an Assistant Manager in the Corporation. As noted herein earlier, although the appellant was working as an X-ray Technician, he claimed that he had the requisite experience of ten years on the administrative side as well. To substantiate his claim, he has pointed out a number of administrative duties performed by him while working as an X-ray Technician and which have already been narrated by us herein earlier. It may be noted that for the purpose of applying for the post in question, the candidates were required to fill in forms, which were to be forwarded by the heads of their departments under whom they were working. Each form was required to be scrutinized by the respective head and only after being satisfied that a candidate was having more than ten years administrative experience, he was to make an endorsement in the application form and approve the same for being forwarded to the corporation. Therefore, from the above, it would be evident that it was only after scrutiny by the respective heads of the departments that the candidature of employees was forwarded to the Corporation for permitting them to appear in the written test and if successful, for an oral interview. In this case, there is no dispute that the application form of the appellant was duly signed by the Medical Officer who had endorsed and certified that the appellant was eligible to sit in the written test and if successful, in the oral interview, as he had fulfilled the requisite requirements. As noted herein earlier, a bare perusal of the form filled in by the appellant would clearly show that he had satisfied the condition of ten years experience on the administrative side. The certificates of administrative experience, in favour of all the candidates falling in the technical category, were issued by the Medical Officer of Health and counter signed by the Medical Officer-in-charge of Municipal Referral Hospital, Behrampura, AMC. In so far as the appellant was concerned, the medical officer in-charge of the Municipal Referral Hospital, Behrampura, AMC, AM (Health), under whom the appellant was working as an X-ray technician issued the certificate on 10th of May, 2000, which was placed before the High Court in the writ petition. The certificate runs as under:

\023It is hereby certified that Shri Himanshu Ghanshyambahi Trivedi is rendering service since last 12 years at Health Department as X-ray technician. Since 22nd December, 1999 as per the GDEST 8313, he is holding the post of Assistant manager in the higher grade as well as fro the same date he has attended Engineering (Project) Division.

By the Health Department in the city of Ahmedabad five referral hospitals are run, Since 1983 referral hospitals began and since then no post of clerk is opened. Therefore, the technicians in each division as to compulsorily discharge the duties as technicians as well as administrative clerk. As a X-ray technician he has to perform the following administrative duties.

i) He has to perform the duty of taking X-ray of the patient. From each patient as per the rules of the Corporation he has to collect the money and issue receipt as well as to enter those amount collected in the case paper.

ii) He has to prepare X-ray register in which he has to record the name of the patient whose X-ray is taken.

iii) He has also to maintain the book and enter therein the details of the X-ray plates and X-ray films purchased by him and also to enter in the register the X-ray used by him and also to prepare the expense book, submit the same for audit by the Corporation and also to answer any queries regarding the same.

v) He has also to maintain X-ray date stock register and that is also audited from time to time and the responsibility of auditing is also upon him.

vi) The X-ray technician is holding independent charge and therefore, in his department he is responsible for reparation as well as for proper maintenance and also has to maintain other such registers. Thus for the records of the X-ray department as well as of other departments, he is responsible.

vii) That in the X-ray department need also arises for the sale of old X-ray films for which he has to contact the part whom the corporation has approved and thereafter as per the rules of the corporation he has to sell the old X-ray filings, collect money from him and issue receipt thereof and deposit the amount so collected with the Corporation. All these responsibilities are to be shouldered by him.

Thus X-ray technician has to discharge the obligation and has also to perform other duties. Over and above that he has also been discharging the administrative duties and works aforesaid compulsorily.

He has discharged technical as well as administrative duties diligently, honestly and satisfactorily. Till date has not allowed any complaint of any sort in his department. He holds a good moral character.

