

9

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of decision: 7th December, 2010

+

LPA 249/2003

MCD

..... Appellant

Through: Mr. Mukesh Gupta, Advocate with
Mr. Suresh Kumar Yadav, UDC of
MCD.

versus

SUDHIR KUMAR

..... Respondent

Through: Mr. Ashok Aggarwal, Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

In this intra-Court appeal, the challenge is to the order dated 30th May, 2002 passed by the learned Single Judge in CWP No.3380/1999.

2. The facts which are essential to be exposted for adjudication of this appeal are that the respondent as writ petitioner invoked the jurisdiction of this Court under Article 226 of the Constitution of India claiming, inter alia,

that though he was senior to two other persons, namely, Mr. Raghubeer and Mr. Rajbeer working as Assistant Malaria /DDT Beldars which is the feeder cadre post for the post of Assistant Malaria Inspector and who were considered for promotion and conferred the benefit of promotion, yet the similar benefit was not extended to him.

3. The learned Single Judge called for the records, scrutinised them and came to hold that Mr. Raghubeer and Mr. Rajbeer were junior to the writ petitioner. Being of this view, the learned Single Judge directed as follows:-

“In view of the aforesaid there is force in the contention of learned counsel of the petitioner that the petitioner was liable to be promoted prior to his juniors. Thus a writ of mandamus is issued directing the respondent to promote the petitioner to the post of Assistant Malaria Inspector and to give him seniority in accordance with the original seniority list of Malaria Beldars.

4. At this juncture, it is worth nothing that the Letters Patent Appeal was dismissed in limine on 08th April, 2003 without ascribing any reasons. The matter was carried to the Apex Court and their Lordships by order dated 15th March, 2004 in SLP (Civil) No.22968/2003 set aside the said order and remanded the matter.

5. Mr. Mukesh Gupta, learned counsel for the appellant questioning the soundness of the impugned order has raised the following contentions:-

- i) Though the seniority reflected in the gradation list was called in question in the writ petition, yet the affected persons, namely, Mr. Raghubeer and Mr. Rajbeer were not arrayed as parties to the same and in the absence of necessary parties, no adverse finding could have been recorded against them.
- ii) The promotion was given to Mr. Raghubeer and Mr. Rajbeer in the year, 1991 but the writ petitioner challenged their promotion in the year 1999 after the expiry of seven years and, therefore, the learned Single Judge should have been well advised to throw the writ petition at the very threshold on the ground of delay and laches.
- iii) The finding recorded by the learned Single Judge as regards the seniority is not correct inasmuch as the learned Single judge has placed reliance on a document of the year 1988 whereas the gradation list of regularised employees was published in the year 1992 wherein the name of the writ petitioner did not find mention and hence, the earlier document was of no consequence.
- iv) The learned Single Judge erred in issuing a mandamus to the respondents to confer the benefit

of promotion as the post in question is a selection post.

6. Mr. Ashok Aggarwal, learned counsel for the respondent supporting the order passed by the learned Single Judge contended that in pursuance of the order passed by the learned Single Judge, the appellant has issued the order of promotion on 08th September, 2003 and the respondent is functioning on the post of Assistant Malaria Inspector and hence, the controversy should be allowed to rest.

7. First we shall advert to the issue whether the writ petition should not have been entertained on the ground of delay and laches. There is no dispute that the respondent was challenging the benefit of promotion bestowed on the two employees in the year, 1991 and the writ petition challenging their promotion was filed in 1999, after expiry of almost eight years. That apart, the issue of seniority was also called in question after a long lapse of time.

In the case of ***P.S. Sadasivaswamy vs. State of Tamil Nadu, AIR 1974 SC 2271***, the Apex Court has held thus:-

“2. A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226

nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle matters.”

[Emphasis supplied]

8. In ***Malcom Lawrence Ceil D'souza Vs. Union of India (UOI) and Ors., AIR 1975 SC 1269*** the Apex Court has held as under:-

“9. Although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time.”

