

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

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Date of decision: 7th March, 2012

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LPA No. 741/2011

BSES YAMUNA POWER LTD.

..... Appellant

Through: Mr. Sandeep Prabhakar, Advocate

Versus

S.C. KANSAL

..... Respondent

Through: Mr. Rajesh Pathak, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The challenge in this intra court appeal is to the judgment dated 13th July, 2011, as corrected on 20th July, 2011, of the learned Single Judge allowing WP(C) No. 2859/2002 preferred by the respondent by directing the appellant to issue appropriate orders clarifying that the promotion of the respondent as Assistant Engineer (AE) is as of the year 1995 when such promotion became due and by further directing the appellant to consider the case of the respondent for promotion as Executive Engineer on completion of eight years as AE i.e. as of 2003. Notice of the appeal was issued. The counsel for the respondent stated that the respondent will not enforce the

order of the learned Single Judge till decision of this appeal. The counsels have been heard.

2. The respondent filed the writ petition aforesaid pleading that he is a Degree holder in Electrical Engineering of 1976 batch; that he joined the services of the erstwhile Delhi Vidyut Board (DVB) being the predecessor of the appellant as Inspector in July, 1979; that he was promoted to the post of Superintendent in the year 1991 and on completion of three years, as per the Recruitment and Promotion Rules (R & P Rules), became eligible for promotion to the post of AE in July, 1994; that vide Office Order dated 24th August, 1995 he alongwith 28 others, also working as Superintendent, were assigned “current duty charge of the post of AE” and continued to so discharge duties of AE till the filing of the writ petition but without full benefit; that the Office Order dated 24th August, 1995 was under challenge in CWP No. 3080/1995 titled ***K.K. Sharma Vs. MCD***; that in the year 1999 the post of Inspector and Superintendent were amalgamated and converted into the post of Junior Engineer; that no attempt was being made to make regular appointments to the post of AE – instead promotions to the said post were made *ad hoc* and that too by giving preference to diploma holders over degree holders; all this was contrary to R & P Rules; that to the same effect,

vide Office Order dated 15th April, 2002, 73 employees had been promoted to the post of AE though on *ad hoc* basis and none of whom were Degree holder. Relief of quashing of Office Order dated 15th April, 2002 and issuance of mandamus for filling up the post of AE, were sought in the writ petition.

3. The appellant filed a counter affidavit in the writ petition pleading that the respondent was a Superintendent (T) re-designated as JE and was holding the post of AE (E/M) on look after basis since 24th August, 1995; that his name appeared at serial No. 705 in the seniority list of Superintendent (T); that he alongwith 28 others were vide Office Order dated 24th August, 1995 assigned only current duty charge to man the vacant post of AE in view of the orders in CWP No.s 1652/1993 and 3153/1993 (*sic* for 5153/1993) filed by S.K. Goel and A.K. Mittal respectively; that the Office Order 24th August, 1995 did not confer any right for regularization/promotion/*ad hoc* appointment to the post of AE or for any other benefit; that as per R & P Rules, 50% of the vacancies in the grade of AE (E/M) were to be filled up by direct recruitment and 50% by promotion; subsequently the promotion quota was enhanced from 50% to 66%; regular promotion was to be made on the basis of the selection to be done by

DPC/UPSC; however the ad hoc promotion was resorted to since the post of AE being a supervisory post could not be kept vacant for long; such ad hoc promotions were made on the basis of seniority cum fitness and eligibility criteria laid down in R&P Rules; that the petitioner could not claim any right on the basis of higher qualification over his seniors unless the seniors were not eligible under the R&P Rules; that ad hoc promotion had been made in unreserved category till serial no. 626 while the name of the respondent appeared at serial No. 705; that the respondent would be promoted as per his turn.

