

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

Judgment delivered on: May 28, 2015.

+ W.P.(C) 7006/2014

SANJEEV KUMAR VERMA

..... Petitioner

Through

Mr. Rajeev Sharma, Advocate with
petitioner in person.

versus

MUNICIPAL CORPORATION OF DELHI & ORS....Respondents

Through

Ms. Mini Pushkarna, Standing
counsel with Ms. Yoothica Pallavi,
Advocate for NDMC

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE I.S.MEHTA

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JUDGMENT

KAILASH GAMBHIR, J.

1. Challenge in the present petition filed under Article 226 of the Constitution of India is to the order dated 21.01.2014 passed by the learned Central Administrative Tribunal (*hereinafter referred to as 'the learned Tribunal'*), Principal Bench, New Delhi in M.A. No.2430/2011 filed in T.A. No.1294/2009.

2. Before dealing with the rival contentions raised by the parties, it shall be useful to narrate the brief facts of the case.

3. The petitioner was initially appointed as a Lab Assistant in

Municipal Corporation of Delhi and was promoted to the post of Technical Assistant on ad-hoc basis in the Technical Laboratory of the MCD on 27.7.1999 and was made regular on this post on 10.08.1999. The next higher post was that of Technical Officer which could be filled up by direct recruitment and by promotion in the equal proportions of 50:50 ratio as per the Recruitment Rules. Technical Assistant being a feeder post, regular service of 5 years in the said post was a pre-requisite to be considered for promotion to the post of Technical Officer.

4. In the year 1996, a post of Technical Officer, against Promotion Quota against vacancy fell vacant, but, since no eligible person was available, a request was made by the MCD to the UPSC to fill up the said post through direct recruitment. On 25.06.1996, the UPSC had approved the proposal made by the Corporation for diverting the post reserved for SC from promotion quota to direct recruitment quota, temporarily in relaxation of the Rules and Regulations. Whilst doing so, the UPSC had advised the MCD that in future, whenever a vacancy in the direct recruitment quota arises to be filled up by an SC candidate that may be diverted to promotion quota for SC/ST candidates who might have become eligible for promotion.

5. In the year 2003, an advertisement dated 04.10.2003 was issued by the UPSC to fill up 3 vacancies to the post of Technical Officer by direct recruitment. The petitioner also applied in response to this advertisement and even appeared in the examination conducted by the UPSC on 28.11.2004. The result of the said examination was declared in the year 2005 and before the result was declared, the petitioner preferred a Writ Petition being No. 19634/2004 to seek quashing of the advertisement dated 04.10.2003 and sought the following reliefs:-

“I. To quash and set aside the advertisement dated 4.10.2003 and examination held on 28.11.2004 in pursuance thereof by the respondents as far as it relates to filling up of one post in SC category by way of direct recruitment on the post of Technical Officer.

II. To declare that the one post of Technical Officer is reserved for SC candidate falling in promotion quota.

III. To direct the respondents to consider the petitioner for promotion to the post of Technical Officer in promotion quota.

IV. Issue any other appropriate writ, order or direction as deem fit and proper in the facts of the case.

V. any other relief or order which the Hon'ble Court may deem fit and proper in the facts of the case may also be granted to the petitioner.”

6. In the said Writ Petition vide interim order dated 14.12.2004, the learned Single Judge directed that ‘any selection made by the respondents would be subject to the outcome of the decision in the Writ Petition’. The

said Writ Petition was transferred to the learned Tribunal, in view of the transfer of jurisdiction of the High Court to the learned Tribunal, after which it was registered with the learned Tribunal as T.A. No.1294/2009. Vide order dated 14.09.2010 the learned Tribunal disposed of the said T.A. filed by the petitioner. The operative para of the order dated 14.09.2010 passed by learned Tribunal is reproduced as under:-

“11.6 In view of the foregoing, we dispose of this TA with a direction to the respondents to consider the case of the applicant for promotion against as SC category vacancy under the Promotion Quota or even under the Direct Recruitment Quota (to compensate for the diversion in 1996) from the date of his acquiring eligibility by a speaking and reasoned order keeping in view the instructions on the subject, the dates of the vacancies among others. Needless to say while doing so, our observations in the body of this order would be kept in view. In the event of the claims of the applicant regarding the infringement of his rights as an SC category candidate being found justified the case of the applicant would be considered for promotion with prospective effect. This is to be done within a period of three months from the date of receipt of a copy of this order. No costs.”

7. As can be seen from the aforesaid directions given by the learned Tribunal, it was directed to the respondents that in the event of the claim of the petitioner regarding the infringement of his rights as an SC candidate, being found justified, then, the petitioner's case would be considered for promotion with 'prospective' effect. The petitioner was aggrieved by the use of the said expression 'prospective' in the

concluding para 11.6 of the order dated 14.09.2010 passed by learned Tribunal. As per the petitioner, the learned Tribunal could have given a direction to consider his case for promotion to the post of Technical Officer from 'retrospective effect' when he became eligible for the post after completing five years of regular service on the post of Technical Assistant.

