

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

+ W.P.(C) No. 578/2001

% 30th January , 2015

RAJPAL CHATAULA Petitioner

Through: Mr. Vinay Sabharwal and Ms. Neha
Sabharwal, Advs.

versus

NATIONAL AVIATION COMPANY OF INDIA LTD. (FORMERLY AIR
INDIA LTD.) AND ORS. Respondents

Through: Ms. Meenakshi Sood, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition filed under Article 226 of the Constitution of India, the petitioner, an employee of the respondent-Air India Ltd., challenges the action of the respondent/employer in not giving the petitioner promotion from the post of Traffic Supervisor/ Senior Office Assistant to the post of Assistant Manager for the promotion exercise of the year 1996. The post of Traffic Supervisor/Senior Office Assistant is a Group B post and the post of Assistant Manager is the lowest rung post in Group A posts.

Petitioner has got the requisite promotion w.e.f 1997, but, he claims promotional benefits from one year earlier viz 1996.

2. The promotion policy in the present case is admittedly the policy dated 8.5.1996. The defence of the respondent/employer for denying the promotion to the petitioner is based upon paras 5, 6.2, 6.3.2, 6.6 and more importantly read with para 7.1, of the policy, and the cumulative effect of which paras as contended by the respondent is that after apprising the performance of the petitioner for the earlier years and seeing the marks of the petitioner in the interview, petitioner for being successful in the promotion exercise ought to have secured a total of 70 marks out of 100 marks, but since the petitioner had only secured 64.33 marks out of 100 marks, therefore, the petitioner was not entitled to and so was denied promotion. Para 7.1 of the promotion policy dated 8.5.1996 reads as under:-

“7.1 The staff who secures total 70 marks, consisting of Annual Performance Appraisal and Interview Marks will be eligible for promotion to the higher grade.”

3. Petitioner on the contrary relies upon para 12 of the promotion policy which creates exception in favour of SC/ST employees, petitioner being an SC employee, and as per this para 12, the necessary governmental

orders have to be followed and whereunder petitioner was entitled to promotion automatically once he was in the zone of consideration and was considered in the promotion process. The applicable governmental order in this case admittedly is an Office Memorandum of the Government of India, Ministry of Personnel, Public Grievances and Pensions dated 10.4.1989 with the relevant para thereof being para 6.3.2(ii). Para 12 of the promotion policy of the respondent/employer dated 8.5.1996 and para 6.3.2(ii) of the DOPT circular dated 10.4.1989, read as under respectfully:-

"Para 12 of the Promotion Policy

12. The above Promotion Policy is subject to reservations for SC/ST employees as per the Presidential Directives.

Para 6.3.2(ii) of the DOPT circular dated 10.4.1989

(ii) In promotion by selection to posts/services in Group 'B' within Group 'B' within Group 'B' and from Group 'B' to the lowest rung in Group 'A', selection against vacancies reserved for SCs and STs will be made only from those SCs/STs officers, who are within normal zone of consideration prescribed vide the Department of Personnel and A.R. O.M. No. 22011/3/76-Estt.(D) dated 24th December, 1980. Where adequate number of Scs/Sts candidates are not available within the normal field of choice, it may be extended of five times the number of vacancies and the SCs/STs candidates coming within the extended field of choice should also be considered against the vacancies reserved for them. If candidates from SCs/STs obtain on the basis of merit with due regard to seniority, on the same basis as others, lesser number of vacancies than the number reserved for them, the difference should be made up by selecting candidates of those communities, who are in the zone of consideration, irrespective

of merit and 'bench mark' but who are considered fit for promotion."
(underlining added)

4. The case of the petitioner is that even if the petitioner does not meet the 'bench mark', as long as the petitioner is not declared unfit for promotion, and since the existing vacancies were not being filled up, petitioner was entitled to promotion to the post of Assistant Manager for the year 1996. Petitioner in this regard has raised the following ground (VIII) in the writ petition:-

"VIII. Because the promotional exercise in question was violative of the Circular dated 10.3.89 issued by the DOPT Government of India (Annexure 15 hereto). According to the Circular if the candidates from SC's/ST's obtain on the basis of merit with due regard to Seniority, on the same basis as others, less number of vacancies than the number reserved for them, the difference should be made up by selecting candidates of its communities who are in the Zone of consideration, irrespective of merit and bench mark."

