

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

Reserved on: 16.07.2014
Pronounced on : 04.08.2014

+ W.P.(C) 7423/2013, C.M. NO. 15903/2013

GOVT. OF NCT OF DELHI AND ORS. Petitioners
Through : Ms. Zubeda Begum and Ms. Sana
Ansari, Advocates.

versus

SH. RAKESH BENIWAL AND ORS. Respondents
Through : Ms. Amita Singh Kalkal, Advocate, for
Resp. No.1.
Sh. M.K. Bhardwaj, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIPIN SANGHI

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner, the Government of NCT of Delhi (hereafter called "GNCTD") in these proceedings under Article 226 of the Constitution of India questions an order dated 07.08.2013 of the Central Administrative Tribunal (hereafter 'the Tribunal'), in O.A. No. 1459/2012 which directed it to consider the respondents for promotion from the dates on which their immediate juniors were promoted, and also to grant them arrears of pay and consequential benefits alongwith it.

2. The facts surrounding the present writ are that the Govt. of NCT of Delhi (GNCTD), through Delhi Subordinate Services Selection Board, (hereafter “DSSSB”) in 2002 issued an advertisement for appointment to various posts of Grade II DASS (Delhi Administrative Subordinate Service). Accordingly, respondents’ no. 1&4, 2&3 and 5 applied under the Sports, Other Backward Classes (OBC) and Ex-Serviceman categories respectively. The written test for the purpose of recruitment was held on 17.11.2002. The result of the test was declared in stages. On 10.01.2003 the result was declared for three categories, namely; general, physically handicapped and ex-servicemen categories. The second set of results was declared on 22.03.2004 in respect of the scheduled caste(SC) and Other Backward Class (OBC)- subject to outcome of a Letters Patent Appeal (LPA No. 625/2002) filed by the Govt. of Delhi against the decision in C.W.P. No. 5061/2001 *Kunwar Pal &Ors. v. Govt of NCT of Delhi*. That appeal was subsequently dismissed by order dated 13.05.2005. The third set of results was declared on 02.09.2005 in respect of SC & ST candidates from outside the state. The last set of results was declared on 10.12.2007 after directions of this Court (in W.P. (C)No. 6498 of 2007), in the case of the applicants in respect of the sports category.

3. Despite declaration of the result, due to the non-issuance of appointment letters to the applicants, two applications were filed before the Tribunal, namely, *Umesh Gahlot & Ors. v. GNCTD* (O.A. No. 1872/2008) and *Ved Prakash & Ors. v. GNCTD* (O.A. No. 1925/2008). These applications were disposed of by common order dated 07.01.2009 with a direction to the GNCTD to issue appointment

letter to the applicants/ respondents and to assign their seniority on the basis of their merit position in the written test. This judgment was challenged by the GNCTD by W.P. Nos. 8637 & 8638 of 2009 which were disposed of with the direction to the petitioner to issue appointment letters as per the satisfaction of the Secretary (Services). The Secretary further directed by Order 126 (No. F.3/72/2000/SII/2924) dated 22.05.2009 that the appointment orders be issued to the applicants at the earliest.

4. The respondents were finally appointed with effect from 12.08.2009. Their seniority was fixed by an order No. F.55/37/2012/S-I/414 dated 09.10.2012, in consultation with the advice of the Ministry of Home Affairs, Central Government. On 07.02.2011, by Order No. 47 (No. F.55/17/2009/SI/Part-III), GNCTD promoted certain juniors of the respondents to Grade-I DASS as they had fulfilled the requirement of Recruitment Rules and qualifying Period of Service. The respondents herein accordingly filed O.A. No. 1459/2012. The Tribunal, by the impugned order, directed the GNCTD to consider the respondents for promotion to Grade I of DASS from the dates on which their immediate juniors were promoted. The Tribunal also held that the respondent/applicants were entitled to all consequential benefits and arrears of pay.