[Emphasis added]

9. In ***K.R. Mudgal and Ors. Vs. R.P. Singh and Ors., AIR 1986 SC 2086*** the Apex Court has opined thus:-

“7.....Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the government servants created by the writ petitions filed after several years as in this case. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the government servants there would also be administrative complications and difficulties.....”

10. Similar view has been reiterated by their Lordships in ***State of West Bengal Vs. Tarun K. Roy & Ors., (2004) 1 SCC 347.***

11. In ***S.S. Balu & Anr. Vs. State of Kerala & Ors., (2009) 2 SCC 479***

their Lordships have held thus:-

“17. It is also well-settled principle of law that “delay defeats equity”. The Government Order was issued on 15-1-2002. The appellants did not file any writ application questioning the legality and validity thereof. Only after the writ petitions filed by others were allowed and the State of Kerala preferred an appeal thereagainst, they impleaded themselves as party-respondents. It is now a trite law that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment.....”

12. Tested on the touchstone of aforesaid enunciation of law, there can be no iota of doubt that the doctrine of delay and laches gets squarely attracted

to the case at hand.

13. As far as the second aspect is concerned, it pertains to non-impleadment of necessary parties. It is contended by Mr. Gupta that when the seniority and promotion of Mr. Raghubeer and Mr. Rajbeer was called in question, it was incumbent on the part of the writ petitioner to array them as respondents but he chose not to do so. Mr. Ashok Aggarwal, learned counsel for the respondent submitted that the writ petitioner did not want to challenge their promotion but the said submission leaves us unimpressed inasmuch as on the basis of seniority, the benefit of promotion was granted to them.

14. In this regard it is apposite to refer to few citations in the field. In **Prabodh Verma and others v. State of Uttar Pradesh** (1984) 4 SCC 251, it has been held thus:

“..... A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh’s writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the

petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties.”

15. In **State of Uttaranchal and another v. Madan Mohan Joshi and others**, (2008) 6 SCC 797, it has been held thus –

“The High Court, in its impugned judgment, proceeded on the basis as to what would constitute a substantive appointment. The decisions of this Court, whereupon strong reliance has been placed by the High Court in arriving at its conclusion may not be of much significance but what is significant is that in the writ petition even Savita (Mohan) Dhondyal and others who lose their seniority in the event writ petition was to be allowed, were not impleaded as parties. They, in our opinion, should have been impleaded as parties in the writ application. Savita (Mohan) Dhondyal and others, if the writ petition is allowed, would suffer civil consequences. Inter se seniority may not be a fundamental right, but is a civil right. [See State of U.P. v. Dinkar Sinha). The respective rights of seniority of the parties, thus, required determination in their presence.”

16. As is evincible, the two affected persons were not impleaded as parties. Their seniority and consideration for promotion was the subject matter of challenge. When their civil rights were going to be affected and they were likely to be visited adverse consequences, their non-impleadment becomes fatal to the case of the writ petitioner. Thus, it can safely be concluded that no adjudication could have taken place in their absence and

that makes the order of the learned Single Judge pregnable.

17. The last aspect emanates for consideration whether the learned Single Judge could have issued a direction requiring the respondent-employer to grant promotion to the writ petitioner.

18. In *State of Mysore v. Syed Mahmood*, AIR 1968 SC 1113, the Apex Court while dealing with the issue of a nature of direction to be issued by a court in the matter relating to conferral of promotional benefit held that when the State Government is bound to reconsider the cases of the candidates the High Court could only issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to the seniority and fitness the employee should have been promoted on the relevant dates when officers junior to them were promoted but the High Court could not have issued a writ directing the State Government to promote them with retrospective effect.

