

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

WRIT PETITION No.10395 OF 2004

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ORDER:

This writ petition is filed questioning the inaction on the part of the respondent in not giving notional promotion as Typist and other benefits from 31.01.1989.

2. Heard the learned counsel appearing for the petitioner and the learned Counsel appearing for the respondent.

3. The brief facts of the case are as under:

4. The petitioner was appointed as Guard-cum-Peon on 01.02.1986 on compassionate grounds in the respondent Corporation. It is stated that he was qualified for promotion to the post of typist in the year 1989, for which, he made several representations to the respondent to promote him as typist, but his request was not considered. On 02.08.1993 he was promoted as Junior Assistant and thereafter, promoted as Asst.Manager on 15.11.2003. The grievance of the petitioner is that as per G.O.Ms.No.2550 dated 04.11.1985, the post of Typist has to be filled from the feeder category from among the qualified candidates by following the Regulations of the Corporation, but the respondent has not followed the Regulations. As per the said Regulations, the petitioner to be promoted in 1989 as Typist and to be placed above the employees, regularized as per G.O.Ms.No.117, dated 19.02.1990. Questioning the action of the respondent, the petitioner earlier filed W.P.No.26182 of 1996, which was disposed of by order dated 07.02.2002, directing the petitioner to make a detailed representation to the respondent. It is alleged that though the petitioner made a representation on 15.04.2002, which was reminded on 23.02.2004 and 28.05.2004, the respondent did not consider the same.

5. The respondent Corporation filed detailed counter denying the contentions of the petitioner. In WP No.14746/1996, this Court directed the respondent to regularize the services of daily wage employees who have fulfilled the educational qualifications along with completion of 3 years service, as per G.O.Ms.No.117, dated

19.02.1990. It is stated by the respondent Corporation that as per directions of this Court and as per G.O.Ms.No.117, dated 19.02.1990, the services of four employees, who were working as daily wage typists since 1985 prior to the appointment of the petitioner found eligible, and they were regularized as Typists with effect from 01.04.1991, vide proceedings dated 12.04.1991. The petitioner made a representation on 30.11.1990 to consider his case for the post of Typist by promotion. His request could not be considered due to lack of clear vacancy of Typist. Subsequently, the petitioner made another representation on 28.07.1992 to promote him as Junior Assistant instead of Typist and in view of existing vacancies in the cadre of Junior Assistants, his request was considered and the petitioner was promoted as Junior Assistant, vide proceedings dated 20.07.1993. As the petitioner acquired promotion as Junior Assistant, he has foregone his claim for promotion as Typist. The petitioner willfully accepted the promotion as Junior Assistant on 30.07.1993 and continued in the said post till 14.11.2003. It is submitted that on the date of representation dated 14.05.2003, the petitioner was working as Junior Assistant, but not as Typist, further, the post of Junior Assistant and Typist are identical. The petitioner is attempting to take advantage of notional service as typist even though he was working as Junior Assistant at that time. It is further contented that there was no representation from the petitioner against the regularization of Mr.P.Krishna Kumar and others as Typists. The petitioner cannot claim promotion as a matter of right. The regularization of services of other typists from 01.04.1991 was based on Court orders, to which, the petitioner was not party. The representation of the petitioner dated 04.04.2005 after court orders dated 24.06.2004 was already considered and rejected.

6. The petitioner filed reply affidavit reiterating the contents of his writ affidavit and denying the contents of the counter affidavit.

7. The learned counsel for the petitioner submits that under Section 42 (1) of the Ware Housing Corporation (Central Act 58/62 Act 1962) 25% of the vacancies will be filled by direct recruitment and 75% vacancies by promotion from among the eligible candidates, but the respondent has not followed the Regulations. The learned counsel further contends that the petitioner is regular employee and he has to be placed over and above the daily wage employees who were regularized as per G.O.Ms.No.117 dated 19.02.1990.

