

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (Civil) No.2110/2010**

% ***Date of Decision: 01.03.2011***

Union of India *.... Petitioner*
Through Mr.A.S.Chandhiok, ASG with
Mr.H.K.Gangwani, Advocate.

Versus

Sh.Rajendra Kumar *.... Respondent*
Through Nemo.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS. JUSTICE VEENA BIRBAL

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|-----------|---|------------|
| 1. | Whether 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 |

ANIL KUMAR, J.

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1. The petitioner, Union of India, through the Secretary, Ministry of Urban Development, has challenged the order dated 21st August, 2009 in O.A.No.754 of 2008, titled as 'Sh.Rajendra Kumar v. Union of India & Ors.' Passed by the Central Administrative Tribunal, Principal Bench, New Delhi directing the petitioners to reconsider the claim of the respondent as Executive Engineer on ad hoc basis from the date others have been promoted by deeming the service of the respondent as regular service as per statutory rule.

2. The respondent had sought promotion on ad hoc basis as Executive Engineer (Civil) on the ground that the petitioners had granted notional seniority to him and had fixed his pay under FR 22 (1)(a) by letter dated 24th October, 2007 on respondent completing 8 years of regular service. The plea of the respondent was that he should be given notional seniority from the date the vacancy arose with all the consequential benefits. The plea of the respondent was that though he was promoted in the year 2002, but his promotion should be deemed on notional basis from the date he had been found eligible on acquiring eligibility and passing of the LDCE.

3. The respondent had filed an Original Application being No.2710/2003 which was disposed of by order dated 13th May, 2004. While disposing of the Original Application No.2710/2003 directions were given to the petitioner to grant notional seniority to the respondent from the date and order when the vacancies arose.

4. Another Original application filed in Chandigarh Bench being No.1260/CH/2003 was also allowed following the order passed in OA No.2710/2003 dated 13th May, 2004 by the Principal Bench, Central Administrative Tribunal.

5. The petitioners had filed a writ petition bearing W.P.(C) No.1188/2005 in Delhi High Court against the order dated 13th May,

2004 passed in OA No.2710/2003 and another writ petition being W.P.(C) No.19316/2005 against the order dated 29th July, 2004 passed in OA No.1260/CH/2003 in the Punjab & Haryana High Court.

6. The respondent & other Assistant Engineers (Civil) & (Electrical) who were appointed as Assistant Engineer on the basis of LDCE 1999 were given notional seniority w.e.f. 1st July, 1994 in order to implement the directions of the Tribunal and to avoid contempt proceedings against the petitioners. The respondent thereafter sought promotion to the grade of Executive Engineer and for computing 8 years of regular service in the grade of Assistant Engineer from the date of notional seniority and not from the date of actual promotion i.e. 4th April, 2001. Since the regular service in the grade of Assistant Engineer was not computed from the date of notional seniority, the respondent filed an Original Application being No.754/2008, titled as Sh.Rajendra Kumar v. Union of India & Ors.' which was allowed by the Central Administrative Tribunal by order dated 21st August, 2009.

7. The petitioners have challenged the order of the Tribunal on the ground that seniority in particular cadre does not entitle a public servant for promotion to a higher post unless he fulfills the eligibility conditions prescribed by the relevant rules. It is contended that a direct recruit who is senior to the promotees is not required to comply with the eligibility condition and he is entitled to be considered for promotion

to the higher post merely on the basis of his seniority. The petitioners categorically contended that the promotion could only be prospective even in cases where vacancies relate to the earlier year.

8. The learned counsel for the petitioner has relied on the decision of the Co-ordinate Bench in W.P.(C) No.1188-90/2005, Union of India & Ors. v. Vijender Singh & Ors.; W.P.(C) No.1723/2010, Union of India & Anr. v. D.K.Shukla & Ors.; W.P.(C) No.1724/2010, Union of India & Anr. v. Anand Kumar Pandey & Ors.; W.P.(C) No.1725/2010, Union of India & Anr. v. CPWD Engineer Association & Ors. and W.P.(C) No.1726/2010, Union of India & Anr. v. A.K.Sharma & Ors. decided by order dated 29th November, 2010 holding that the service jurisprudence does not recognize the jurisprudential concept of deemed retrospective promotion and unless there exists a rule or there exists a residual power and in exercise of the implementation of the rule, a decision taken to grant retrospective promotion, no person can claim a right to be promoted from the date when the vacancies accrued. This Court thus, allowed the writ petition and set aside the order of the Tribunal granting retrospective promotion. The relevant observations made in these writ petitions which were allowed by this Court by order dated 29th November, 2010 are as under:-

“43. It is thus apparent that service jurisprudence does not recognize the jurisprudential concept of deemed retrospective promotion and unless there exists a rule or there exists a residual power and in exercise of the implementation of the rule or in exercise of power conferred

by the residual rule a decision is taken or can be taken to grant retrospective promotion, no person can claim a right to be promoted from the date when the vacancy accrued and he must take the promotion with its benefits from the date of actual promotion.

