

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 04.01.2011
% Date of decision : 17.01.2011

+ WP (C) No.3968/2010

SUREKSHA LUTHRA PETITIONER

Through : C.Hari Shankar and
Mr.Pushkar Kumar Singh, Advocates.

- V E R S U S -

THE REGISTRAR GENERAL,
DELHI HIGH COURT & ORS. ... RESPONDENTS

Through : Mr.Rajiv Bansal and Mr.Amandeep,
Advocates for R-1.

Mr.Inderjit Sharma
and Mr.R.C.Nangia, Advocates
for R-2 and R-3.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE RAJIV SHAKDHER

Whether the Reporters of local papers may be allowed to see the judgment?	YES
To be referred to Reporter or not?	YES
Whether the judgment should be reported in the Digest?	YES

SANJAY KISHAN KAUL, J.

1. The petitioner joined the services of the Delhi High
Court as an LDC on 21.02.1979 and attained her

promotions from time to time right till the post of Deputy Registrar on 01.11.2006.

2. The grievance of the petitioner is that when her case for promotion to the post of Joint Registrar was considered along with other candidates, she was superseded and not appointed as a Joint Registrar despite being the senior most Deputy Registrar. The representations made by the petitioner against her supersession were also rejected. However, the petitioner, while her representations were rejected, was appointed as a Joint Registrar against a vacancy vide order dated 03.06.2009 with effect from 21.03.2009. Thus, the only question which is required to be considered in the present case is the date from which the petitioner is required to be treated as having joined the post of Joint Registrar and whether her supersession was valid.
3. We may note that learned counsel for the petitioner has conceded that the petitioner does not claim any monetary benefits for the period she has not worked in the post of Joint Registrar, but she seeks appointment from the date of earlier consideration for all other benefits and for her to be shown senior to R-2 and R-3, who were appointed as Joint Registrar superseding her.

4. The petitioner has pleaded that the conditions of service of the staff on the Establishment of this Court are governed by the Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972 ('the said Rules' for short) which have been issued under Article 229 of the Constitution of India. The appointments to the various posts as specified in Schedule II to the said Rules are to be made by the Hon'ble Chief Justice as per the mode of appointment and qualifications provided in the said Schedule to the said Rules. The post of Joint Registrar is to be filled up in the following manner:

"a. By selection on merit on deputation from Delhi Higher Judicial Service or Delhi Judicial Service (Selection Grade)

Or

b. By selection on the basis of merit cum seniority from Officer of category 2 (Deputy Registrars) of Class-I mentioned in Schedule-I."

In the present case we are concerned with clause (b) as all the concerned people are already officers working in the High Court as Deputy Registrar.

5. Rule 11 of the said Rules read as under:

"11. Application of Central Government Servants Service Rules –

In respect of all such matters regarding the conditions of service of Court servants for which no provision or insufficient provision has been made in these rules, the rules and orders for the time being in

force and applicable to Central Government servants shall regulate the conditions of service of the Court servants subject to such modifications, variations or exception, if any, in the said rules, as the Chief Justice may, from time to time, specify.

Provided that the Registrar and Joint/Deputy Registrar belonging to Delhi Higher Judicial Service and Delhi Judicial Service respectively, shall be governed by the rules applicable to the said service.”

6. The gravamen of the case of the petitioner is based on the aforesaid Rule and OM No.35034/7/97-Estt(D) dated 08.02.2002 issued by the Department of Personnel and Training. The aforesaid Rule provides for application of the norms applicable to Central Government servants where no provision or insufficient provisions have been made under the said Rules. The OM No.35034/7/97-Estt(D) dated 08.02.2002 seeks to traverse a slightly different path in respect of appointment based on merit-cum-seniority (which is applicable to the post of a Joint Registrar) inasmuch as it prescribes a change whereby once the persons to be appointed on the said basis meet the benchmark, no supersession in selection/promotion is permissible. The petitioner thus pleads that it is no one's case that she did not meet the benchmark, but that R-2 and R-3 were appointed to the post of Joint Registrar despite being junior to her on the basis of superior ACRs.

