

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

Judgment Reserved on August 12, 2013

Judgment Delivered on August 26, 2013

+ **W.P.(C) 5617/2001**

PS. BEHL Petitioner

Represented by: Mr.Shanker Raju, Advocate

versus

GOVT. OF NCT OF DELHI & ORS. Respondents

Represented by: Ms.Avnish Ahlawat, Advocate
for GNCTD
Mr.M.L.Sharma, Advocate for
R-4

+ **W.P.(C) 7316/2011**

PS. BEHL Petitioner

Represented by: Mr.K.K.Sharma Senior Advocate
with Ms.Bhanita Patowary, Adv.

versus

GOVT. OF NCT OF DELHI & ORS. Respondents

Represented by: Ms.Shawana Bari, Advocate for
Mr.Rajiv Nanda, Advocate for
R-1
Ms.Avnish Ahlawat, Advocate
Mr.M.L.Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The subject matter of the writ petitions is different. The petitioner in both the petitions is common and the reliefs being

interrelated, the same are being disposed of by this common order.

2. For purpose of convenience Mr.Kuljeet Singh who is respondent No.4 in WP(C) No.5617/2001 and respondent No.5 in WP(C) No.7316/2011 is referred to as respondent No.4 in the body of the judgment.

3. For purpose of WP(C) No.5617/2001 relevant facts to be noted would be that the petitioner joined Delhi Police as Sub Inspector on June 29, 1978 in the pay scale of ₹ 425-700; the revised scale being ₹1640-2900. On June 23, 1992 the petitioner went on deputation in the Transport Department of Delhi Government and eventually got absorbed as Inspector (Enforcement) in the pay scale of ₹1640-2900 vide order dated May 18, 1994.

4. He was allowed to hold lien in Delhi Police for a period of two years. It is the case of the petitioner that persons junior to him got promotion as Inspector in Delhi Police, the corresponding post of which was denied to him in the Transport Department. The next promotional post is that of Enforcement Officer in the pre-revised scale of ₹6500-10500, for which the eligibility is 4 years regular service as Inspector (Enforcement).

5. It is noted that the petitioner was suspended on December 29, 1994, which was revoked on August 16, 1996. He filed Original Application No.2487/1996 *inter-alia* praying for treating his period of suspension as on duty and directing the department to hold DPC and consider the case of the petitioner for promotion to the post of Enforcement Officer with effect from June 22, 1996 and further setting aside the appointment of respondent No.4 who while working as

Deputy Manager in Delhi State Mineral Corporation Limited was declared as surplus. He was first appointed/re-deployed on ad-hoc basis but later on regular basis with effect from August 05, 1996.

6. The Original Application No.2487/1996 was disposed of by the Tribunal vide order dated July 23, 1997, whereby a direction was given to the department to consider the case of the petitioner for promotion with effect from June 22, 1996.

7. Against non compliance of the aforesaid direction the petitioner filed Contempt Petition No.115/1998, wherein it is the stand of the department that DPC in terms of directions dated July 23, 1997 was held and that in the promotion quota the only vacancy that subsist is reserved with reference to the instructions on the subject as subsisted in June, 1996 and as per roster applicable. In other words because of non availability of general vacancy, the petitioner could not be promoted with effect from June 22, 1996.

8. It is further the case of the department that pursuant to the decision of the Supreme Court in the judgment reported as (1995) 2 SCC 745 R.K.Sabharwal & Ors. v. State of Punjab & Ors. and judgment of the Allahabad High Court reported as (1978) 1 SLR 844 J.C.Malik v. Union of India new instructions have been issued on roster points and the petitioner has been considered and promoted as Enforcement Officer with effect from July 02, 1997. Further, the Delhi Police, the parent department of the petitioner promoted him as Inspector from August 18, 1994 under the next below rule by order dated May 31, 2004 which resulted the petitioner getting notional seniority in the grade of Enforcement Officer from August 18, 1994

vide order dated June 22, 2004 and was shown senior to Mr.Kuljeet Singh respondent No.4 in the seniority list as on January 01, 2010 issued on January 12, 2010.