5. In the counter-affidavit, the respondent/employer has not given any specific reply to this ground and has only made a general denial with respect to this ground by stating that since petitioner has not given a copy of the DOPT circular dated 10.4.1989, respondent cannot comment to the same. However, this stand of the respondent is misconceived as not only the respondent is bound as an employer government organization by the relevant DOPT circular but also because the petitioner has filed with the writ petition the letter of the respondent dated 5.6.2000 and para 3 of which shows that

respondent is aware of the various DOPT circulars till November 1991 i.e the respondent would be aware even of the subject circular dated 10.4.1989 i.e two years prior to 1991. Also, reference of the DOPT circular of 1989 was made by the petitioner in the proceedings before the National Commission for Scheduled Castes and Scheduled Tribes, and which proceedings were contested by the respondent unsuccessfully for the promotion of the petitioner for the year 1997.

6. A reading of the counter-affidavit shows that the respondent/employer admits that petitioner has to get promotion from Group 'B' post to the lowest rung post in Group 'A' and therefore para 6.3.2(ii) of the DOPT circular dated 10.4.1989 will apply because it is not the case of the respondent that all the vacancies were filled or vacancies were not available for promoting the petitioner to the posts of Assistant Managers in the promotion exercise for the year 1996. In view of para 6.3.2(ii) of the DOPT circular dated 10.4.1989, and which has necessarily to be read with para 12 of the applicable promotion policy of the respondent dated 8.5.1996, consequently, even if the petitioner does not meet the bench mark, petitioner is still entitled to promotion once the necessary vacancies did exist in the posts of the Assistant Manager with the respondent for the year 1996.

7. There is no defence of the respondent/employer that there were no vacancies, and the only defence of the respondent was that he did not meet the bench mark of 70 marks out of 100 marks. This defence is specifically stated in preliminary objections 3 and 4 of the counter-affidavit of the respondent/employer and which paras read as under:

“ 3. That the Petitioner has misrepresented before this Hon’ble Court with regard to the promotion policy dated 8.5.96 in representing that the promotion to the post of Asst. Manager which is a Group-A post is based merely on seniority. It is submitted that promotion from the supervisory post of Traffic Supervisor (Group-B post) to the post of Asst. Manager (Group-A) is based on merit i.e by selection. As per promotion policy the selection is based on Annual Performance Appraisal for last five year and on the basis of personal interview (60 and 40 mark respectively). As per promotion policy the promotions to the post of Asst. Manager is subject to suitability and 60% of total eligible candidates are to be promoted. Under the promotion exercise for the year 1996 the petitioner neither achieved qualifying marks nor was he within the zone of promotability i.e even if he would have achieved the qualifying marks he could not have been promoted as the last SC candidate listed was at Sr. No. 472 while the petitioner was listed at Sr. No.522 of the seniority list. As far as the promotion exercise for the year 1997 is concerned, the fact is that he has been promoted w.e.f. 1.7.1997 with all consequential benefits. It is, therefore, submitted that the Petitioner has no legal right to file the present writ petition more so after having duly considered for promotion.

4. That in the promotion exercise for year 1996 a total 741 staff (SC 105, ST 30 GEN 606) were called for interview. The Petitioner Mr. Raj Pal Chautala (SC), Staff No. 41032, Seniority No. 522, although was not meeting the eligibility criteria, was called for interview as some of his juniors had

completed the requisite eligibility criteria stipulated in the promotion policy and were eligible to be called for interview. The last SC staff promoted was at Seniority No. 472 whereas the Petitioner was at Seniority No. 522. Further, the Petitioner even otherwise was not eligible having scored only 64.33 marks out of 100. It is also pertinent to mention that between the last SC staff promoted i.e. from seniority No. 472 to Seniority No. 522 there were 5 more SC staff although suitable but could not be promoted since they were not within the promotability zone i.e 60% of the eligible candidates, as laid by the promotion policy. It is thus amply evident that the Petitioner neither has any right for promotion w.e.f. 1.7.96 nor any cause of action has accrued in his favour for filing the present writ petition, and therefore the writ petition is liable to be dismissed at the threshold.”