7. To buttress her arguments, the petitioner has relied upon the note dated 01.08.2008 drawn up by the Establishment of the Delhi High Court while putting up the case before the Selection Committee for appointment to the post of Joint Registrar. The noting dated 01.08.2008 specifically drew attention to the instructions contained in the OM No.35034/7/97-Estt(D) dated 08.02.2002 which were thus unquestionably applicable. The petitioner had a grading of 'Good' in the first ACR earned as a Deputy Registrar for the year 2003 while for the subsequent years i.e.2004-2007, she had earned a 'Very Good' for each of the years. We may note that even in the previous posts for a number of years, the petitioner has earned an ACR of 'Very Good', the year 2003 being an exception.
8. The Selection Committee vide its Minutes dated 04.08.2008 made a comparative assessment of the petitioner, R-2 and R-3 for the posts which had fallen vacant and found R-2 and R-3 to be more meritorious than the petitioner who was the senior most candidate and thus recommended the appointment of R-2 and R-3 to the posts of Joint Registrar, who were so appointed. The petitioner aggrieved by the aforesaid supersession submitted two representations dated 25.09.2008 and 21.11.2008. The representations

were based on the plea that no adverse ACR had been communicated to the petitioner and there was no justification for ignoring her seniority in view of OM No.35034/7/97-Estt(D) dated 08.02.2002. The petitioner has also placed reliance *inter alia* on the judgments of the Supreme Court in Dev Dutt v. UOI & Ors.; 2008 (8) SCC 725 and State of U.P. v. Yamuna Shankar Misra; (1997) 4 SCC 7 for ignoring the ACR of the petitioner for the year 2003 since if that came in the way of her promotion she had not been communicated the said ACR. These representations were rejected by the Selection Committee on 19.01.2009. The petitioner was, however, recommended for selection against the subsequent temporary vacancy of Joint Registrar created with effect from 20.12.2008 and was subsequently so appointed vide order dated 03.06.2009 with effect from 21.03.2009.

9. The petitioner seeks to also rely upon the manner in which the Delhi High Court had earlier dealt with two such similar cases – Sh.J.L.Kalra and Sh. D.K.Prasad against their supersession. She sought the relevant information under the Right to Information Act, 2005 and she was duly supplied the material sought by her. The petitioner relied upon the same to substantiate her plea that even Sh.J.L.Kalra was earlier ignored but

subsequently promoted to the post of Joint Registrar and Mr.D.K.Prasad who was earlier ignored but subsequently promoted to the post of Registrar with seniority and the decision to supersede them by their juniors was reversed. Another case cited by the petitioner is of Ms.Usha Kiran Gupta which found favour with the Selection Committee vide its Minutes drawn on 23.12.2009. A reading of these Minutes shows that the Selection Committee has noted that a formal benchmark had not been laid for promotion to the posts of Assistant Registrar, Deputy Registrar and Joint Registrar. It was noted that henceforth the benchmark for consideration to the posts of Assistant Registrar, Deputy Registrar and Joint Registrar would be at least three gradings of 'Very Good' in the ACRs during the preceding five years and those candidates fulfilling this condition of benchmark would be assessed in accordance with the said Rules. It has also been submitted by the petitioner that while considering the case of Mr.J.L.Kalra, the Selection Committee had, in fact, once again noted the aspect of non-communication of a down-grading ACR and the factum of 3 out of 5 ACRs being 'Very Good' entitling him to promotion on the basis of the benchmark.

10. The writ petition has been resisted both by the Delhi High Court and the private respondents.

11. The stand of the Delhi High Court is that the selection in question being merit-cum-seniority, the subjective findings of the Selection Committee dated 04.08.2008 which have taken the comparative merit into consideration ought not to be interfered with. The application of OM No.35034/7/97-Estt(D) dated 08.02.2002 has not been disputed but it is pleaded that the same had become obsolete as having been superseded by a Government of India OM No.22011/3/2007-Estt(D) dated 18.02.2008 containing revised guidelines. The OM prescribes that the DPC should ensure that promotion to the scale of Rs.18,400-22,400 and above which would apply to the post of a Joint Registrar, the benchmark of 'Very Good' should be invariably met in all ACRs of five years under consideration. The DPC in terms of the guidelines of the Department is required to make its own assessment on the basis of entries in the ACRs and not be guided by overall grading. It has been emphasized that the executive instructions by the Government of India cannot be *ipso facto* made applicable to the High Court and strength is sought to be drawn from a judgment of the Supreme Court in K.K.Parmar & Ors. V. High Court of Madras ; AIR 2006 SC 3559 where it has been observed that Rules framed by States under Article 309 proviso may be

