

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

% *Judgment Reserved on: 10.3.2011*
Judgment Delivered on: 17.3.2011

+ **RSA No.191/2007 & CM Nos.9992/2007 & 23069/2010**

MUNCIPAL CORPORATION OF DELHI Appellant
Through: Mr.Rahul Kumar for Mr.Gaurang
Kanth, Advocate.

Versus

SH.SUBHASH CHANDER GUPTA & ORS. Respondents
Through: Mr.Manoranjan, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. Plaintiff Subhash Chand Gupta has filed the present suit seeking declaration against the defendant/Municipal Corporation of Delhi (MCD) that a decree of declaration be passed in his favour declaring that he was entitled to promotion to the post of Assistant Audit Officer w.e.f. 01.3.1982 with all consequential benefits.

2. Plaintiff was working as a Section Officer (Audit) in the statutory Audit Department. He was illegally ignored by the defendant. He was denied his promotion. This was because of the corruption in the office of the defendant no1; defendants no.2 to 6 were beneficiaries. Plaintiff had made complaints and drew attention of the defendant no.1 to the corruption in its office and the breaches committed by the various officers of the defendant in

their day to day routine. This was the reason why he was malafidely and arbitrarily ignored for his promotion. The persons junior to the plaintiff were unjustly promoted. Plaintiff was denied his dues which were legally due to him. Present suit had accordingly been filed.

3. In the written statement of the defendant no.1 the allegations were denied. It was denied that the promotion of the plaintiff became due on 01.3.1984 in the grade of ₹650-1040/- as an Assistant Audit Officer or that he was illegally ignored. It was submitted that there were 20 posts of Assistant Audit Officer on 01.3.1984 and 20 persons senior to him as per the procedure had been promoted. He had no right for promotion on that date. It was submitted that he along with the other eligible officers was considered for promotion under the requirements/ rules of the duly constituted Departmental Committee (DPC) but was found unfit for promotion. He was informed vide letter dated 09.12.2005.

4. In the replication the averments in the plaint were reiterated. It was pointed out that as per Resolution No.426 dated 16.7.1984 of the defendant corporation 25 posts were available on 01.3.1984; further in terms of this resolution six more posts were added. Plaintiff was at serial no.22 but he was illegally denied his promotion. There was no scope for reservation of any posts for deputationist; this was in contravention of the instructions of the Comptroller & Auditor General of India (CAG).

5. On the pleadings of the parties the following five issues were framed.

1. Whether the action of the defendant is not promoting the plaintiff on 1.3.84 is illegal and without jurisdiction and mala fide? OPP

2. Whether the plaintiff is entitled for declaration and consequent relief prayed for? OPD
3. Whether the plaintiff is entitled for the damages if so to what extent? OPD
4. Whether the suit is barred Under Section 477/478 DMC Act?
5. Relief.”

6. One witness was examined on behalf of the plaintiff and correspondingly one DW-1 was examined on behalf of the defendant.

7. Trial judge on the basis of the oral and documentary evidence had dismissed the suit. Ex. PW-1/1 was resolution No.426 of the defendant corporation. Ex. PW-1/5 was also relied upon. Trial judge was of the view that he was rightly as per the eligibility criteria fixed by CAG not considered in the first and the second DPC. He was considered in the third DPC which was held in December 1985 but was found not fit. Suit of the plaintiff was accordingly dismissed.