Sd/-

Medical Officer-In-Charge
Municipal Referred Hospital,
Behrampura, AMC

AM (Health) Health Officer\024

From the aforesaid certificate, it would be evident that the appellant was having administrative experience, even though he was working as an X-ray technician. The stand taken by the Corporation before the High Court was also to the effect that the appellant had satisfied the requirement as to ten years administrative experience and, therefore, he could be appointed as an Assistant Manager. In so far as the appellant was concerned, the Corporation in paragraph 9 of the affidavit, filed before the High Court, stated as under:
\023It is alleged that one Mr. Trivedi Himanshi is X-ray Technician and therefore ought not to have been selected on the ground of lack of administrative experience. It is stated that Mr. Trivedi is holding

the qualification of B.Sc. and LLB plus course of Radiology Branch. It is stated that Mr. Trivedi is working as X-ray Technician since 1984 and he is responsible not only the technical work, but also for clerical and administrative work of the said department. It is stated that there is no clerk in the Radiology Department of the Hospital and X-ray Technician has to do clerical work and has to work as an Administrative help qua the administration for maintaining the records about working of the Radiology Department.\024(Emphasis supplied)

7. Before the High Court, an affidavit in reply was also filed by the appellant along with the other selected candidates, inter alia, stating that the only allegation made against the appellant was to the effect that he was a man of technical cadre and lacked administrative experience and that it was put to rest by the certificate dated 10th of May, 2000 issued by the Corporation. It may be noted that the certificate dated 10th of May, 2000 was issued by the Corporation, at a time, when the writ petition was pending before the High Court. But, it must also be remembered that the application form of the appellant was forwarded by the Medical Officer under whom he was working, endorsing his signature thereon and thereby approving that the appellant was having more than ten years experience on the administrative side as well. Even if an objection is raised that the certificate dated 10th of May, 2000 issued by the Corporation cannot be looked into because it was issued at the time when the writ petition was already pending and not at the time of selection before the selection committee, even then, the endorsement and approval of the Medical Officer, under whom the appellant was working, was duly made and therefore cannot be overlooked. In categorical terms, the Corporation had taken the stand before the High Court that in so far as the technicians are concerned, no clerks were appointed and therefore, the clerical/administrative work was also required to be done by the technicians. Apart from the aforesaid certificate, which enlisted the different administrative duties performed by the appellant, the endorsement in the application form by the Medical Officer approving the nature of administrative work performed by the appellant and forwarding the duly scrutinized form to the corporation, would clearly show that the appellant was performing administrative work for more than ten years in the Corporation. The said form was then examined and scrutinized by the Committee, which conducted the written test and thereafter, permitted the appellant to appear in the written examination for the post in question. The application form was also placed before the Interview Committee, which had conducted the oral interview of the appellant. It may be mentioned, as noted herein earlier, that the oral interview was conducted by a Five Member Interview Committee consisting of (i) Municipal Commissioner, Ahmedabad; (ii) Prof. Pestonjee, Indian Institute of Management, Ahmedabad; (iii) Dr. N.R. Dixit, Director, Som Lalit Institute and visiting faculty of Indian Institute of Management, Ahmedabad; (iv) Deputy Municipal Commissioner [Finance]; and (v) Chief Auditor, Municipal Corporation, Ahmedabad who are all respected persons of the society. The five member interview committee, which consisted of eminent persons of the society, would not have allowed the appellant, who is a technical hand, to appear before them with out first satisfying themselves that the appellant had possessed ten years administrative experience. If the administrative experience shown in the application form

