

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

W.P.(C) No.8827/2008

Date of Decision : October 13, 2009

GOVT. OF NCT OF DELHI & ORS.

..... Petitioner

Through: MS. Avnish Ahlawat, Advocate.

versus

HARGIAN SINGH

..... Respondent

Through: Mr. A.K. Behera with Mr. Saurabh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE VIPIN SANGHI

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

%

JUDGMENT (Oral)

ANIL KUMAR, J.

1. We have heard learned counsel for the parties and with their consent we proceed to dispose of the petition at the admission stage. The petitioner, Union of India impugns the order dated 02.09.2008 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in O.A No.468/2008 whereby the aforesaid original application preferred by the respondent herein has been allowed and the petitioner has been directed to make over to the respondent arrears of pay and allowances of the

promotional post of Grade II (DASS) w.e.f. 03.10.1997 till 26.07.2004 with all consequential benefits.

2. The respondent was appointed as a Sub Inspector in Co-operative Societies on 08.12.1964. He was promoted as UDC/Gr.III on 14.11.1980. He was transferred to the Labour Department of Directorate of Education on 05.12.1994 and was then posted at District Central in diverted capacity with direction to work in personnel branch vide order dated 23.12.1994. He superannuated on the said post on 31.10.2005.

3. The respondent was found fit for promotion by the DPC to the post of Grade II (DASS) subject to vigilance clearance and his ACRS for the period 1994-95 and 1996-97 being made available. Despite the aforesaid recommendation of the DPC, the respondent was not promoted to the post of Grade II(DASS) on account of the non-availability of his ACRs. Persons junior to him were however promoted. The respondent represented against his supersession. He was once again overlooked for promotion and his juniors were promoted to the post of Grade II (DASS) in 2003. On 26.07.2004 he was given promotion w.e.f. 03.10.1997 notionally. Consequently, he was denied pay and allowances of the promotional post for the period 03.10.1997 to 26.07.2004. The respondent represented against the denial of the pay and allowances of the promotional post for the past period. However the petitioner did not relent. The respondent then preferred O.A. No.1795/2007 which was disposed of by the Tribunal on 04.10.2007 ex parte, with the direction to the petitioners to pass an order on the representation of the respondent in accordance with law as expeditiously as possible and preferably within two months from the date of receipt of the said order.

4. The petitioner passed the order dated 13.11.2007 in pursuance of the aforesaid direction of the Tribunal wherein it was admitted that the DPC held on 17.9.1997 had found him fit for promotion "*subject to IC/VC ACR 94-95 to 96-97*". When these documents were made available they were placed before the review DPC which again recommended him fit for promotion notionally w.e.f. 03.10.1997 i.e. the date of promotion of his immediate junior Shri H.L. Sharma having seniority No.4180 in Grade III (DASS), who was promoted to the post of Grade II (DASS). To deny the respondents claim for arrears of pay and allowances of the promotional post w.e.f. 03.10.1997, the petitioner relied upon FAR 17(1) which stipulates that an officer shall begin to draw the pay and allowances attached to his tenure of a post w.e.f. from the date when he assumes the duties of that post.

5. To challenge the order dated 13.11.2007, the respondent preferred O.A.No.468/2008 before the Tribunal which, as aforesaid, has been allowed by the impugned order.

6. Learned counsel for the petitioner, Ms. Avnish Ahlawat has made two fold submissions. Firstly she submits that the original application preferred by the respondent before the Tribunal was barred by limitation. It is argued that the order dated 26.07.2004 which granted notional promotion to the respondent w.e.f. 03.10.1997 could have been challenged within a year of it being passed insofar as it denied arrears of pay and allowances of the promotional post to the respondent. However, the respondent chose to first approach the Tribunal by filing O.A. No.1795/2007 only in the year 2007. By that date the relief claimed by the respondent was already barred by limitation. She submits that merely because the petitioner had

WP(C)No.8827.08

passed the order dated 13.11.2007 in compliance of the order dated 04.10.2007, the same would not give a fresh cause of action to the respondent to prefer an original application before the Tribunal. She submits that the Tribunal has not dealt with the issue of limitation which had been raised by the petitioner in their reply/counter affidavit filed before the Tribunal.

7. In response to this submission, learned counsel for the respondent submits that the petitioner never raised any objection with regard to the claim of the respondent being barred by limitation, much less at the time of arguments before the Tribunal. He further submits that even in the writ petition, no such ground has been taken to allege that the Tribunal had entertained a time barred original application and that the petitioner had raised such a ground before the Tribunal and the same has not been considered by the Tribunal. He also disputes the petitioners' submission that the first Original Application preferred by the respondent was barred by limitation. He submits that the respondent represented against denial of the arrears of pay and allowances of the promotional post on 04.10.2004 and 05.09.2005, which representations had not been disposed off when the respondent first approached the Tribunal.

8. We are of the view that there is not merit in the submission of the petitioner so far as the bar of limitation is concerned. Pertinently, the petitioner could have sought a review/recall of the ex parte order dated 04.10.2007 by approaching the Tribunal and by bringing to its notice that the claim of the respondent was barred by limitation. However the petitioner did not choose to take any such step and went ahead to decide the representation of the respondent by passing the order dated 13.11.2007. Even while deciding the representation and passing the order dated 13.11.2007, no such

WP(C)No.8827.08 *Page 4 of 8*

objection appears to have been taken by the petitioner. Consequently, it cannot be argued that the decision of the petitioner contained in its communication dated 13.11.2007 did not give a fresh cause of action to the respondent to prefer the Original Application. There also appears to be merit in the respondent's submission that his representations dated 04.10.2004 and 05.09.2005 not having been decided, he was entitled to wait for a reasonable period before approaching the Tribunal.