4. The learned single Judge has in the impugned judgment observed/found/held :-

- (i) that there was no valid explanation given by the appellant to justify the grant of ad hoc promotion in August, 1995 to persons junior to the respondent and the grant of promotion to the appellant as AE only in the year 2004;
- (ii) that there was no denial by the appellant in the counter affidavit that persons junior to the respondent and having only a diploma

had been promoted on ad hoc basis as AE and thereafter on regular basis;

- (iii) the action of the appellant in not considering the case of the respondent for promotion when the same fell due was unfair;
- (iv) that instead of placing the respondent on current duty charge as AE w.e.f. 24th August, 1995, he should have been considered for regular promotion w.e.f. that date;
- (v) there was no explanation for not doing so till 2004 by which time many of the juniors of the respondent had been promoted either on ad hoc basis or otherwise;
- (vi) the respondent had thus been discriminated in the matter of consequent promotion to the post of EE.

5. We may at the outset clear the position as in the Recruitment Rules. Therein, the post of AE (E&M) is described as a selection post, with the method of recruitment of 66% by promotion and 34% by direct recruitment and with eligibility for promotion from the post of Superintendent (T) prescribed as 3 years regular service in the case of Degree holder and 7 years regular service in the case of Diploma holder.

6. The Office Order dated 24th August, 1995 assigning current duty charge as AE to the respondent as also the counter affidavit of the appellant referred to CWP No.s 1652/1993 and 5153/1993. We had during hearing called for the said files. CWP No. 1652/1993 titled ***Surinder Kumar Goel Vs. MCD*** and CWP No. 5153/1993 titled ***Anil Kumar Mittal vs. MCD*** were filed seeking a direction for consideration of the petitioners therein for promotion as Assistant Engineer. It was the case of Shri Surinder Kumar Goel and Shri Anil Kumar Mittal in the said writ petitions that a large number of vacancies in the post of AE in the direct recruitment quota were remaining unfilled and *ad hoc* appointments therefor were being made while there was a long delay in promotion quota for the said post; relief of filling up of the direct quota post of AE by regular appointments by promotion was sought in the said writ petitions. Vide order dated 11th March, 1994 in the said writ petitions promotions to the post of AE were stayed. However, vide order dated 24th May, 1994 direction was issued for filling up of the then 50% post of the direct quota post of AE and the said posts were restrained to be filled up by promotion / *ad hoc* promotion. Further direction was issued for filling up of 50% promotion post of AE in accordance with the R & P Rules and restraint was issued against

regularization of *ad hoc* promotees to the said posts. The said writ petitions were ultimately dismissed for non-prosecution on 31st January, 2000 and 9th December, 2002.

7. It was explained in the counter affidavit in CWP No. 1652/1993 that the posts of AE of the quota of direct recruitment were not being filled up for the reason of the then general ban on the recruitment in Government service; however since the said post was a supervisory post and the functioning of DVB was being affected by vacancies in the said post, those eligible for being promoted to the said post were given current duty charge/*ad hoc* promotion to the said post.

8. What thus emerges is, that the current duty charge of the post of AE given to the respondent on 24th August, 1995 was against the vacant post of AE in the direct recruitment quota. The respondent could have been given regular promotion only in the promotion quota post of AE. There is nothing to show that there were any vacancies in the promotion quota post of AE till then. The categorical assertion of the appellant in the counter affidavit to the writ petition as also before us was/is of the respondent as per the seniority list being at serial no. 705 and having been promoted to AE in the year 2004. It is settled principle in law that there is no right of promotion on acquiring

eligibility. Promotion can be claimed only against a vacancy (see *Union of India v. Ishwar Singh Khatri* 1992 Supp (3) SCC 84 and *Deepa Augustine v. Geetha Alex* (2008) 16 SCC 526. Infact in *A.K. Sarma v. Union of India* (1999) 2 SCC 178 ex post facto clarification that promotion was *ad hoc* was upheld for the reason that at the time of promotion since no regular vacancies existed, the promotion could not have been treated on regular basis.). The respondent, even if after 3 years as Superintendent, had become eligible in 1994 to be promoted as AE, had no claim to be even considered for promotion until a vacancy occurred in the said post. According to the appellant, there was no vacancy. The respondent has been unable to show otherwise. The learned Single Judge also has not returned any finding in this regard; he has proceeded on the premise that because *ad hoc* promotions were being made and current duty charge as AE being assigned, there must be a vacancy. However, that vacancy as aforesaid was in the direct recruitment quota posts and to which the respondent could not have been promoted. The Supreme Court in *State of Mysore v. C.R. Sheshadri* (1974) 4 SCC 308 observed that no promotion could be directed to be given from a back date unless the Court had the necessary data regarding the vacancy

position and set aside the direction of the High Court granting such promotion without any finding as to the vacancy position.

