

5

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

LPA 78 OF 2012
LPA 102 OF 2012

%

Judgments Reserved on: 16.4.2012.
Judgment Delivered on: 11.5.2012.

LPA 78 OF 2012

MCD

... APPELLANT
Through : Mr. Gaurang Kanth, Advocate
with Ms. Biji Rajesh,
Advocate.

VERSUS

RAJ KUMAR

... RESPONDENT
Through: Mr. Rajiv Agarwal, Advocate.
With Ms. Neelam Tiwari,
Advocate.

Judgments Reserved on: 17.4.2012.

LPA 102 OF 2012

MCD

... APPELLANT
Through : Mr. Gaurang Kanth, Advocate
with Ms. Biji Rajesh,
Advocate.

VERSUS

MOREDHWAJ

... RESPONDENT
Through: Mr. K.K. Rai, Sr. Advocate
with Mrs. Rekha Palli and Ms.
Amrita Prakash, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. In both these appeals common issue is raised namely promotion from the post of Garden Chaudhary to Section Officer. As per the MCD, the workmen in both the cases do not fulfill the eligibility conditions and were given promotions. For convenience, we take note of facts in LPA 78 of 2012.
2. By this intra court appeal preferred by the appellant Municipal Corporation of Delhi (MCD), filed under Clause 10 of Letter Patents Act, the MCD questions the validity of judgment dated 2.12.2011 passed by the learned Single Judge of this Court in Writ Petition (C) 11737/2009 which was preferred by the MCD challenging the Award dated 24.3.2009 rendered by the Industrial Tribunal-I in favour of the respondent workman herein. Vide the said Award, the Industrial Tribunal has held that the workman is entitled to be promoted from the post of Garden Chaudhary to that of Section Officer from the date when the juniors to him were promoted. He was granted consequential benefits including monetary or otherwise as well. The learned Single Judge has modified this Award by holding that the respondent would be entitled to ad-hoc promotion as Section Officer as was given to other 9 Garden Chaudharies named in Office Order dated 29.9.2000. The controversy falls in a narrow compass. As per the MCD, such a direction was impermissible because of the reason that the respondent does not fulfill the eligibility conditions for promotion to the post of Section Officer as per the extant Recruitment Rules, and, therefore, he has no right to seek promotion to the said post. The Recruitment Rules for the post of

7

Section Officer (Horticulture) as framed by the MCD *inter alia* stipulates the following educational and other qualifications:-

“7.Educational and other qualifications

Prescribed for direct recruitment

Essential: Degree in Agriculture or in Science with Botany as a subject from a recognized University or equivalent.

Desirable Experience in the field of ornamental Horticulture/landscape Gardening.

8. Whether age and educational qualifications prescribed for direct recruits will apply in the case of promotes:

Age: No.
Qualifications: Yes.

11. In case of rectt. By promotion/deputation Transfer, grades from which promotion/Deputation/Transfer to be made.

- (i) Nursery Record Keeper with 5 years Service in the grade.
- (ii) Choudhary with 12 years regular service in the grade.

Note: The eligibility for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grade post.”

3. Reading of the aforesaid columns of the Recruitment Rules makes it clear that holding a degree in Agriculture or in Science with Botany as a subject from a recognized University is an essential qualification. This is so specified against column no.7 which prescribes the qualification for direct

recruitment. However, column 8 provides that this educational qualification is required even in the case of a promote.

4. The respondent workman had joined the duties as Garden Chaudhary on daily wage basis w.e.f. 6.11.1978 and thereafter pursuant to the award passed in an industrial dispute raised by him which was upheld by this Court, he was regularized to the post of Garden Chaudhary on 2.7.1984. Thus, he is working as Garden Chaudhary on regular basis w.e.f. 2.7.1984 and has thus rendered more than 12 years of regular service in this grade, he therefore fulfills the eligibility criteria/conditions prescribed in column 11 for the promotion to the post of Section Officer (Horticulture). However, it is an admitted case that he does not have essential qualification namely degree in Agriculture or in science with Botany as a subject from a recognized University or equivalent. Thus, insofar as educational qualification is concerned, he lacks the same. It is also clear that holding of this qualification for being eligible to the post of Section Officer (Horticulture) is "essential" and therefore cannot even be relaxed. Obviously, this makes the respondent ineligible for consideration to the post of Section Officer (Horticulture).

5. In *R.S. Garg Vs. State of U.P.* (2006) 6 SCC 430 the Supreme Court relying on its earlier decision in *Suraj Prakash Gupta Vs. State of J & K* (2000) 7 SCC 561 held as under:-

“ It would not be a mere irregularity, when a person not eligible therefor would be considered for promotion. It may be that for the purpose of direct appointment, experience and academic qualifications are treated to be on a par, but when

9

an eligibility criterion has been provided in the Rules for the purpose of promoting to a higher post, the same must strictly be complied with. Any deviation or departure therefrom would render the action *void*."

6. Notwithstanding the aforesaid position, the Award of the Labour Court as well as the judgment of the learned Single Judge raised a discrimination i.e. some other Garden Chaudharies who did not fulfill these qualifications were also promoted as Section Officers on ad-hoc basis vide order dated 29.9.2000 to take effect from 3.5.1997 and therefore this benefit was to be given to this workman as well.

7. The discussion contained in the Award, on this aspect, reveals two reasons given in support of the award holding the workman to be entitled to promotion:-

(i) Juniors to the respondent workman were promoted to the post of Section Officer w.e.f. 29.9.2000 and 1.10.2003.