9. The petitioner filed Original Application No.681/1999 before the Tribunal, wherein the petitioner had prayed for the following reliefs:

- (a) *Call for all the relevant records of the cases;*
- (b) *declare that the applicant is eligible and entitled for further promotion as Enforcement Officer in the respondent Transport Department w.e.f. 22.6.1996 as there was unreserved vacant post of Enforcement Officer on that date as well as on subsequent days;*
- (c) *quash and set aside the Agenda (Annexure A-11) and DPC Proceedings (Annexure A-12) as the same are nonest in the eyes of law;*
- (d) *issue direction to the respondents nos. 1 & 2 restraining them from appointing Shri Kuljit Singh, the respondent no.3 as the regular Enforcement Officer in the respondent Transport Department.*

10. In so far as prayer b & c are concerned, the Tribunal has held as under:

“Another ground taken by the learned counsel for the applicant is that the respondents could not have reserved one post for SC category on 22.6.1996, and he should have been accordingly considered for promotion with effect from that date. It is noted from the relevant records submitted by the respondents that in the reply dated 26.10.1998 given to the Department’s letter

dated 29.7.1997 requesting for de-reservation of the post of EO, they have asked the Department to prepare the roster as per the relevant Instructions dated 2.7.1997. The relevant portion of this letter read as follows:

'With reference to your letter No.F.5.(45)/93/Admn./Tpt./5728 dated 29.7.97 on the subject cited above, I am directed to say that vacancy based rosters have been replaced by the post based roster vide instructions of Govt. of India OM No.36012/2/2/96-Estt.(Res.) dated 2.7.97 on the subject matter duly circulated by this department vide letter No.19/11/97/S.III/dated 16.7.97. However, the vacancy position in roster shown in your above referred letter are not according to the new post based roster. You are therefore, requested to prepare the roster as per the instructions dated 2.7.97 on the subject matter, which are self explanatory.'

What action, if any, has been taken by the respondents on the above matter has not been placed on record. To this extent, we see merit in the claim of the applicant that he has not been properly considered by the DPC held on 20.11.1997 against the third post falling in the promotion quota for which he is eligible to be considered in accordance with the Recruitment Rules. In paragraph 3 of the Agenda note itself, they have mentioned that "it appears there is no reservation on any of the above mentioned posts". No reasons have been given as to why correction action has not been taken by the official respondents to review or reconsider the case of the eligible candidates in the light of the reply received by them as far back as 26.10.1998. This is not justified on their part. In this view of the matter, the application partly succeeds so far as the official respondents are concerned."

11. The directions which followed are in para No.14 of the impugned order and the same are re-produced as under:

14. *“In the result, for the reasons given above, the applicable is disposed of as follows:*

- (i) Respondents 1-3 are directed to consider the matter regarding whether the post of EO which fell vacant on 22.6.1996 is a reserved vacancy or not in terms of the relevant Instructions/law. In case the post is not a reserved post and falls under the general category, they shall hold a review DPC to consider the eligible candidates, including the applicant, subject to their fulfilment of the conditions laid down under the Rules at the relevant date. This shall be done within three months from the date of receipt of a copy of this order.*
- (ii) Taking into account the particular facts and circumstances of the case, Respondents 1-3 are directed to pay cost of Rs.2000/- (Rupees Two Thousand) to the applicant; and the applicant is directed to pay cost of Rs.4000/- (Rupees Four Thousand) in favour of Respondent 4.”*

12. Pertaining to WP(C) No.7316/2011, most of the facts having been narrated pertaining to writ petition No.5617/2001, for brevity we are not repeating the same. The additional facts are that the respondent No.4 Mr.Kuljeet Singh challenged the seniority list issued on January 12, 2010, wherein the petitioner was shown senior to him by filing

Original Application No.364/2010, wherein he sought the following reliefs:

(a) Admit the OA., call for the relevant records, examine the same and grant the relief to the applicant as prayed for.