8. The learned counsel for the respondent Corporation submits that the employees

who were regularized were working as daily wage typists since 1985, whereas the petitioner has entered into service on 01.02.1986 as Guard-cum-Peon on compassionate grounds. The learned counsel further submits that as per Court Orders in WP No.14746/1996 and as per G.O.Ms.No.117, dated 19.02.1990, after following due procedure, regularized the four daily wage employees who have been working since 1985 in the existing clear vacancies as Typists. The learned counsel further submits that the petitioner in his representation dated 28.07.1992 stated that he is willing to work as Junior Assistant but not as Typist and accordingly he was promoted as Junior Assistant and therefore, the petitioner now cannot claim notional promotion as Typist with effect from 31.01.1989.

9. The point that falls for consideration is that as to whether the petitioner is entitled to be notionally promoted as typist w.e.f.01-02-1989 i.e., the date on which he completed three years of service as Guard-cum-Peon in the respondent-Corporation?

10. The admitted fact is that the writ petitioner was appointed as Guard-cum-Peon on compassionate grounds on 01-02-1986. Prior thereto, several persons were working as Typists on contract basis in the respondent-Corporation. The time when the petitioner joined as Guard-cum-Peon, he was a matriculate. Thereafter, he acquired the qualification of typewriting by lower grade. As per the rules of the Corporation, the persons in Category-III which includes Guard-cum-Peon are eligible to be promoted as Typists/Junior Assistants, if they put in three years of service and possess the requisite qualification. Both the posts of Typists and Junior Assistants are of one cadre and they are equal in all respects except for the requirement of a person seeking promotion to the post of typist requires to possess the qualification of typewriting by lower grade. By 31-01-1989, the petitioner completed three years of service and according to him, he is eligible to be promoted as typist as on 01-02-1989 and as on that date, there existed a clear vacancy in the category of typist. The writ petitioner made a representation on 30-11-1990 for being promoted as typist. The Corporation did not consider his request on the ground of want of a clear vacancy. Thereafter, the persons who were working as typists on contract basis, even prior to the date of the petitioner joining the duty in the Corporation as Guard-cum-Peon, filed W.P.No.14746 of 1996 seeking for their regularization on the basis of G.O.Ms.No.117, dated 19-02-1990. In pursuance

to the orders of the High Court, the daily wage typists were regularized w.e.f.01-04-1991.

11. Subsequently, on 28-07-1992, the writ petitioner made a representation to promote him as Junior Assistant instead of Typist and accordingly, he was promoted as Junior Assistant on 20-07-1993. Subsequently, he has been promoted and as on the date of his filing the writ petition in the year 1995, he was working as Assistant Manager in the respondent-Corporation.

12. The main contention of the writ petitioner is that since he became eligible to be promoted on 01-02-1989 he ought to have been promoted as typist even prior to regularizing the services of the contract employees in the year 1990. Since the respondent-Corporation has regularized the services of the contract Typists without promoting him as typist from the post of Guard-cum-Peon, he became junior to several people in the category of Typist/Junior Assistant. It is submitted that subsequently when he acquired the qualification of graduation, he became eligible to be promoted as Junior Assistant and accordingly on his representation dated 28-07-1992, he was promoted as Junior Assistant on 20-07-1993. The present request of the petitioner is that he should be given notional promotion w.e.f. 01-02-1989 as typist so that he will become senior to such of the contract employees who were regularized w.e.f. 01-04-1991.

13. The contention of the Corporation is that even by the date when the writ petitioner joined as Guard-cum-Peon in the Corporation on compassionate basis, several persons were working as typists on contract basis and in pursuance to a Government Order, and direction of the High Court in the writ petition W.P.No.14746/1996, their services were regularized as typists w.e.f., 01.04.1991. It is further contended that merely because the writ petitioner became eligible to be considered for promotion to the post of typist on 01-02-1989, having completed three years of service, he cannot claim as of right to be promoted as such. It is further submitted that promotion to a post depends upon several factors such as the existence of the vacancy, the requirement of the department and suitability or otherwise of the employees. Learned Counsel submits that the writ petitioner cannot seek notional promotion which was rejected on the ground that there was no clear vacancy as on that date when he became eligible to be promoted.