9. The petitioners also do not appear to have raised the specific ground of limitation in their reply/counter affidavit filed before the Tribunal in response to the respondent's Original Application. In response to para 3 of the O.A., which states that the petition has been filed within the period of limitation, there is no denial by the petitioner, and all that is said is that the respondent herein is put to strict proof of the averment.

10. Moreover, from the impugned order it appears that the said argument was never urged before the Tribunal. From the order impugned it appears that the only argument urged by the petitioner was founded upon FAR 17(1) to say that since the respondent had not actually worked on the promoted post from 1997 to 2004, he could not make a claim for being granted arrears of pay and allowances for the promotional post. It is for this reason that the Tribunal has not dealt with the aspect of limitation now sought to be urged by the petitioner. Even in the writ petition now preferred before us there is not a whisper to say that the petition preferred by the respondent before the Tribunal was barred by limitation or that such an objection, founded upon the bar of limitation, was taken in their reply by the petitioners or urged at the time of arguments before the Tribunal and the same has not been dealt with by the Tribunal.

Though learned counsel for the petitioner, admittedly, was not the counsel representing the petitioner herein before the Tribunal, she urges that the said objection was urged before the Tribunal. We cannot accept this submission of the petitioner. As aforesaid, firstly, from the reply of the petitioners filed before the Tribunal it does not appear that the ground of bar of limitation was urged by them. In our view there was no occasion for the Tribunal to deal with grounds which were not taken in the pleadings before the Court and which have actually not been urged at the time of arguments.

11. The issue of limitation is a mixed question of fact and law. To enable the opposite party to effectively meet such a ground it is essential that the party desirous of urging the ground of limitation should fairly and squarely raise the same not only in his pleadings but also argue the same at the time of personal hearing so as to provide adequate opportunity to the opposite party to meet the same.

12. In view of the aforesaid discussion we reject the argument of Ms. Ahlawat that the Tribunal ought to have rejected the Original Application on the ground of limitation.

13. Turning to the aspect of grant of arrears of pay and allowances to the respondent for the promoted post, it is argued by learned counsel for the petitioner that the respondent not having worked on the higher post, is not entitled to be paid the salary and allowances for the said post by application of FR 17(1). In our view there cannot be any hard and fast rule on this aspect. It would have to be examined on the facts of each case whether the employee should be paid the emoluments of the promotional post even though he has not discharged the responsibilities of the higher post. If the denial of the higher post to the employee is a result of his own conduct or

he has contributed to the creation of, or accepted that state of affairs, he may be denied the emoluments of the higher post on the ground that he has not discharged higher responsibilities. But where the employee has been relentlessly agitating the denial of promotion to him and the said denial is not in any way of his own making and he has not contributed to such a situation arising, the employee cannot be denied the emoluments of the higher/promotional post by the employer. We find that the respondent himself did little to agitate his rights in the year 1997 and for some time thereafter even though his juniors were promoted and he was left out. The respondent therefore continued to discharge his services on the lower post and did not shoulder the responsibility of the promotional post i.e Grade II (DASS). Though we agree with the finding of the Tribunal that the respondent was not entirely to be blamed for his not being promoted, as it was the responsibility of the petitioners to make available the service record of the respondent in a timely manner so as not to cause any prejudice to him and, therefore, the respondent cannot be denied the arrears of pay and allowances only on account of his not having actually discharged the responsibility of the promotional post, we are of the opinion that the respondent is equally to be blamed for the state of affairs that he found himself in. He did not agitate his rights and demonstrated a laid back attitude. From the impugned order it is seen that the petitioner was conscious of the injustice done to the respondent and did undertake internal correspondence on this issue from 26th June, 2000 onwards. In our view at least from June 2000, the respondent was therefore entitled to arrears of pay and allowances for the promotional post.

14. On the last date we had asked the petitioners to produce the computation of arrears of pay and allowances computed from 01.06.2000 onwards upto the date of

actual promotion i.e. 26.07.2004. Ms. Ahlawat has tendered in court the said revised calculation of pay and allowances for the period June 2000 to 26.07.2004 and a copy thereof has also been served on the respondent. Mr. Behera, learned counsel for the respondent has gone through the same and does not dispute the correctness of the said statement, according to which, the amount due to the respondent towards arrears of pay and allowances to the promotional post has been quantified as Rs.61,512/-.

15. In view of our aforesaid discussion, we modify the impugned order and direct that the respondent shall be entitled to arrears of pay and allowances of the promotional post w.e.f 1.6.2000 to 26.7.2004. The petitioner had deposited an amount of Rs.78,000/- in this court in terms of the order dated 15.12.2008. The said amount is lying in a fixed deposit. Consequently, we direct the Registry of this Court to release to the respondent forthwith the amount of Rs.61,512/- along with proportional interest accrued thereon, while the balance amount may be paid to the petitioner along with proportional interest accrued thereon. With the aforesaid directions, the petition stands disposed of.

ANIL KUMAR, J.

VIPIN SANGHI, J.

OCTOBER 13, 2009
as