5. GNCTD is aggrieved with the impugned order which, in relevant part, is as follows:

“11. We have considered the arguments of both sides. It is not disputed that the applicants who appeared in the 2002 examination were appointed many years after their other batch-mates had been appointed. The delay occurred only

on the part of the respondents for which the applicants are not to be blamed. Hence to us it appears that denying them further promotion now on the grounds that they had not possessed requisite years of service, is adding insult to injury. Instead of setting right the wrong done to the applicants, the respondents are further perpetuating it. In our opinion, as has been laid down by Hon'ble Supreme Court in the case of Pilla Sitaram Patrudu (supra) the applicants should be considered for promotion by notionally counting their service from the date their juniors joined rather than counting it from the date on which they actually joined themselves. In the case of K.B. Rajoria (supra) the Hon'ble Supreme Court has clearly made a distinction between regular service and actual service. Thus while the applicants may not possess actual service on account of their joining late, their regular service should be counted notionally from the date their juniors had joined.

13. Resultantly, this O.A. succeeds. The respondents are directed to consider the applicants for promotion to Grade-I of DASS from the dates on which their immediate juniors were promoted. The applicants will also be entitled to consequential benefits and arrears of pay. This consideration will be done within a period of eight weeks from the date of receipt of a certified copy of this order.”
(emphasis added)

6. The GNCTD argues that the Tribunal did not appreciate instruction No. 6.3.1 (c) of Part IV of the consolidated instructions issued by the Department of Personnel and Training (hereafter the “DoPT”), Government of India by OM No. 22011/5/86-Estt. (D) dated 10.04.1989 (as amended by OM No. 22011/5/91-Estt. (D) dated 27.03.1997). The relevant portion of the instructions have been reproduced as under:

“(c) Although among those who meet the prescribed benchmark inter se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfilment 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.”

7. Furthermore, contends the GNCTD, the respondents are as yet not eligible to be promoted despite grant of relaxation to them under OM dated 18.03.1988 read with OM dated 25.03.1996. The relevant portion of the instructions have been reproduced as under:

“Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying/ eligibility service by more than half of such qualifying/eligibility service or two years, whichever is less and having successfully completed their probation period for promotion to the next higher grade along-with their juniors who have already completed such qualifying/eligibility service”

8. The GNCTD argued on the principle that there are two essential requirements to be considered for promotion to the higher grade. The first requirement of seniority has been met by the respondents, and that the fulfilment of the second requirement, being completing the minimum qualifying service for promotion, has not been met by the respondents; consequently promotion cannot be granted. Additional arguments of the GNCTD are that the experience over a certain number of years in service along with due performance of duties and responsibilities attached to the post of Grade II (DASS) is very

relevant and accordingly, is an important eligibility qualification towards the suitability for the promotional post of Grade I (DASS). It is argued in this regard that the directly recruited Grade II (DASS), like the respondents too are to be considered for promotion to the Grade I (DASS) soon after they render six years approved service in Grade II (DASS).

9. The respondent applicants argue that the Tribunal's order is sound and should not be interfered with. It is submitted that the GNCTD's contentions cannot be accepted as the delay in their appointment was as a direct result of the inaction of the GNCTD which prevented them from joining service earlier. Counsel relied on the decision of the Supreme Court reported as *Pilla Sitaram Patrudu & Ors v. Union Of India* (1996) 8 SCC 637, to say that if a selected candidate's appointment is delayed for a reason not attributable to him, his seniority or promotion cannot be prejudiced.

10. The dispute herein requires resolution of two important questions:

- (a) Whether applicants who are deprived of joining service are entitled to be considered for promotion on the date which their immediate juniors were promoted and;
- (b) Whether as a consequence, the respondent/applicants are entitled for all consequential benefits and arrears of pay for the period that they were deprived of being in service at the requisite position in the organisational hierarchy.