14. The admitted fact is that both the posts of Typists and Junior Assistants are in the same class and there is a common seniority which is feeder channel for higher promotions. After the contract employees who were working as typists even prior to the writ petitioner joining the Corporation were regularized, the writ petitioner acquired the qualification of graduation and therefore on 28-07-1992 he made a representation to the respondent-Corporation requesting to promote him as Junior Assistant but not as Typist. Two days thereafter i.e., on 30.07.1992 he once again gave a representation to the respondent-Corporation stating that he made the request to promote him as Junior Assistant but not as typist out of frustration and that he may kindly be promoted as typist or Junior Assistant as he acquired the requisite qualification for being promoted as Junior Assistant. Finally, he requested the Corporation to consider his case for promoting as typist or Junior Assistant and in pursuance to the said representation, the Corporation has promoted the writ petitioner as Junior Assistant on 30-07-1993.

15. What is manifest from the above is that the writ petitioner specifically made a request initially for being considered for promotion as Junior Assistant but not as typist, but, within two days thereafter, he submitted another representation seeking the relief of promotion either as typist or Junior Assistant. The said request was acceded to by the Corporation.

16. Having requested the Corporation to promote him either as Junior Assistant or Typist, and since the Corporation has acted upon the representation of the writ petitioner and promoted him as Junior Assistant in the year 1993, he cannot heard saying that he ought to have been promoted as typist w.e.f. 01-02-1989 even prior to regularizing the contract employees who were already working as typists by then so that he becomes senior to the typists who were regularized on 04-04-1991.

17. The writ petitioner has originally filed W.P.No.26182 of 1996 questioning the orders of the respondent-Corporation dated 07-11-1996 rejecting the request of the writ petitioner seeking fixation of seniority above the contract typists who were regularized prior to his promotion as Junior Assistant. By order dated 07-02-2002, the High Court directed the writ petitioner to file a detailed

representation to the respondent-Corporation and the Corporation was directed to consider the same and dispose it of within a time frame. Thereafter, the writ petitioner made a representation on 15-04-2002. Since the said representation was not disposed of by the Corporation by 21-06-2004, the present writ petition came to be filed.

18. What is noticed from the prayer of the writ petition is to consider and dispose of the representation made by the writ petitioner on 15-04-2002 which was not disposed of by the date of filing of the writ petition. Subsequently, however, on 01-06-2005, the respondent-Corporation has rejected the request and disposed of the said representation. The petitioner has not taken any steps to challenge the orders of the Corporation dated 01-06-2005 by and under which the representations made by the writ petitioner on 15-04-2002 and 04-04-2005 were rejected.

19. The contention of the Corporation is that the representation said to have been made by the writ petitioner on 15-04-2002 in pursuance to the orders of the High Court was not received, but however, in his subsequent representation dated 04-04-2005 which he made after filing the writ petition in pursuance to the interim orders of this Court in the present writ petition, the writ petitioner enclosed his previous representation dated 15-04-2002, the respondent-Corporation has considered the representations of the writ petitioner and the same were rejected on 01-06-2005 i.e., subsequent to filing of the present writ petition. The respondent Corporation contended that since the petitioner has himself specifically requested for being promoted as Junior Assistant but not as Typist, the same was considered and he was promoted in the year 1993, he cannot claim any notional promotion as typist prior to the regularization of the contract employees. It is asserted by the Corporation that the petitioner cannot claim promotion as a matter of right, more particularly, since the regularization of the contract typists was done on 01.04.1991 based on the orders of the High Court in the writ petition filed by them.

20. In view of the above, the writ petitioner cannot claim as of right his notional promotion as typist on 01-02-1989 i.e., the date on which he completed three years of service. Even if a vacancy exists and an employee becomes eligible to be considered, he cannot claim as of right that he should invariably be promoted immediately on his acquiring eligibility or existence of a vacancy.

Even by the date when the writ petitioner entered the Corporation as a Guard-cum-Peon on compassionate appointment in view of the death of his father in harness, several persons were working as typists on contract basis. Their services were regularized in pursuance to the Government Order and the directions in the writ petition. He cannot therefore claim that he is entitled to become senior by giving notional promotion over and above the persons who were actually promoted as typists on 01-04-1991.