(b) Quash and set-aside the impugned order/circular to the extent whereto respondent No.5 has been shown Senior to the applicant.

(c) Pass an order whereby the applicant may kindly be declared as Senior Enforcement Officer to the Respondent No. 5 as Enforcement Officer.

13. It is the case of the respondent No.4 that petitioner could not have been promoted on August 18, 1994 within two years of his absorption in the Transport Department because as per the Recruitment Rules of the department, he could have been promoted only after four years of regular service in the post of Enforcement Inspector.

14. Further it was the case of respondent No.4 that the promotion of the petitioner in Delhi Police with effect from August 18, 1994 by order dated May 31, 2004 was wrong because the petitioner has been permanently absorbed in the Transport Department and had ceased to have lien in Delhi Police. The said Original Application was resisted by the petitioner herein. The Tribunal decided the Original Application No.364/2010 by holding as under:

“In the instant case also, although the fifth Respondent could have claimed the seniority of the year 1994, yet he would be eligible for promotion only from 1996 after completing four years in the grade of Inspector (Enforcement), as per the

recruitment rules. It is clear that whichever is the year of seniority of the fifth Respondent, he would be eligible for promotion only from the year 1996, subject to the availability of vacancies in that year. The promotion of the fifth Respondent with effect from 18.08.1994 is against the rules as he was not eligible for promotion in the year. In the result the seniority of the fifth Respondent above the Applicant, which is a consequence of the order dated 20.06.2004, by which the fifth Respondent has been promoted from the above date, also cannot be sustained. The impugned seniority list of 12.01.2010 is quashed to the extent that the fifth Respondent has been shown above the Applicant. The second Respondent is directed to redraw the seniority list of the Enforcement Officers of the Transport Department, wherein the Applicant would be shown senior to the fifth Respondent. These directions would be complied with within eight weeks of receipt of certified copy of this order. No costs.”

15. A perusal of the aforesaid order would show that the Tribunal had set aside the seniority list dated January 12, 2010 to the extent that the petitioner was shown above the respondent No.4 by holding that the promotion of the petitioner with effect from August 18, 1994 is against the rules as he was not eligible in that particular year. The ultimate direction of the Tribunal to the department was to show the respondent No.4 senior to the petitioner herein. A Review Application No.279/2011 seeking review of order dated December 01, 2010 was dismissed. It is this order dated September 23, 2011 in Review Application No.279/2011 and order dated December 01, 2010 in Original Application No.364/2010 which have been impugned by the petitioner in writ petition No.7316/2011.

16. Mr.Shanker Raju, the learned counsel for the petitioner appearing in WP(C) No.5617/2001 would submit that the Tribunal while disposing of the Original Application No.2487/1996 had inter alia directed the department to consider the case of the petitioner for the post of Enforcement Officer in terms of the Recruitment Rules with effect from June 22, 1996. According to him the grant of promotion to the petitioner with effect from July 02, 1997 is untenable. He would submit that the Supreme Court in terms of its judgment in the case of R.K.Sabharwal's case (supra) decided on February 10, 1995 has settled the law wherein it has held that the reservation of jobs for the backward classes, SC/ST/OBC should applied to 'posts' and not to 'vacancies'. The judgment of the Supreme Court was much before June 22, 1996 and was binding on the Authorities and they should have treated the vacancy as 'unreserved' and, not a 'reserved' vacancy, and considered the case of the petitioner for the post of Enforcement Officer. He submits that the stand of the respondents that the Department of Personnel & Training had, pursuant to the judgment of the Supreme Court in R.K.Sabharwal's case (supra) and J.C.Malik's case (supra) had issued instructions only on July 02, 1997 and it is only thereafter the petitioner's case could be considered is totally untenable. The judgment of the Supreme Court cannot be made subject of relevant instructions to be issued by the appropriate department. It becomes binding the day when the judgment has been pronounced moreover the Supreme Court in R.K.Sabharwal's case (supra) has made the judgment prospective and since the date of consideration of his case in terms of the Tribunal's order was June 22, 1996, the same being a prospective

date, the respondents should have considered the case on that date itself.