applicable to the employees of the High Court, the executive instructions issued by the State, however, would not be applicable, particularly, when such executive instructions were contrary to or inconsistent with the Rules framed by the Chief Justice of the High Court in terms of Article 229 of the Constitution of India.

12. Learned counsel for R-1/Delhi High Court while emphasizing that this Court should not function as a Court of appeal over decisions of the Selection Committee fairly did not dispute that there had been no specific norms laid down as to the benchmark of 'Very Good' for five years prior service, but on the other hand the various selection committees had noted that a benchmark of 'Very Good' for three years would suffice. It was, however, pleaded that OM No.22011/3/2007-Estt(D) dated 18.02.2008 appears to have escaped attention. Learned counsel also could not seriously dispute the applicability of OM No.35034/7/97-Estt(D) dated 08.02.2002 as in the note prepared for the Selection Committee to carry out the selection, the said note was itself relied upon.
13. The records also show that in the past where such supersession had occurred in the case of an officer meeting the benchmark, the supersession had been subsequently reversed.

14. The private respondents (R-2 and R-3) have emphasized on the basis of selection which is merit-cum-seniority. It has been thus pleaded that a duly constituted Selection Committee having considered relative merit, this Court ought not to interfere with the same. The private respondents deny the applicability of any OM of the Government of India as their contention is that an OM to be made applicable has to be adopted by Hon'ble the Chief Justice. It has been emphasized that the administrative instructions cannot apply to the High Court and the power vests with the Chief Justice of the High Court which is unfettered under Article 229 of the Constitution of India. The cases of Sh.J.L.Kalra, Sh.D.K.Prasad and Ms.Usha Kiran Gupta are stated to have no application in the given facts of the case. Learned counsel for the said respondents relied upon the decision of the Supreme Court in Dalpat Abasaheb Solunke & Ors. v. Dr.B.S.Mahajan & Ors.; AIR 1990 SC 434 to support the plea that whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. It was observed that the Court has no such expertise. A reference was also made to the judgment in M.Gurumoorthy v. Accountant General, Assam and Nagaland AIR 1971 SC 1850 for the proposition that

the Chief Justice of the High Court or his nominee is the supreme authority in the matter of appointment of officers and servants of the High Court as per Article 229 of the Constitution of India.

15. We may notice that on a specific question being posed to learned counsel for R-1/Delhi High Court, it was categorically stated before us that the OM No.35034/7/97-Estt(D) dated 08.02.2002 was attracted in the present case and a categorical averment has already been made in para 11 of the counter affidavit to that effect. In fact, para 11 states that “only those officers who obtain the said Benchmark are promoted in the order of merit.” We find there is really not even a dispute raised about the factum of the petitioner having achieved the benchmark for being considered for promotion. The OM No.22011/3/2007-Estt(D) dated 18.02.2008 has not been made applicable till date and the notings made in the case of Sh.J.L.Kalra (prior to the case of promotion of the petitioner) and of the minutes dated 23.12.2009 (post the case of the petitioner) show that the benchmark being followed was of three ‘Very Good’ in the previous five years. In view of the aforesaid position, the only issue really to be examined is whether it was open to the Selection Committee to consider the comparative merit of the

candidates who met the benchmark or whether it had to proceed in accordance with seniority once the benchmark was satisfied.