8. In view of the above, the following conclusions emerge:-

(i) The admitted promotion policy which is applicable is the promotion policy of the respondent/employer dated 8.5.1996.

(ii) No doubt, under the policy with respect to General Candidates, such general candidates cannot get promotion unless they achieve the bench mark of 70 marks out of 100 marks, divided as 60 marks for appraisal reports and 40 marks for interview, however the selfsame policy contained in para 12 is that there were to be exceptions for SC/ST employees in terms of the Presidential Directives. The Presidential Directives in the present case would be the DOPT circular dated 10.4.1989 and which provides that once

there are vacancies with respect to the officers in the zone of consideration, petitioner admittedly being in the zone of consideration inasmuch as he was called for the interview and his reports were appraised, vacancies could not be left unfulfilled on the ground that an SC candidate in the zone of consideration did not meet the bench mark.

9. The only other ground for denying promotion would be in terms of para 6.3.2(ii), if the petitioner was declared unfit for promotion other than that for the reason that he did not meet the bench mark, but this is not the case of the respondent that the petitioner was unfit for promotion for the promotion exercise for the year 1996.

10. Therefore, petitioner being an SC candidate was covered under para 12 of the promotion policy of the respondent/employer dated 8.5.1996 read with para 6.3.2(ii) of the DOPT circular dated 10.4.1989 which provided that all SC candidates in the zone of consideration have to be granted promotion even if the officers do not meet the bench mark, once there are vacancies and there is no reason to hold them unfit for promotion. Hence, petitioner was entitled to promotion from the post of Traffic Supervisor/Senior Office Assistant to the post of Assistant Manager for the year 1996.

11. The issue will then arise is that what should be the benefits which are to be given to the petitioner, inasmuch as, petitioner has not worked on the promoted post. No doubt, there is a doctrine of 'no work no pay', however, the Supreme Court in the judgment in the case of ***State of Kerala & Ors. Vs. E.K.Bhaskaran Pillai (2007) 6 SCC 524*** has held that this doctrine is not an inflexible one and it depends upon the facts of each case as to whether an employee should or should not be denied the monetary benefits. In the present case, petitioner cannot be denied monetary benefits inasmuch as, petitioner has not refused to work on the promoted post. Counsel for the petitioner very fairly has agreed that petitioner by partially respecting the doctrine of 'no work no pay', but however it was the respondent who prevented the petitioner from working at the promoted post and non-working on the promoted post was not on account of any act or omission of the petitioner, the petitioner will be satisfied if the petitioner gets 40% of the total monetary emoluments which were to be given by the respondent to the petitioner on the promoted post of Assistant Manager for the year 1996 and that the petitioner should get consequential benefits for the subsequent years taking the petitioner as promoted in 1996.

12. Accordingly, this writ petition is allowed. Petitioner will be held to be entitled to the promotion to the post of Assistant Manager for the year 1996 with all consequential benefits. Petitioner however will only get 40% monetary benefits limited to the year 1996 of the post of Assistant Manager and petitioner on such amounts will also be entitled to interest at 5% per annum simple from 1.1.1997 till the date of payment of such amount for the year 1996 by the respondent to the petitioner. It is clarified that petitioner will also get all consequential monetary emoluments taking that the petitioner would be promoted to the post of Assistant Manager from the year 1996 along with *pendente lite* and future interest @ 5% p.a. simple. Respondent is directed to make the necessary payments to the petitioner positively within a period of three months from today. Parties are left to bear their own costs.

JANUARY 30, 2015
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VALMIKI J. MEHTA, J