17. The learned counsel relied upon the judgment of this Court in the case of (2000) 7 Apex Decisions Delhi 284 S.Rama Rao v. Managing Director, Food Corporation of India . More specifically para 8 of the judgment which is reproduced as under:-

“As far as the implementation of the impugned circular No.41/97 dated 17.11.1997 whereby the cut-off date is fixed as 30.1.1997 is concerned, the same is against the principle and spirit of the judgments in the case of R.K.Sabharwal and Union of India & Others Vs. Virpal Singh Chauhan & Others (supra) since both the judgment aim at correcting the error/mistake in fixing the correct seniority of General Category employee as well as Reserved Category, OBC in light of the rules, principles stated therein, reproduced above. There does not seem any logic/rational in fixing 30.1.1997 as the cut off date for implementing the circular No.41/97 dated 17.11.1997. Now, when the seniority is required to be refixed in light of the principle in the case of Union of India & Others Vs. Virpal Singh Chauhan & Others, (supra), then in that case the effective date of circular No.41/97 should be at least within reasonable time of the date of judgment in Virpal Singh Chauhan’s case i.e. 10.10.1995. It is irrelevant that in Virpal Singh Chauhan’s case the Supreme Court gave directions only to Indian Railway. What is to be seen is what is the principle laid down by the Supreme Court in the matter of fixation of seniority in the cases like the present one. The present case is fully covered by the principle laid down in the case of Virpal Singh Chauhan. And again the respondent did modify the policy of fixing seniority on promotion (page 3 of Annexure P-5) but gave effect to the same from 30.1.1997 vide circular No.41/97 dated 17.11.1997. The object of circular No.41/97 is obviously to

correctly fix the seniority on promotion in light of the principle and spirit of the judgment in Virpal Singh Chauhan's case. Now fixing 30.1.1997 as the effective date of circular No.41/97 would be nothing but arbitrary and having no nexus between the object and spirit of circular No.41/97 and its effective date namely 30.1.1997."

18. Mr.K.K.Sharma, learned senior counsel appearing for the petitioner in WP(C) No.7316/2011 would submit that if the petitioner succeeds in WP(C) No.5617/2001 then the WP(C) No.7316/2011 would become infructuous.

19. Mr.M.L.Sharma, learned counsel appearing for the respondent No.4 would oppose the prayers in the writ petition. He submits that in so far as WP(C) No.5617/2001 is concerned the petitioner cannot challenge the appointment of respondent No.4 in respondents No.1 and 2 organization with effect from August 05, 1996. He would further submit that the promotion of the petitioner as inspection in Delhi Police that too with effect from August 18, 1994 in the year 2004, after he has been absorbed is illegal and against the Rules. He would support the impugned order of the Tribunal in WP(C) No.7316/2011. He also states that the action of the department in granting promotion to the petitioner with effect from July 02, 1997 need not be disturbed.

20. We only note that the respondent No.4 has not challenged the judgment dated March 09, 2001 in Original Application No.681/1999 of the Tribunal wherein the Tribunal has inter alia directed the respondents No.1 and 2 to reconsider whether the post of Enforcement Officer which fell vacant on June 22, 1996 is a reserved vacancy or not. He has also not challenged the promotion of the petitioner as

Enforcement Officer with effect from July 02, 1997.

21. Ms.Avnish Ahlawat, learned counsel appearing for the respondents No.1 and 2 would submit that after the judgment by the Supreme Court in R.K.Sabharwal's case (supra) and J.C.Malik's case (supra), the Department of Personnel & Training, Government of India had issued instructions on July 02, 1997, formulating a reservation roster wherein the point reserved for a Scheduled Caste candidate has been converted into unreserved point. Accordingly the case of the petitioner was considered and he was found fit to be appointed on the post of Enforcement Officer which has been granted to him with effect July 02, 1997.