(ii) That the MCD has taken the plea that the workman did not fulfill the eligibility criteria as per Recruitment Rules, which was not correct as the workman had completed more than 12 years of service and there was no reasonable or justifiable cause to ignore the workman for the promotion when juniors to him were promoted.

8. The learned Single Judge on the other hand went only by consideration that vide order dated 29.9.2000 ad hoc promotion was given to

10

junior Garden Chaudhary to the post of Section Officer and non-granting of this promotion to the respondent herein amounts to discrimination. However, since others were promoted on ad hoc basis and not on regular basis, award is modified by making the promotion of the respondent as Section Officer on adhoc basis.

9. It is clear from the above that the learned Single Judge did not go into the question of the eligibility of the respondent workman for promotion to the post of Section Officer. Learned Counsel for the respondent argued that this contention was never raised earlier and could not be raised for the first time in this appeal. This is factually incorrect. As pointed out above, the contention was raised before the Industrial Tribunal and was in fact dealt with by the Tribunal. Recruitment Rules were proved on record as MW1/1. The mistake which the Tribunal committed was it went only by the length of service and ignored column no.7 & 8 of the Recruitment Rules which lay down educational qualification as one of the essential eligibility conditions.

10. Once we find that the workman was not eligible for consideration, merely because his juniors were promoted even on adhoc basis would be insignificant and when the respondent is not eligible, he cannot plead discrimination.

11. A faint attempt was made by the learned counsel for the respondent to argue that MCD has been promoting non-qualified and even illiterate persons to the post of Section Officer. In the written submission example of one Hari Chand and one Sh. Asha Ram is given and it is submitted that the said fact has been admitted by the Mr. R.K. Mehra, Assistant Director,

11

Horticulture. A perusal of the cross-examination of the said witness of the MCD would show that he was categorical in his statement that persons promoted from the post of Garden Chaudary to Section Officer fulfills the eligibility criteria as per Recruitment Rules. (incidentally this also nullifies the contention of the workman that no such case was set up before the Industrial Tribunal by the MCD). However, this witness accepts that Sh. Hari Chand was promoted to the post of Section Officer in the year 1992 and he did not fulfill the eligibility criteria laid down in the Recruitment Rules and Mr. Amba Prasad was promoted who did not fulfill the eligibility conditions as per recruitment rules. The explanation which comes on record of LPA 102/2012 in respect of these two persons is as under:

In the case of Amba Prasad, the order was passed by the Court and therefore, the MCD has no choice but to implement the said order. Interestingly, the MCD has taken up the matter to Supreme Court and the Supreme Court has dismissed the appeal only on the ground that the MCD had not pointed out that it was following the recruitment regulation approved in the year 1984 prescribing certain qualification and a considerable time had intervened. At the same time the Supreme Court very categorically clarified that it is not to be used as a precedent in other cases. As is clear from the brief order passed in that that:-

“Leave granted.

It is more or less an admitted position that at earlier stages of the proceedings. It was not pointed out on behalf of the appellant-corporation that they were following the Recruitment Regulations approved in the year 1984, prescribing certain qualifications. As a considerable time has intervened, we are not inclined to interfere with the impugned order.”

The appeal is accordingly dismissed. However, this should not be used as precedent in other cases and if similar petitions are filed it will be open to the appellant corporation to point out the relevant Recruitment Regulations. No costs."

Insofar as Hari Chand is concerned, the submission of the MCD was that he had obtained promotion by fraudulent means without possessing necessary qualifications. This is taken note of by the learned Single Judge in the impugned judgment dated 22.12.2011 which is the subject matter of LPA 102/2012, however, not allowed to be raised on the ground that it was not raised before the Labour Court. The learned Single Judge has also drawn inference to the effect that Hari Chand was given promotion by relaxing the Rules if he did not possess the requisite qualification. However, this was not the correct approach for two reasons:-

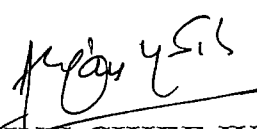
- (i) The Regulations clearly mention that it is the essential qualification which cannot be relaxed.
- (ii) However, even if that be so, the plea of discrimination cannot be a right as equity is not a negative concept.

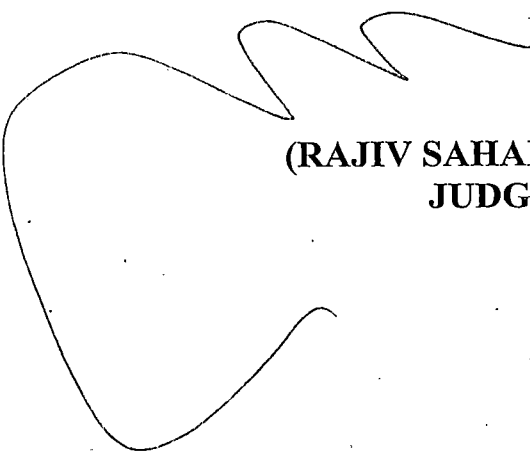
12. If wrong is committed in two cases that would not mean that it has to be perpetuated, that too, by the Courts by giving such directions of promotion to a person who is otherwise not eligible as per the recruitment rules.

13. We thus are of the opinion that the Award of the Industrial Tribunal as well the order of the learned Single Judge are contrary to the law and

13
cannot be sustained. We allow this appeal and set aside the Award passed by the Industrial Tribunal as well that of the learned single Judge.

14. There shall be no order as to costs.


ACTING CHIEF JUSTICE


**(RAJIV SAHAI ENDLAW)
JUDGE**

11.05.2012
Skb