44. Thus, the writ petitions are allowed. Impugned orders dated 13.5.2004, 16.7.2009, 14.7.2009 and 25.12.2009 are quashed. OA Nos.2710/2003, 2524/2008, 220/2009, 1874/2008 and 1749/2008 are dismissed.

45. Since the respondents have taken benefit under the impugned decision of extra wages paid to them, we permit the petitioner to effect recoveries but in phases; the amount recovered would be by deducting from the monthly salary henceforth payable but not exceeding per month 20% of the basic salary till the amount is recovered. No interest would be recovered by the petitioner.

46. We may lodge a caveat. In the absence of any pleadings. The issue pertaining to qualifying service for purposes of further promotion to the post of Executive Engineer has not been decided by us and thus the said issue would be left open. Further, what would be the effect of the applicability of the next below rule i.e. when a person junior in the seniority list becomes eligible for promotion, whether the person above, who has not rendered the qualifying service would or would not be entitled to be considered for promotion is also an issue which is left open. Needless to state the respondents would be permitted to predicate a claim qua eligibility on the said issues. We may note that to a pointed question: whether any promotions have been effected to the post of Executive Engineer and in the process the respondents have been left out vis-à-vis those who are shown junior to them in the seniority list and who became Assistant Engineers in the quota of 'seniority subject to fitness' category, the answer was a categorical 'No'. thus, as of today, for purposes of further promotion all the effected parties have acquired the relevant eligibility which were informed is 8 years' regular service in the grade of Assistant Engineer and thus on said account the issue pertaining to qualifying service for further promotion has been rendered meaningless. The only issue which would be surviving would be back wages and the same stands decided against the respondents.

9. The learned counsel for the petitioner has contended that even the above noted writ petition was initially taken up along with writ petitions decided by this Court on 29th November, 2010 however, the above noted writ petitions could not be disposed of by the said order as the respondent had not been served.

10. The learned counsel contends that the issues raised in the present writ petition are exactly the same as has been decided by another Bench of this Court by judgment dated 29th November, 2010. The respondent has been served and affidavit of service of Sh.L.R.Gupta, Deputy Director, Administration dated 21st January, 2011 is filed along with the copy of the notice which was duly received by the respondent on 10th January, 2011. Despite the service of notice, neither the respondent has appeared, nor anyone has appeared on behalf of the respondent.

11. The pleas and contentions as raised by the petitioners have not been disputed and this Court is also in agreement with the reasoning of the another Bench of this Court in WP (C) 1188-90 of 2005 titled UOI & Ors. Vs Vijender Singh & ors, in order dated 29th November, 2010 where this Court has held relying on (1989) Supp 2 SCC 625, Union of India & ors Vs K.K.Vadera & ors: *Baij Nath Sharma vs. Hon'ble Rajasthan High Court At Jodhpur & Anr.* (1998) 7 SCC 44; *State of*

Uttaranchal & Anr. vs. Dinesh kumar Sharma (2007) 1 SCC 683 as under:

43. It is thus apparent that service jurisprudence does not recognize the jurisprudential concept of deemed retrospective promotion and unless there exists a rule or there exists a residual power and in exercise of the implementation of the rule or in exercise of power conferred by the residual rule a decision is taken or can be taken to grant retrospective promotion, no person can claim a right to be promoted from the date when the vacancy accrued and he must take the promotion with its benefits from the date of actual promotion.

12. Thus the writ petition is allowed and the order dated 21st August, 2009 passed in OA No. 754 of 2008 passed by Central Administrative Tribunal, Principal Bench is set aside and the OA 754 OF 2008 is dismissed. If the respondent had taken the benefit under the impugned decision of extra wages, the petitioners shall be entitled to recover the extra wages in phased manner by deducting the amount from the monthly salary henceforth payable to the respondent but not exceeding per month 20% of the basic salary the amount is recovered. No interest would be recovered by the petitioners. With these directions the writ petition is disposed of and the parties are left to bear their own costs.

ANIL KUMAR, J.

March 01, 2011.
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VEENA BIRBAL, J.