19. In *State of Mysore and another v. P.N. Nanjundiah and another*, 1969 (3) SCC 633 a three-Judge Bench of the Apex Court after referring to the decision in *Syed Mahmood* (supra) held that the High Court ought not to issue writs directing the State Government to promote the aggrieved officers

with retrospective effect. It has been further held that the correct procedure for the High Court is to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to the eligibility of an employee he should be promoted on the relevant date and so what consequential benefits should be allowed to him. The proper course is to issue a direction to consider but not to issue a writ of mandamus directing the government to promote a particular employee with retrospective effect.

20. In **State Bank of India and others v. Mohd. Mynuddin**, AIR 1987 SC 1889, it has been held thus:

“ If promotion has been denied arbitrarily or without any reason ordinarily the Court can issue a direction to the management to consider the case of the officer concerned for promotion but it cannot issue a direction to promote the officer concerned to the higher post without giving an opportunity to the management to consider the question of promotion.”

21. In Case of **K. Samantaray v. National Insurance Co. Ltd.**, (2004) 9 SCC 286, the Apex Court has held thus:

“6. In all services, whether public or private there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as understood under the service law jurisprudence, is advancement in rank, grade or both and no employee has a right to be

promoted, but has a right to be considered for promotion.”

22. In view of the aforesaid enunciation of law, we are disposed to think that in the obtaining factual matrix the learned Single Judge was not justified in issuing a writ of mandamus solely on the ground that the alleged juniors had been promoted. The seniority may be a facet of eligibility but the same does not *ipso facto* make him entitled to get the benefit of promotion. The factum of suitability has to be adjudged by the employer. There may be cases where the court may see any kind of perversity or illegality in dealing with an employee's claim wherein a direction may be thought of being issued but definitely the present case was not a case of the said nature. Thus, the learned Single Judge, in our considered opinion, was not justified in issuing a direction to the appellant to extend the benefit of promotion to the writ petitioner.

23. The next aspect which requires to be adverted to is whether the learned Single Judge was correct in adverting to the seniority position. As the aggrieved persons were not made as the parties, without entering into the debate whether the earlier document or the later document has to be relied upon, we set aside the finding with regard to the seniority.

24. Presently, we shall dwell upon the aspect what should be the appropriate direction in praesenti as far as the writ petitioner-respondent is concerned. It is worth noting an office order has been issued on 08th September, 2003 which reads as follows:-

“In pursuance of Hon’ble High Court orders dated 30.05.02, Addl. Cm. Health vide his order dated 04.09.03 has been pleased to promote. Sh. Sudhir Kumar S/o Sh. Ram Nath Malaria Beldar, to the post of Assistant malaria Inspector with immediate effect subject to outcome of SLP going to filed by MCD.

On promotion Sh. Sudhir Kumar S/o Ram Nath is posted in Narela Zone against the vacant post of AMI.”

25. It is submitted by Mr. Mukesh Gupta, learned counsel for the appellant that the order was issued subject to the result of the appeal. True it is, we have dislodged the findings returned by the learned Single Judge but as things have changed in the meantime inasmuch as the respondent-writ petitioner has come up in the ladder of seniority, he may have come within the zone of consideration. Mr. Gupta, learned counsel fairly stated that MCD shall consider the case of the respondent along with the other respondents for the post of Assistant Malaria Inspector, if the respondent comes within the zone of consideration.

26. In view of the aforesaid, it is directed that till the said consideration takes place, the respondent shall not be reverted and in case the reversion takes place, it can be challenged by the respondent on any other ground including the ground of seniority.

27. Quite apart from the above, it is clarified that as the respondent has rendered service on the promotional post on the basis of the order passed by the MCD and though a condition has been incorporated subject to the result of the appeal, yet no amount shall be deducted from the salary that has already been paid.

28. Consequently, we conclude and hold that the order passed by the learned Single Judge is unsustainable. As we have issued certain directions, the appeal is disposed of with the said directions. There shall be no order as to costs.

CHIEF JUSTICE

MANMOHAN, J

DECEMBER 07, 2010

Js/dk