Point No (a)

11. At the outset, it is necessary to highlight that the respondents were selected consequent to a written test conducted way back in 2002. 12 years have gone by since the examination was conducted. Yet, they are still placed in the post of Grade II (DASS) while their juniors have been promoted to Grade I (DASS). The GNCTD by order No. F.55/37/2012/S-I/414 dated 09.10.2012 fixed the seniority of the respondents. The same order states that promotion to Grade-I (DASS) is to be done from amongst those eligible Grade II (DASS) officials who have completed six years of regular service in Grade II.

12. The respondents here were issued appointment letters after a long delay, which implies that they were only able to commence their respective positions in Grade II (DASS) at a much later stage as compared to their juniors. This preliminary delay on part of the GNCTD had a cascading effect upon the promotion prospects of the respondents who not only had to wait to commence their respective jobs and assignment of duties, but now also have to wait to be promoted to Grade I (DASS). At the same time however, their juniors, as a direct consequence of the rules in place and the fact that they had fulfilled the minimum qualifying level of service, were promoted to Grade I (DASS). The respondents were willing to work after their selection, subsequent to the test. However, due to the delay caused, they have been unable to fulfil the requirement of minimum qualifying level of service. To not grant them arrears of pay would be akin to imposing an additional penalty for committing no offence. The requirement of fulfilling the second essential for the purpose of

promotion as stated by the petitioners in the relevant OM therefore cannot be said to follow the mandate of Article 14.

13. In light of the relevant Office Memoranda, it would be useful to recollect the Supreme Court's ruling in *Pilla Sitaram Patrudu*. The relevant portion has been reproduced as under:

“The 5th respondent, K.R. Ramanandan, was selected by direct recruitment in the year 1977 for selection as Assistant Executive Engineer. All the direct recruits except the respondent were appointed in the year 1978. It was admitted that when he had filed O.P. No.7226/85 in the CAT, Ernakulam Bench, by order dated 31.1.1990 it was held that his appointment was delayed due to laches on the part of the Railway Administration. After his appointment in the year 1981, within two years he passed his test. When his case was not considered for promotion as Executive Engineer, he filed the O.A. The Tribunal without deciding the inter se seniority in the cadre of Asstt. Executive Engineers had directed the Railway Administration to consider his case for promotion as Executive Engineer for the years 1984, 1985 and 1986 and if found fit for promotion in any of the posts, to give him promotion for that year and to fix seniority among Executive Engineers accordingly. Pursuant thereto, the respondent was considered and promoted as Executive Engineer. After the above order came to be made, the Railway Administration did not carry the matter in appeal to this Court. Some of the persons seemingly aggrieved against the direction admittedly filed a review petition which was also dismissed and that order became final. The petitioners thereafter challenged the same order by filing separate O.A. and in the impugned order of the Tribunal dated October 19, 1995 the Tribunal has confirmed its earlier order. It is further contended that the fifth respondent was not qualified since he had not completed 8 years of required service. The Tribunal has recorded a finding that two years period is relaxable in the case of the reserved candidates. The inter-se

seniority as Asstt. Executive Engineer is required to be determined; he joined service in 1981 and, therefore, he did not have the requisite service. We find no force in the contention. Since he was selected by direct recruitment, he is entitled to be appointed according to rule. *His appointment was delayed for no fault of him and he came to be appointed in 1981, he is, therefore, entitled to the ranking given in the select list and appointment made accordingly. Under these circumstances, we do not find any illegality in the order.*”

14. The Supreme Court, again in *Union of India v. K.B. Rajoria* (2000) 3 SCC 562 10 which, while considering the definition of the word 'regular' in the Concise Oxford Dictionary, Ninth Edition, noted that it meant:

“(1) Conforming to a rule or principle, systematic; (2) harmonious, symmetrical; (3) acting or done or recurring uniformly or calculably in time or manner, habitual, constant, orderly; (4) conforming to a standard of etiquette or procedure, correct, according to convention; (5) properly constituted or qualified, not defective or amateur, pursuing an occupation as one's main pursuit.