8. In appeal the impugned judgment had reversed this finding. Ex. PW-1/1 i.e. the Resolution No.426 dated 16.7.1984 was re-appreciated. It was noted that Ex. PW-1/1 was to be given effect to in the financial year in which the resolution was passed i.e. in the year 1984 itself. Resolution No.1556 dated 07.2.1985 (PW-1/5) wherein reservation of 20% posts was made for deputationists was a resolution of the Standing Committee and was without approval of the Corporation; as such it could not have precedence over Ex.PW-1/1. Decision No.80 dated 27.2.1990 (admitted document filed before the appellate court) clearly evidenced that no reservation was required to be made for the deputationists. First appeal court concluded that on the date of the first DPC i.e. on

14.12.1984 there were 37 posts available on which 80% i.e. 30 posts were to be upgraded/promoted from Section Officer to the Assistant Audit Officer. In terms of Ex.PW-1/5 there were 31 posts and six additional posts were created by Ex.PW-1/1 and even after reservation of 20% posts for deputationist (out of the 37 posts), 7 posts would be reserved and 30 posts would be available for the purpose of promotion at the time of the first DPC. The appellant was admittedly at serial No.22. He was however not promoted. The impugned judgment had also noted that two Section Officer namely Sh.D.K.Jain and Sh.Pehlad Singh were promoted to the post of Assistant Audit Officer by a specially convened DPC in November 1986 and had been promoted w.e.f. 01.3.1984. The document evidencing this fact i.e. item No.1246 is an admitted document; it has been placed on record before this Court. Admittedly this document was not proved in the course of trial but by orders of this court dated 07.8.2009 permission had been granted to the respondent to file his reply which he had filed along with the aforementioned document. On 20.10.2009 permission had also been granted to the appellant to refer to documents i.e. Annexures P-2, P-4, P-5, P-7, P-8, P-11, P-15 and P-19 although these documents admittedly had not been proved before the trial court. However being official documents, in the nature of public documents, permission had been granted to him to make a reference to the said documents during the course of arguments.

9. The impugned judgment had further noted that there was mistake on the part of the defendant in not considering him for promotion although he had fulfilled the criteria of completion of three years service before the second DPC. A distinction between

three year service and a three year regular service in the previous year had been pointed out. The impugned judgment was of the considered view that the appellant had completed three years of regular service as a Section Officer on 24.12.1984 i.e. on the date of the first DPC and on the date of the second DPC which was held on 18.7.1985, there was nothing adverse against him; yet he was discriminated and illegally not considered. He was accordingly entitled for promotion and his suit was decreed.

10. This is a second appeal. It has been admitted. After its admission on 21.4.2010 the following substantial question of law was formulated:

“Whether the findings of the Appellate Court are perverse on facts and law?”

11. On behalf of the appellant, it has been urged that the impugned judgment suffers from a gross perversity as Resolution No.426 has not been correctly appreciated; the increase of six additional posts had to take effect in the year 1985, the Resolution No.426 had been passed on 16.7.1984 and a reading of this resolution clearly shows that effect of it had to be given in the year 1984-85; it could not have a retrospective application. It is pointed out that the plaintiff was rightly not considered for the first and the second DPC as he did not fulfill the eligibility criteria as per the instructions of the CAG. He was considered in the third DPC which was held on 10.12.1965 but was rejected on merits. The impugned judgment is liable to be reversed as it has not appreciated the evidence both oral and documentary in its correct perspective. The plaintiff had also failed to comply with the requirements of Section 478 of the Delhi Municipal Corporation Act 1957

(hereinafter referred to as 'the DMC Act'); suit was also barred by limitation. It is pointed out that admittedly the appellant had not filed any cross objection; the persons whose rights would be effected if this decree is enforced have not been made parties; right of no person can adversely be affected without giving him a right of hearing. For all the aforementioned reasons, the appeal is liable to be allowed.

12. Arguments have been countered. It is pointed out that the judgment suffers from no infirmity. It is a reasoned order and scope of interference by the second appellate Court on findings of fact is restricted; the said scope cannot be enlarged. No perversity has been pointed out. It was after appreciation of evidence both oral and documentary that the court has arrived at the aforementioned finding decreeing the suit of the plaintiff.