21. Further more, as per the counter of the Corporation, four employees by name P.Krishna Kumar, DVN Ramachandra Rao, Abdul Shukur and K.Ramakrishna Reddy were appointed as regular typists on 19-02-1990. All the four employees who were promoted were engaged by the Corporation on daily wage basis in November, 1984, February, 1986, June, 1986 and December, 1986 respectively. All the four employees were graduates and they all possessed the qualification of typewriting by higher grade as against the qualification of the writ petitioner of being a matriculate with typewriting lower grade. If the writ petitioner is to be given notional promotion w.e.f., 01-02-1989 as Typist, all those whose services were regularized as typists in the year 1991 will become juniors to him and their seniority will be affected. The writ petitioner has not made such of the employees whose seniority is likely to be affected as parties to the writ petition and without impleading the affected parties, the writ petitioner cannot seek the relief which would adversely affect the other employees of the Corporation. In **KULWANT SINGH v. DAYA RAM** after referring to several decisions of the Supreme Court on the subject, the Supreme Court observed that when by the determination of the Tribunal their rights had squarely been affected, the situation commanded, we are inclined to think, that they should have been impleaded being necessary parties and their non-impleadment now permits them to take the plea that the said order does not bind them.

22. The decision of the Supreme Court in which the respondent-Corporation herein was the appellant in Civil Appeal No.1263/2007 has been produced. In the said decision, by placing reliance upon the decision of the Supreme Court in **H.C.KULWANT SINGH & OTHERS v. H.C.DAYA RAM & ORS** the Supreme Court observed that there can be no shadow of doubt without the affected parties being impleaded as parties, a decision could not have been rendered.

23. Learned Counsel appearing for the writ petitioner has relied upon a decision of the Supreme Court in **GENERAL MANAGER, S.C.RAILWAY v. SIDDHANTTI**. In that case, a regulation of the railways was questioned and that was likely to affect more than 120 employees. Those employees were not impleaded and the Supreme Court made the following observations in paras 12, 15 and 16 as under:-

“The second is that the writ petitioners did not implead about 120 employees who were likely to be affected by the decision in this case. Those employees, proceeds the argument, were necessary parties and their non-joinder is fatal to the petition. In support of this contention. Counsel has cited *Padam Singh Jhina v. Union of India and Ors. (C.A. No. 405 of 1967 decided by Supreme Court on 14-8-1967)*.

As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop departments. The Respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the Constitutionality of a statutory rule regulating seniority of government servants is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952 were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition.

The ratio of this Court's decision in Padam Singh Jhina's case (C.A. No. 405 of 1967 decided by Supreme Court on 14-8-1967) is not applicable to the facts of the instant case. Jhina's contention was that he had been mala fide reduced in the list of seniority, from the 5th to the 7th place and that one Prem Sagar had been placed above him in contravention of the Rules. The validity or vires of the Rules was not in question. All the persons whose placement in the seniority list was controverted were not impleaded, and as such, had no opportunity of replying to the case set up by Jhina, and, in the absence of persons directly affected, it was not possible for the Court to adjudicate the matter. The ratio of Jhina's case does not help the appellant. The cases relevant for our purpose are *B. Gopalaiah and Ors.v.*

Government of Andhra Pradesh (AIR1969 AP 204) J. S. Sachdev and Ors. v. Reserve Bank of India, New Delhi (ILR (1973) 2 Delhi 392) and Mohan Chandra Joshi v. Union of India and Ors (Civil Writ No. 650 of 1970 decided by Delhi High Court). We approve of the rule enunciated on this point in those cases”.

24. A perusal of the above authority shows that the same cannot be applied to the facts of the present case. In the instant case, the writ petitioner is not challenging any rule position as such or any regulation of the Corporation for claiming the seniority. His specific case is that he ought to have been promoted as typist on 01-02-1989 prior to the regularization of the contract employees in the year 1991 and since that was not done, he became junior to such of the employees who were regularized in the year 1991 and therefore he is seeking notional promotion as Typist w.e.f. 01-02-1989, thereby affecting the seniority of such of the persons whose services were regularized in the year 1991. Those persons are necessary parties and behind their back, no orders can be passed which affects their seniority. Therefore, I see substance in the contention of the respondent Corporation that the writ petition is bad for non-joinder of necessary parties.

25. In view of the foregoing discussion, there are no merits in the writ petition and the same is liable to be dismissed, and is accordingly dismissed. No order as to costs.

26. Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: 10.12.2015

Dsr/Smr