could not be treated as a sufficient compliance with the requirement as to ten years experience on the administrative side, the interview committee, being an expert committee, could have rejected the candidature of the appellant on the ground that he did not possess the requisite administrative experience for appointment to the post of Assistant Manager in the corporation. That apart, on the question of administrative experience of the appellant, who was working as an X-ray technician, no objection was raised either by the Examination Committee which conducted the written examination or by the Interview Board which conducted the oral interview. Even the candidates namely, the writ petitioners-respondents 2 and 3 herein did not raise any objection, by making a prayer, either before the examination committee or before the interview board, that the appellant lacked the requisite administrative experience for selection to the post in question. After scrutinizing and considering the application forms of all the candidates, they were directed to appear in the written test and thereafter, those who were found to have passed the written examination were directed to appear before the Interview Board for an oral interview. From the record, it also appears that in the past, many persons, who were holding technical posts were promoted to administrative posts and subsequently have been further promoted. That apart, the corporation, at the time of inviting applications for appointment to the post in question, had never stated that the persons of technical cadre should not apply. On the contrary, the circular dated 13th of November 1997 clearly stated that candidates of all the departments were qualified to apply, on fulfilling the requirements laid down in the circular. The writ petitioners-respondents 2 and 3 herein cannot be permitted to raise the objection that the appellant could not have been considered for appointment, he being a technical hand without any administrative experience, after the appellant was selected along with the other selected candidates. It was open to the respondents 2 and 3 to raise such an objection at the initial stage, either in the written examination or at the time of the oral interview. Such objection was raised, for the first time, by the respondents 2 and 3, after the appellant successfully completed four months in his capacity as an Assistant Manager (his promoted post in the corporation). That apart, it appears from the judgment of the High Court that the High Court has quashed the appointment of the appellant only, although, the corporation had appointed seven other candidates, holding such technical posts. Therefore, we are unable to agree with the High Court that the administrative experience enlisted by the appellant in his application form, duly endorsed by the Medical Officer, could not be considered as an administrative experience of over ten years and therefore, the appointment of the appellant should be cancelled. In any view of the matter, it is not for the courts to find out whether a candidate, from the technical side, was having administrative experience of ten years when he applied for the post of Assistant Manager as we find that the manual of the Corporation clearly states that it was the sole discretion of the Municipal Commissioner to consider as to which post was technical or administrative. In our view, the High Court had failed to appreciate that the corporation, being the employer, is the best judge to decide whether the appellant had discharged the responsibilities on the administrative side and once the corporation came to a finding that the appellant had discharged not only the duties of an X-ray technician but also performed clerical/administrative work, particularly in view of the admitted fact that since 1984, no post of clerks was created in the Beherampura Referral Hospital, the High Court

was not justified in concluding that the appellant did not possess the administrative experience of more than ten years.

8. As noted herein earlier, respondents 2 and 3 who had filed the writ petition before the High Court, challenging the appointment of the appellant were themselves unsuccessful in the examination, even though they claimed that they had passed the written examination but failed in the interview. Since the names of respondents 2 and 3, who were the writ petitioners before the High Court, did not figure in the merit list, in our view, it was not open to them to challenge the said selection list and the appointment of the appellant before the High Court.

9. It is not in dispute that the respondents 2 and 3 as well as the appellant were all found eligible, in the light of the marks obtained in the written test, to be called for the oral interview. Up to this stage, there was no doubt. The Respondents 2 and 3 and the appellant appeared before the Committee constituted by the corporation for conducting the oral interview. The respondents 2 and 3 could not clear the oral interview and were not selected whereas the appellant was found successful and accordingly, selected. Therefore, there cannot be any dispute that only because the respondents 2 and 3 could not get selected and named in the final merit list, as a result of their combined performance, both in the written test as well as in the oral interview, they challenged the appointment of the appellant and other selected candidates by moving the writ petition. Such being the position, we are of the view that the High Court was not justified in exercising its power under Article 226 of the Constitution by granting relief to the writ petitioners, who are now respondents 2 and 3 in this appeal. As we are of the opinion that the appellant did possess the administrative experience of ten years required for selection to the post of Assistant Manager in view of the varied nature of work performed by him while working as an X-ray Technician, we do not find any reason to take a view, different from the one taken by the Corporation and the Selection Committee. Therefore, we are of the view that it was not open to the respondents 2 and 3 to challenge the appointment of the appellant and other selected candidates, as they were themselves unsuccessful in the test. In this connection, reliance can be placed on a decision of this Court in the case of Madan Lal and Others Vs. State of J & K and Others [(1995) 3 SCC 486].

10. Accordingly, we are of the view that the High Court was neither justified in interfering with the appointment of the appellant by holding that he did not possess the requisite administrative experience of ten years while working as an X-ray Technician nor was it open to the High Court to entertain the writ petition challenging the appointment of the appellant and other selected candidates at the instance of the unsuccessful candidates.