13. Record has been perused.

14. Resolution No.426 dated 16.7.1984 is relevant. It clearly stated that there is one vacant post for the post of Auditor for the year 1984-95; further there is the need of up-gradation of six posts to the post of Section Officer; further there were auditors who were awaiting promotions and three other Section Officer who are due to return from deputation on 30.6.1984 would be promoted and adjusted under the service scheme; an expenditure of Rs.26,000/- would be incurred in the current financial year. This resolution had resolved as under:

“Resolved that as recommended by the Standing Committee vide its resolution No. 469 dated 10.5.84, the proposal of the Municipal Chief Auditor contained in his letter No. DCA/87/4 dated 19.4.1984 regarding revision of the scales of pay of the Statutory Audit Department w.e.f. 1.3.1984 as per details given in the aforesaid letter be approved.”

This resolution further resolved:

Resolved further that as proposed by the Municipal Chief Auditor in the letter referred to above, upgradation of 6 posts of Auditor as Section Officer (Proposed to be re-designated as Asstt. Audit Officer/Section Officer) for the present financial year and upgradation of 24 posts to be filled in as and when Auditors pass the S.S.S.A. Examination in the ensuing year be approved.”

This up-gradation of six posts of Auditor to Section Officer were for the present financial year. This is the categorical language of the resolution. The resolution was passed on 16.7.1984. A financial year is a year w.e.f. 1st April to 31st March. These additional posts were for the financial year 1984-85; they had to be given effect to in the year 1984 i.e. w.e.f. 01.3.1984. This resolution has been proved as Ex.PW-1/1. No other inference can be drawn from a plain reading of this document.

15. Ex.PW-1/5 i.e. item No.1157 dated 07.1.1985 was a Resolution of the Standing Committee. It was not approved by the Corporation. Even as per Ex.PW-1/5 there were 31 posts and six additional posts had been created for the financial year 1984-85 in terms of Ex.PW-1/1. 20% of these posts were to be filled in by transfer on deputation. Ex.PW-1/5 had however failed to consider the six additional posts which had been sanctioned vide Ex.PW-1/1 which were for the current year i.e. for the year 1984-85.

16. The first DPC was held on 24.12.1984. On this date there were 37 posts available. Even presuming that 20% posts were to be reserved for deputationists i.e 7 posts; 30 posts became available in the 80% quota for promotion. The appellant was at serial no.22. The alternate submission of the respondent is that even if in terms of Ex. PW-1/5 only 31 posts are considered available as on 1.3.1984, and 20% are served for deputationist 25

seats were available on 01.3.1984; respondent being at serial no.22 should have been considered.

17. At the time of the second DPC which was held in July 1985, plaintiff was again arbitrarily ignored. He was eligible for promotion as per the CAG instructions; he had completed three years regular service on 24.12.1995; he thus became entitled to be considered for promotion at the time of this second DPC. He was however ignored. He was considered only for the third DPC when he was found not fit. DW-1 in his deposition had stated that the plaintiff was considered for promotion at the first DPC; this deposition is contrary to the pleadings i.e. the defence in the written statement wherein it was admitted that plaintiff was not considered at the time of first DPC.

18. Ex. PW-1/1 prescribed six additional posts which are to be added to the quota of 31. In Ex.PW-1/1 there is no reference of reservation for the deputationists. Even assuming that Ex.PW-1/5 is to be read in conformity with Ex.PW-1/1 and 20% of the seats are to be reserved for deputationists i.e out of 37 seats 7 are to be reserved, 30 would fall for up-gradation/promotion. Plaintiff being at serial no.22 had to be considered. Even if second line of argument is adopted and the additional six posts are not considered in the year 1984-85; out of the 31 seats, six would be the reserved category for deputationists and 25 would fall in the line of up-gradation/promotion. Even in this category appellant being at serial no.22 should have been considered in the second DPC held in July, 1985.