11. The word ‘regular’ therefore does not mean ‘actual’

The notional promotion was given to Krishnamoorti to right the wrong that had been done to him by his supersession on 22-2-1995. If Krishnamoorti is denied the right to be considered for promotion to the post of Director General on the basis of such notional promotion, particularly when the relevant provisions so provide, it would result in perpetuating the wrong done to him. That is exactly what the High Court has done."

15. A Division Bench of this Court in *Atul Kumar Sharma v. Delhi High Court* (WP 4077-84/2004, decided on 23-10-2009) also observed that rules prescribing eligibility conditions, such as qualifying service in the lower grade, cannot stand in the way of directing promotions in favour of those unfairly denied such relief, on account of inaction or wrong action of the state agency, in these terms:

"The respondents' argument that the petitioners are claiming an untenable relief, as without their promotion to SJA, and essential five years' service, they cannot be considered for further promotion seems facially to accord with the rule position. However, this Court is now called upon to rule in respect of a situation where the authority, at five different points in time, did not follow the rules; at least in two of those instances, there really was no excuse for not holding a departmental test for promotion to the SJA cadre. Pertinently, in relation to the cadre of AOJ/CM, the petitioners were successful in seeking orders - right up to the Supreme Court, permitting their appearance in the written test; the respondents even held a supplementary test to enable their participation. Yet, inexplicably, they were not interviewed. The Court is duty bound to reconstitute their "lost opportunity" as their subsequent promotion cannot but act to their disadvantage vis-à-vis those who were promoted, in time, and who had participated in the said promotional process."

16. The appointment of the respondent/applicants took place 7 years after the examination was conducted. Their juniors were naturally eligible for promotion having completed the requisite qualifying period. However they-for no fault of their own-were retained in the same grade as a consequence of their late appointment. The right of equality before law spelt out by Article 14 of the

Constitution of India dictates that all individuals must be treated equally before law. If the respondents are denied promotion on the ground that they are still serving their probation period as a consequence of their appointment in 2009, the same cannot be said to be fair treatment of all the employees by the petitioners. In the present case, the rule requiring fulfilment of qualifying service is not an immutable condition, incapable of being relieved. The Office Memoranda quoted by the Tribunal, and extracts reproduced above, disclose that promotions can be given to seniors whose claims are unjustly ignored, to start with. Therefore, this Court finds no infirmity with the direction to grant promotion to the applicant/ respondents.

Point No (b)

17. The GNCTD argued before this Court that, according to the principle of “no work no pay”, the respondents are not entitled to any claim or arrears in the form of back wages and/or consequential benefits for the period where they have not actually worked in the post in question i.e. Grade I (DASS). Reliance is placed on *Hari Govind Yadav v. Rewa Sidhi Gramin Bank & Ors.* 2006 (6) SCC 145, *State of Haryana & Ors v. O.P. Gupta & Ors.* 1996 (7) SCC 533 and *Union of India & Ors. v. Rajinder Singh Rawat* 1999(9) SCC 173. This court has considered the law in this regard. In *State of Kerala & Ors. Vs. E.K. Bhaskaran Pillai* (2007) 6 SCC 524, it was stated that the said "principle" has no universal application and cannot be accepted or applied as a rule of thumb. The view expressed in *Commissioner, Karnataka Housing Board v. C. Muddaiah* (2007) 7 SCC 689 enunciated similarly that the principle of no work no pay cannot be

applied as an absolute proposition as it does not have any backing of a statute. Furthermore, this Court notices that those decisions - applying "no work no pay" - were usually rendered in the context of employees who had been dismissed or terminated from service, and the question as to manner of pay was considered upon reinstatement. In light of these aspects, the GNCTD's argument on the ground of 'no work no pay' in this context of denial of pay, cannot be accepted.

18. The GNCTD contends that the arrears of pay and allowance cannot be granted to the respondents as per the provision of Fundamental Rule ("FR")17 (1) as they have not worked on the post of Grade I (DASS).The said rule has been reproduced herein;

"F.R. 17. (1) Subject to any exceptions specifically made in these rules an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty unauthorisedly shall not be entitled to any pay and allowances during the period of such absence."