16. The answer of the aforesaid aspect in turn is dependent on the OM No.35034/7/97-Estt(D) dated 08.02.2002. We may notice that there is undoubtedly a distinction between the promotion based on merit-cum-seniority and seniority-cum-merit as explained in Haryana State Electronics Development Corporation Limited and Ors. V. Seema Sharma and Ors.; (2009) 7 SCC 311 and Rajendra Kumar Srivastava and Ors. v. Samyut Kshetriya Gramin Bank and Ors.; (2010) 1 SCC 335, the latter following the earlier judgment in UOI and Ors.v. Lt.Gen Rajendra Singh Kadyan and Anr.; (2000) 6 SCC 698. Undisputedly, in merit-cum-seniority, greater emphasis has to be placed on merit and seniority comes into picture when the merit of the two candidates is more or less equal. The comparative merit can thus be taken into account. However, the OM No.35034/7/97-Estt(D) dated 08.02.2002 seeks to lay down a different parameter even in the case of merit-cum-seniority which provides that once a benchmark is met, there should be no supersession in promotion. This is apparent from a reading of the memorandum itself, relative portion of which is extracted below:

“F.No.35034/7/97-Estt(D)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training

New Delhi – 110 001

February 8, 2002

OFFICE MEMORANDUM

Subject : Procedure to be observed by Departmental Promotion Committees (DPCs) – NO supersession in ‘selection’ promotion – Revised Guidelines regarding.

... ..

2. Existing Guidelines

2.1 As per the existing (aforementioned) instructions, in promotions *up to and excluding* the level in the pay scale of Rs.12,000-16,500 (excepting promotions to Group ‘A’ posts/services from the lower group), if the mode happens to be ‘selection-cum-seniority’, then the bench-mark prescribed is ‘good’ and officers obtaining the said bench-mark are arranged in the select panel in the order of their seniority in the lower (feeder) grade. Thus, there is no supersession among those who meet the said bench-mark. Officers getting a grading lower than the prescribed bench-mark (‘good’) are not empanelled for promotion.

2.2 In the case of promotions from lower Groups to Group ‘A’, while the mode of promotion happens to be ‘selection by merit’, the bench-mark prescribed is ‘good’ and only those officers who obtain the said bench-mark are promoted in the order of merit as per grading obtained. Thus, officers getting a superior grading supersede those getting lower grading. In other words, an officer graded as ‘outstanding’ supersedes those graded as ‘very good’ and an officer graded as ‘very good’ supersedes officers graded as ‘good’. Officers obtaining the same grading are arranged in the select panel in the order of their seniority in the lower grade. Those who get a grading lower than the prescribed bench-mark (‘good’) are not empanelled for promotion.

2.3 In promotions to the level in the pay-scale of Rs.12,000-16,500/- and above, while the mode of promotion is ‘selection by merit’, the bench-mark prescribed is ‘very good’ and only those officers who obtain the said bench-mark are promoted in the order of merit as per the grading obtained, officers getting superior grading supersede those getting lower grading as explained in paragraph 2.2 above.

Officers obtaining the same grading are arranged in the select panel in the order of their seniority in the lower grade. Those who get a grading lower than the prescribed bench-mark ('very good') are not empanelled for promotion.

3. Revised Guidelines

The aforementioned guidelines which permit supersession in 'selection' promotion ('selection by merit') have been reviewed by the Government and after comprehensive/extensive examination of relevant issues it has been decided that there should be no supersession in the matter of 'selection' (merit) promotion at any level. In keeping with the said decision, the following revised promotion norms/guidelines, in partial modification (to the extent relevant for the purpose of these instructions) of all existing instructions on the subject (as referred to in paragraph 1 above) are prescribed in the succeeding paragraphs for providing guidance to the Departmental Promotion Committees (DPCs).

3.1 Mode of Promotion

In the case of 'selection' (merit) promotion, the hitherto existing distinction in the nomenclature ('selection by merit' and 'selection-cum-seniority') is dispensed with and the mode of promotion in all such cases is rechristened as 'selection' only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion.

3.2 'Bench-mark' for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded 'fit' (in terms of the prescribed bench-mark) by the DPC.

3.2.1 Although among those who meet the prescribed bench-mark, inter-se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/Service Rules, including the conditions

that one should be the holder of the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post.”