11. Before parting with this judgment, we may deal with a short submission of the learned counsel appearing on behalf of the respondents 2 and 3. It is an admitted position that although, the respondents 2 and 3 had passed the written examination conducted under the supervision of the Indian Institute of Management, Ahmedabad, they were unsuccessful in the oral interview. Therefore, according to the learned counsel for the respondents 2 and 3, they did have the locus standi to move the writ application for challenging the

appointment of the appellant because they were successful in the written examination. In this connection, a decision of this Court in the case of *Alocious Fernandez Vs. Union of India*, reported in [JT 1992 SC 169] was strongly relied on. In that decision, this Court had laid down that an appointment in disregard to the rules is a matter not between the appointing authority and the appointee himself, but, all those who had similar qualification and could not apply as they did not possess the qualifications mentioned in the advertisement, are also affected. Neither do we accept this submission of the learned counsel for the respondents 2 and 3, nor can we rely on the decision of this Court in the case of *Alocious Fernandez* [supra], for the simple reason that in this case, admittedly, respondents 2 and 3 were not selected on the combined performance of the candidates in the written test and the oral interview. Although, the selection process itself was challenged before the High Court, it is to be noted that the learned Single Judge, while allowing the writ application, had turned down the argument of the respondents 2 and 3 holding that the entire selection process could not be said to be illegal or tainted with mala fides. So far as the Division Bench is concerned, we do not find any argument advanced by the respondents 2 and 3 challenging the selection process before it. That being the position, we are unable to hold that even though, the respondents 2 and 3 were unsuccessful in the test and could not figure in the merit list, they would be entitled to challenge the appointment of the appellant. Another decision of this Court in the case of *Atul Khuller and Others Vs. State of J & K and others* reported in [(1986) Suppl SCC 225] was also relied on by the learned counsel for the respondents 2 and 3 in support of the contention that it was open for an unsuccessful candidate to challenge an appointment by way of a writ petition. Learned counsel for the respondents 2 and 3 relied on paragraph 20 of the said decision in which it has been observed by this Court that the Selection Committee conducting the viva test should maintain the entire record, including the original worksheets on which marks were recorded by each member separately, for a minimum period of one year after the examination and failure to do so can strengthen an allegation of mala fide against the selection committee. Since the Corporation could not produce the record before the High Court, the learned counsel for the respondents 2 and 3 submitted that a case of mala fide on the part of the Corporation for not producing the records before the High Court ought to have been found and therefore, the appointment of the appellant ought to be cancelled as done by the High Court. In our view, this submission of the learned counsel for the respondents 2 and 3 cannot be accepted. It is true that the records relating to the marks obtained by the candidates in the written test as well as the oral interview could not be produced before the High Court because they were lost and thus not available. In our view, in the absence of any material on record, we are unable to accept the contention of the learned counsel appearing for the respondents 2 and 3 that the records were not produced by the Corporation due to mala fide intention. In this connection, the finding of the learned single judge on the question whether an adverse inference could be drawn against the corporation for non- production of the records before the High Court and whether for such non-production, a case of mala fide could be found, may be seen. The learned single judge, while allowing the writ petition, on consideration of the entire materials on record, came to a finding that in the absence of any specific averment of mala fides against the Members of the Committee holding the interview test, it was neither possible to strike

down the result of the interview nor would it be proper to conclude that the Corporation had conducted the interview in an illegal or unlawful manner. We also endorse the same view and hold that only because the records could not be produced in view of the fact that they were lost and not available, the appointment of the appellant could not be cancelled, particularly when no mala fide had been attributed by the writ petitioner \026 respondents 2 and 3 in the writ petition.

10. For the aforesaid reasons, this appeal must succeed and accordingly, the judgments of the Division bench of the High Court as well as of the single judge are set aside and the writ petition filed by the respondents 2 and 3 stands dismissed. No order as to costs.