19. The Supreme Court has deliberated upon the said FR and its implications in circumstances where an employee was kept away from working in a particular position in these terms in *Union of India v. K.V. Janki Raman* AIR 1991 SC 2010:

"We are not much impressed by the contention advanced on behalf of the authorities. The normal rule of 'no work no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept (away) by the authorities for no fault of his. This is not a

case where the employee remains away from work for his own reasons although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.”

20. A corollary in *K.V. Janki Raman* (supra) may also be applied to the present matter wherein the inability of the respondents to join the post of Grade II (DASS) was on account of long delays by the petitioners herein to issue them appointment letters, despite the respondents intimating their desire to join service. In *State of A.P. v. K.V.L Narasimha Rao & Ors.* AIR 1999 SC 2255, the applicants had originally been appointed as Munsif Magistrates. Subsequently, there was a dispute relating to seniority in respect of Judicial Officers being recruited in different streams and a norm was fixed by the High Court which led to juniors being promoted over their seniors. When the seniors were given the promotion from the same date as their juniors, there was a dispute regarding the salary and other service benefits flowing from their respective dates of notional promotion to the higher posts from the grade of Munsiff to Subordinate Judge and from Subordinate Judge to District Judge. The Supreme Court, applying FR 26, held as under:-

“....A wrong had been committed in unduly delaying the finalisation of seniority and giving promotions thereto and hence denial of monetary benefits to them would be arbitrary in violation of Arts. 14 and 16 of the Constitution.

5. In normal circumstances when the retrospective promotions are effected all benefits flowing there from, including monetary benefits, must be extended to an officer who has been denied promotion earlier...”

21. A view relevant to the present matter with regard to grant of arrears of pay was highlighted in this Court's decision in *Balwant Singh Bisht v. Union of India & Ors.* (W.P. (C) No. 23332/2005 decided on 14.03.2008) wherein,

“14. In those cases where concerned employees seniors as well as juniors are granted the benefit of promotion and the salary for the period in question, same should invariably be given to such an employee who is given belated promotion retrospectively as non-grant of arrears of pay and allowances of the higher post for the relevant period, in such circumstances, would amount to hostile discrimination.”

22. This Court observed a catena of judgments, relating to a similar situation as the present matter, where the Courts have held that if promotion is denied to an employee because of the mistake of the administration and due to no fault of the applicant/employee, then the authorities are bound to pay the arrears of salary etc. upon giving him the benefit of retrospective promotion after realizing that mistake. This principle would be extended even to those cases where due to sheer negligence, carelessness or on account of malafides, an employer denies the benefit of promotion to the employee at the time when it becomes due and grants it afterwards though retrospectively. (Ref. *State of Kerala and Ors. v. E.K. Bhaskaran Pillai* JT 2007 (6) SC 83; *Mohd. Ahmed v. Nizam Sugar Factory and Ors.* 2004 (11) SCC 210; *Nalini Kant Sinha v. State of Bihar and Ors.* 1993 Supp (4) SCC 748; *Shri Kalyan Singh v. Union of India and Ors.* 2001 (1) AISLJ (DHC) 216; and *Indraj Singh v. State of Haryana* (2013) 14 SCC 491.

23. The respondents have spent a majority of the 12 years waiting on results and the procedure of being appointed to Grade II (DASS), and have been endlessly litigating the issue. Instead of pursuing their employment and working for a livelihood in earnest, the respondents who were at the threshold of starting a new life are stuck in the middle still litigating for a promotion, when they have merely followed the instruction of the petitioners. The GNCTD cannot disregard the suffering endured by the respondents. A perusal of matters surrounding disputes against the petitioners have unearthed a similar matter decided by this court in *The Chief Secretary & Ors. v. Kuldeep Singh & Anr.* [W.P. (C) No. 8910 of 2009 decided on 24.11.2011]. The stark delays in the processing of the application of the respondent by the same petitioners in the present writ has been evidently highlighted therein. This court held;

“8. In this background, admittedly, the delay in offering the appointment to the respondent no.1 rests squarely on the petitioner’s organization and the respondent no.1 herein cannot be faulted for the same. In fact, the appointment letter would not have been issued but for the fact that the respondent no.1 approached the Principal Bench of the Central Administrative Tribunal by way of a petition under Section 19 of the Administrative Tribunal Act, 1985 resulting in the pronouncement dated 2nd April, 2009.