22. On consideration of the aforesaid submissions of the learned counsel for the parties the only question which falls for our consideration in WP(C) No.5617/2001 is whether the petitioner is entitled to be considered for the post of Enforcement Officer with effect from June 22, 1996 or July 02, 1997. It is an accepted position that the Supreme Court in R.K.Sabharwal's case (supra) and J.C.Malik's case (supra) has held that the reservation has to apply to 'posts' and not to 'vacancies' the earlier instructions on roster issued have become unoperational in view of the judgment of the Supreme Court in R.K.Sabharwal's case (supra). The department of Personnel & Training, Government of India has to formulate a new roster. So the post of Enforcement Officer could not have been filled by reserved candidate but by a general candidate. In fact this aspect gets reinforced by the O.M. dated July 02, 1997 issued by the Department of Personnel & Training, Government of India. It so happened that pursuant to the

judgment of the Supreme Court in R.K.Subharwal's case (supra) and J.C.Malik's case (supra) the Department of Personnel & Training, Government of India could issue the instructions only on July 02, 1997 and not before that. Merely because the Department of Personnel & Training had issued instructions only on July 02, 1997, whether the promotion to the post of Enforcement Officer should be given from that date only the answer would be clearly 'NO' in the facts of this case. This we say so because the petitioner had in his favour directions from the Tribunal in Original Application No.2487/1996 wherein the Tribunal had directed for considering his case for the post of Enforcement Officer with effect June 22, 1996.

23. We could have agreed with the submissions of the learned counsel for the department justifying the promotion of the petitioner with effect from July 02, 1997, if there were no directions from any Court of law directing the consideration from a date prior to July 02, 1997. That is not the case here. The petitioner already had directions in his favour from the Tribunal in the Original Application referred to above. A clear distinction has to be made where there were no directions for consideration from a date prior to July 02, 1997 and a case wherein such directions exist. This case falls in the latter category. The effect of the promotion given to the petitioner with effect from July 02, 1997 would mean that the earlier directions of the Tribunal had been made redundant by the respondents by prescribing a different date not prescribed by the Tribunal while disposing of Original Application No.2487/1996. This is clearly untenable.

24. This peculiar position has arisen because of the O.M. dated

July 02, 1997 has been given effect from the said date only. We are also conscious of the fact that the dicta of the Supreme Court in R.K.Sabharwal's case (supra) could not be given effect to without formulating/amending the already existing roster. The amendments to the roster point having taken place only on July 02, 1997 the same was given effect from that date but without examining what would happen to those cases which became ripe for promotion between February 10, 1995 and July 02, 1997. Any observation by us against the fixing of the cut-off date of July 02, 1997 would lead to litigation at this point of time. We refrain from saying any further except that the case in hand where the petitioner has already had directions in his favour to consider his case for the post of Enforcement Officer with effect from June 22, 1996 in Original Application No.2487/1996, which has not been challenged by the respondents No.1 and 2 and which direction in a way reiterated by the Tribunal in the impugned order dated March 09, 2001 we hold in the peculiar facts of this case without forming a precedent, the petitioner is entitled to be promoted as Enforcement Officer with effect from June 22, 1996 as nothing adverse has been shown to us against the petitioner on that day.

25. In view of our reasoning above and the direction issued in paragraph 24 it has to be held that the decision by the Tribunal in the order dated December 01, 2010 dismissing OA No.364/2010 and its decision to dismiss RA No.279/2011 seeking review of the order dated December 01, 2010 as per the order dated September 23, 2011 declining petitioner right to be promoted as an Inspector and hence seniority reckoned with effect from August 18, 1994 is correct.

26. Accordingly, both writ petitions stand disposed of directing the department to promote petitioner as an Enforcement Officer with effect from June 22, 1996 and reckon his seniority with effect from said date and work out the inter se seniority between the petitioner and respondent No.4 in accordance with the applicable rule and instructions within a period of 3 months from today.

27. No costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 26, 2013
km/mm