17. We have consciously reproduced the relevant portion of the aforesaid memorandum to show that the issuing authority was conscious of the normal practice based on merit-cum-seniority, but a revised guideline was issued. Once a revised guideline is applicable, there can be no doubt that no supersession can take place on the basis of comparative merit.
18. The private respondents (R-2 and R-3) did seek to contend that the OM No.35034/7/97-Estt(D) dated 08.02.2002 is not applicable in view of the provisions of Article 229 of the Constitution of India.
19. We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be made applicable when no provision or insufficient provision has been made in the said Rules. Other than stating that the criteria is merit-cum-seniority, nothing else was set out in the Rules and thus OM No.35034/7/97-Estt(D) dated 08.02.2002 was made applicable. There is little doubt over the application of the OM No.35034/7/97-Estt(D) dated 08.02.2002 when the office note itself proceeds by relying on OM

No.35034/7/97-Estt(D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner, R-2 & R-3 and other officers.

20. We are thus unequivocally of the view that the OM No.35034/7/97-Estt(D) dated 08.02.2002 would apply to the present case and which would entitle the petitioner to be promoted prior to promotion of R-2 and R-3.

21. The other aspect which has been raised arises from the non-communication of the adverse ACR to the petitioner which comes in the way of promotion of the petitioner. In this behalf, learned counsel for the petitioner relied upon the judgment in Dev Dutt v. UOI & Ors.'s case (supra). Learned counsel for R-1/Delhi High Court, however, submitted that the Supreme Court of India itself in a order dated 29.03.2010 has referred to the inconsistencies arising from the said pronouncement on the one hand and in the case of Satya Narain Shukla v. Union of India; 2006 (9) SCC 69 and K.M.Mishra v. Central Bank of India and Ors.; 2008 (9) SCC 120. These observations have been made in Special Leave to Appeal (Civil) No. 15770/2009. We, however, find that all the three judgments have been considered by a Division Bench

of this Court in P.K.Sarin v. Union of India & Ors. 2009 INDLAW Delhi 1344 where the conclusion was reached that the adverse ACRs ought to have been communicated.

22. We respectfully follow the decision of this Court in P.K.Sarin's case (supra) with a caveat; in view of the facts obtaining in the present case. The Division Bench in P.K.Sarin's case (supra) directed in the operative part of the judgment, reconsideration of the petitioner's case based on a fresh representation. Such an eventuality does not arise in the present case. The petitioner already stands promoted albeit from a later date. The effective relief sought is only that the date of seniority be advanced. Therefore, the question of communicating the ACRs to the petitioner and permitting the petitioner to make a representation whereafter reconsideration takes place does not arise. The application of OM No.35034/7/97-Estt(D) dated 08.02.2002 ensures that the petitioner in any case is entitled to promotion as she has satisfied the benchmark and was senior to R-2 and R-3. We may add that it is the case of none of the respondents that the OM No.22011/3/2007-Estt(D) dated 18.02.2008 would apply but even if it was so, the petitioner satisfied the benchmark as she had a 'Very Good'

throughout except for the year 2003 which ACR was never communicated to the petitioner.

23. We may notice the other aspects which emerge from a perusal of the record. The first one is that when the petitioner was promoted to the post of Joint Registrar subsequently, the next person in line had superior ACRs and yet the petitioner was promoted. Thus, the benefit of superior ACRs for such promotion is not an aspect taken into consideration. Not only that, in previous cases when this norm was breached, the same was remedied in each of the cases by subsequent acts of the Delhi High Court and each of the examples given show this – Sh. J.L.Kalra, Sh.D.K.Prasad and Ms.Usha Kiran Gupta. A different norm cannot be applied to the petitioner.

24. The second aspect is that the petitioner had earned a grading of 'Good' only for one year i.e. for the 2003 while she had earned a grading of 'Very Good' throughout in the previous post as Private Secretary and after her promotion as Joint Registrar has earned a grading of 'Outstanding'.

25. On consideration of the aforesaid facts and circumstances, we are of the view that the petitioner is liable to succeed and the petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date

when she ought to have been promoted to the post of Joint Registrar i.e.07.08.2008 without the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009.

26. The writ petition is accordingly allowed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

JANUARY 17, 2011
dm

RAJIV SHAKDHER, J.