15. Given the facts and circumstances noticed above, interests of justice merit that the respondent in any case would be entitled to the consequential financial benefits.

17. The respondent no.1 has been given due seniority. It is accordingly directed that the respondent no.1 would be

entitled to increment from the same date w.e.f. 1st April, 2009.

In case the respondent no.1 is entitled to any other financial benefits as a result of this increment, the petitioner shall compute the same and effectuate the same as well.

[emphasis added]

24. Whilst the law dictates that salary is to be paid for work done, a parallel cannot be drawn from the principle of “no work, no pay” to apply to the circumstances of the present dispute. The Tribunal appreciated that the applicants should not suffer at the cost of bureaucratic delays of the GNCTD and its litigative proclivities. The respondents herein were appointed many years after their other batch mates had been appointed. The maxim *commodum ex injuria sua non habere debet*, i.e. no person ought to take advantage from his own wrong applies squarely to the petitioners here. The Supreme Court in *Kusheshwar Prasad Singh v. State of Bihar & Ors.* (2007) 11 SCC 447 held,

“13. it is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, ‘a wrong doer ought not to be permitted to make a profit out of his own wrong’.”

25. The maxim has been interpreted by the Apex Court in *Mrutunjay Pani & Anr. v. Narmada Bala Sasmal & Anr.* [1962] 1 SCR 290 wherein it was held that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. Further in *Union of*

India & Ors. v. Major General Madan Lal Yadav (Retd.) [1996] 3 SCR 785 it was observed,

“In Broom's Legal Maxims (10th Edn.) p. 191 wherein it was stated;

...it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

26. The delay in appointment and the consequential denial of benefits is the direct corollary of the inaction of the petitioners; consequently, they cannot take advantage of their own delays in declaring results and issuing appointment letters to deny promotion to the respondents. The Supreme Court has observed in this regard in the matter of *Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur*, 1988 SCC (L&S) 1754,

“But here the appellant has been deprived of his promotion without any fault of his. High Court said that it might be sad state of affairs that the name of the appellant was not considered for promotion till he retired. High Court may feel anguish but it gives no comfort to the appellant. At least for future such an unfortunate thing should not happen to any other officer similarly situated. This malaise which abysmally afflicts any service when there is recruitment from different sources when there is recruitment from different sources crops up in the one form or the other with great disadvantage of one or the other. But then service is not constituted merely for the benefit of the officers in the service but with a certain purpose in view and in the present case for dispensing justice to the public at large.”

[emphasis added]

27. The circumstances surrounding the present matter reflect a casual and indifferent attitude on part of the petitioners, which borders on being callous. The respondents have had to, in the interregnum, not only go through the ignominy of working under their juniors, but also, despite admittedly being senior to them, still continue to draw lesser pay. In the economic scenario prevailing in the country, where prices of even essential commodities have gone skyrocketing, not from year to year or month to month, but from day to day, the respondents have had to manage his affairs with a far lower pay packet than they might have got on the promotional post.

28. This court accordingly finds no infirmity in the order of the Tribunal and directs the petitioner to consider the respondents for promotion, from the date when their immediate juniors were promoted and additionally grant them all consequential benefits and arrears of pay from that date. These directions are to be complied with, within a period of eight weeks.

29. The writ petition is disposed of in the above terms; there shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

VIPIN SANGHI
(JUDGE)

AUGUST 4, 2014
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