19. The discrimination qua the appellant appears to be writ

large. There was nothing adverse against the appellant at the time of the second DPC on July 1985. He had fulfilled the eligibility criteria. The eligibility criteria has prescribed a three years service as per the CAG instructions. This CAG criteria was never approved by the Corporation or by the Standing Committee. That apart the respondent had completed three years of service before this second DPC. Impugned judgment had noted that the word "previous year" had been deliberately introduced in these instructions to oust the appellant from the eligibility criteria. Impugned judgment had noted that the orders of the CAG received in February 1985 and July 1985 did not make any reference to the word "previous year"; it had been introduced later on. The respondent had in fact completed three years of regular service as a Section Officer on 24.12.1984. The second DPC was held in July 1985. There was nothing adverse against the appellant at this time. He should have been considered in the second DPC but he was illegally ignored.

20. It has also been admitted by DW-1 K.K.Pathak that for the candidate S.K.Mudgal the DPC was constituted in July 1985 whereas in normal course it was constituted once a year after the month of October in a year. This candidate S.K.Mudgal had also not completed three years of regular service on 01.10.1984. The same criteria had not been applied qua Mudgal and the appellant. Mudgal was in the seniority line at serial no.21. Respondent was immediately thereafter at serial no.22. Had the appellant also been considered in the second DPC which was held in July 1985 considering the fact that there were seats available, the name of the appellant would have figured. It was wrongly noted that the

appellant had not completed three years regular service till that time.

21. It has also come on record that to Section Officer D.K.Jain and Prehlad Singh were promoted to the post of Assistant Audit Officer by a specially convened DPC in 1986 and they had been promoted w.e.f. 01.3.1984. The document to the said effect has noted as supra is on record.

22. Malafides on the part of the department is thus evident. The impugned judgment suffers from no perversity on any count. Impugned judgment had rightly appreciated the oral and documentary evidence to draw a conclusion that the plaintiff was entitled to the relief sought for by him.

23. Section 478 of the DMC is relevant; it reads as follows:

“ 478. Notice to be given of suits. – (1) No suit shall be instituted against the Corporation or against any municipal authority or against any municipal officer or other municipal employee or against any person acting under the order or direction of any municipal authority or any municipal officer or other municipal employee, in respect of any act done, or purporting to have been done, in pursuance of this Act or any rule, regulation or bye-law made thereunder until the expiration of two months after notice in writing has been left at the municipal office and, in the case of such officer, employee or person, unless notice in writing has also been delivered to him or left at his office or place of residence, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of residence of the intending plaintiff, and unless the plaint contains a statement that such notice has been so left or delivered.

(2) No suit, such as is described in sub-section (1), shall unless it is a suit for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(3) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the

object would be defeated by the giving of the notice or the postponement of the institution of the suit.”

24. The plaintiff had categorically in para 8 averred that notice under Section 478 of the DMC Act Ex.PW-1/8 dated 21.4.1986 had been served; registered A.D. Card had also been proved on record. It had been averred that the cause of action had accrued on the harassment meted out to the plaintiff and on the denial of promotion to him.

25. Justice and fair play had been denied; reference had also been made to his representation dated 08.3.1986; suit was filed on 07.7.1986 well within a period of six months.

The trial judge had returned a finding on issue no.4 against the plaintiff. It was of the view that there has been no effective compliance of Section 478 (2). In the first appeal Court in the ground of appeal this finding was assailed but unfortunately the impugned had returned no finding on this score; it had not dealt with this contention of the appellant. It has otherwise allowed the appeal on merits. Record shows that in fact there has been an effective compliance of Section 478 of the DMC Act. This is evident from a bare reading of Ex.PW-1/8 (notice under Section 478 of the DMC Act).

26. The impugned judgment calls for no interference. It suffers from no perversity. What is perverse has been defined by the judicial pronouncements time and again. For a finding to be perverse it must be based on no evidence or a mis-reading or it must be not right, turned the wrong way; distorted from right, deviating from what is right, proper, correct etc. No such lacuna has been pointed out. The impugned judgment has in fact after a

detailed scrutiny of the evidence oral and documentary returned a cogent and coherent finding which finding calls for no interference. Appeal is without any merit. The appeal as also the pending applications are dismissed.

INDERMEET KAUR, J.

MARCH 17, 2011
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