9. The Supreme Court in *State of Punjab v. Arun Kumar Aggarwal* (2007) 10 SCC 402 reiterated that asking an officer holding substantively lower post to discharge the duties of higher post cannot be treated as promotion and such person continues to hold the substantive lower post and only discharges the duties of higher post essentially as stop gap arrangement; that no right accrues from the same. Similarly, in *State of Haryana v. S.M. Sharma* 1993 Supp (3) SCC 252 the judgement of the High Court reading the order of giving current duty charge as an order of promotion was set aside. Yet again in *Sreedam Chandra Ghosh v. State of Assam* (1996) 10 SCC 567 it was held that officiation in a higher post confers no right to the post.

10. As far as the argument of the respondent of Diploma holders having been given preference over Degree holders is concerned, the R & P Rules as aforesaid equate a Degree holder Superintendent of 3 years experience with a Diploma holder Superintendent with 7 years experience. It is thus well nigh possible that a Diploma holder Superintendent with 7 years experience may be senior to the respondent even though a Degree holder. As aforesaid

there appears to have been a stagnation for long in the post of AE by promotion. Thus a Diploma holder if had completed 7 years as Superintendent before the respondent though a Degree holder completed 3 years as Superintendent, would be senior to the respondent. Even otherwise the post as per the R & P Rules is a selection post. The appellant in its counter affidavit to the writ petition had relied upon the seniority list in which the respondent was placed at serial no. 705. The said seniority list was not under challenge. Though the respondent in the rejoinder to the counter affidavit of the appellant had generally controverted the seniority list but had not impleaded those ahead of him as parties thereto. In the absence of any challenge to the seniority, the same cannot be doubted.

11. The Supreme Court in *V.B. Badami v. State of Mysore* (1976) 2 SCC 901 held that where Rules prescribe quota between direct recruits and promotees, confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre and confirmed persons are senior to those who are officiating. It was further held that direct recruitment is possible only by competitive examination and promotees, if any, in excess of clear permanent vacancy cannot claim any right to hold the promotional post unless the vacancies fall within their quota; if the

promotees occupy any vacancies which are within the quota of direct recruits, then when direct recruitment takes place, the direct recruits will occupy the vacancies within their quota and the promotees occupying the vacancies within the quota of direct recruits will be reverted if cannot be absorbed in the vacancies within their quota. It was further held that as long as the quota rule remains, neither promotees can be allotted to any of the substantive vacancies of the direct recruits nor direct recruits can be allotted to promotional vacancies. It was yet further held that one group cannot claim the quota fixed for another group on the ground that the quotas are not filled up or on the ground that the excess in one quota should be absorbed depriving the other group of the quota.

12. The counsel for the respondent invited our attention to judgment dated 8th February, 2008 of this Court in LPA No. 1037/2004 titled ***Satya Dev Tomar Vs. MCD*** holding that promotion should be deemed to have taken effect retrospectively from the commencement of the current duty charge, specially when the incumbent had continued uninterruptedly with the said charge for long. However, the same as aforesaid, has to be subject to availability of post. The respondent neither before the learned Single Judge nor before us has been able to build up a case of availability of post of AE in

the promotion quota in the year 1995. There is also no challenge as aforesaid to the seniority list. There is thus nothing to suggest that the respondent was wrongly denied promotion at any stage.

13. We are afraid the aforesaid aspects were not highlighted by either of the parties before the learned Single Judge and which has resulted in the same remaining unconsidered. Once the matter is seen in the said perspective, no error is found in the actions of the appellant which were impugned in the writ petition and consequently the judgment of the learned Single Judge cannot be sustained. The appeal is accordingly allowed; the judgement dated 13th/20th July, 2011 set aside; consequently the writ petition filed by the respondent is dismissed. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 7, 2012
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