8. The order dated 14.09.2010 was challenged by the petitioner before this Court in W.P. (C) No. 4011/2011. The same was withdrawn by him vide orders dated 10.08.2011 seeking leave of the Court to file a clarificatory petition before the learned Tribunal. Accordingly, to seek clarification of the order of the learned Tribunal, he filed an application being M.A. No.2430/2011, which was dismissed by the learned Tribunal vide order dated 17.02.2012, by taking a view that in the garb of seeking clarification, the endeavour of the petitioner was to seek a substantive relief and such a remedy could not be availed by moving a Miscellaneous Application.

9. Another Writ Petition being W.P. (C) No. 5056/2012 was preferred by the petitioner to challenge the order dated 17.02.2012 passed by the learned Tribunal and expressing its displeasure, the High Court directed

the Tribunal to hear the clarification application afresh and to give a clear decision as to whether the word 'prospective' ought to be substituted with the word 'retrospective' in para 11.6 of the order dated 14.09.2010. It is pursuant to the said direction passed by this Court, that the learned Tribunal again considered the clarification application of the petitioner and vide order dated 21.01.2014, it took a view that the Bench which had decided the T.A. No.1294/2009 should not have ordered for consideration of 'retrospective' promotion of the petitioner and the use of the word 'prospective' in para 11.6 of the order dated 14.09.2010 was apposite and correct. This is how the order dated 21.01.2014 passed by the learned Tribunal is under challenge in this third Writ Petition.

10. Assailing the legality and correctness of the order dated 21.01.2014, Mr. Rajeev Sharma, the learned counsel for the petitioner submitted that the petitioner was well within his rights to claim promotion against 50% promotion quota in the SC category, for which he became eligible on 09.08.2004. The learned counsel for the petitioner further submitted that instead of granting clarification on the clarification application, vide order dated 21.01.2014 the Tribunal again entered into the merits of the case and vide the said order passed a fresh order which

as per the learned counsel for the petitioner is totally impermissible in law. The learned counsel also averred that it was an admitted case of the respondent that the vacancy against 50% promotional quota did exist in the year 2004 and the same was being occupied by the ad-hoc appointee, but the respondents instead of giving an appointment to the petitioner with effect from the date when he became eligible continued with the ad-hoc appointee i.e. one SC candidate, Sh. Pradeep Kumar whose appointment was extended from time to time, after the UPSC granted permission on temporary basis to divert the post reserved for SC from Promotional Quota to Direct Recruitment Quota temporarily in relaxation of Recruitment Rules.

11. On the other hand, Ms. Mini Pushkarna, the learned counsel for the MCD submitted that at the time of appointment of Sh. Pardeep Kumar on ad-hoc basis, the petitioner was not eligible for appointment to the said post. She also submitted that Sh. Pardeep Kumar who was a General Category candidate was appointed against the post of SC category from the quota of direct recruits. She further submitted that the respondents had fully implemented the directions given by the learned Central Administrative Tribunal, in terms of para 11.6 of the order dated

14.09.2010. The learned counsel also averred that pursuant to the said direction given by the learned Tribunal, a DPC was held on 27.04.2012 and a decision was taken by the DPC that the petitioner be given promotion to the post of Technical Officer vide office order dated 18.05.2012.

12. We have heard the submissions made by the learned counsel for the parties and have given our thoughtful consideration to the arguments advanced by them.

13. We find considerable merit in the contentions raised by the learned counsel for the petitioner that by the impugned order dated 21.01.2014 passed by learned Tribunal it has freshly examined the entire case of the petitioner on its merits instead of restricting its jurisdiction to the clarification sought by the petitioner vide his M.A. no.2430/2011 and in compliance of the direction given by this Court vide orders dated 10.08.2011 and 22.08.2012.

14. This re-examination of the matter by the learned Tribunal perhaps would not have taken place, had the Bench which decided the Original Application of the petitioner been there to give clarification of the

expression “prospective” in order dated 14.09.2010. In our view, if the Bench, which has decided the clarificatory application of the petitioner had carefully gone through the order dated 14.09.2010 passed by their predecessor Bench then there would not have been any difficulty in appreciating the spirit of their order and in giving certain directions in para 11.6 of the order dated 14.09.2010. In the T.A.No. 1294/2009 filed by the petitioner, he sought quashing and setting aside of the advertisement dated 04.10.2003 and the examination which was held on 28.11.2004 and he was seeking these reliefs on the premise that he was eligible to be appointed to the said post against 50% promotional quota in the SC category and this eligibility the petitioner claims from the year 2004. In the said T.A., the petitioner also sought direction to consider his case for promotion to the said post of Technical Officer in promotional quota.

15. The learned Tribunal after having examined the contentions raised by both the parties, gave certain directions to the respondents and these directions are contained in the operative para 11.6 of the order dated 14.09.2010. The genesis of directions given in para 11.6 can be traced in a para preceding the said para 11.6 of the order dated 14.09.2010. In this

para the learned Tribunal in unequivocal terms expressed its agreement with the case of the petitioner and stated that he had admittedly acquired eligibility for being considered for promotion to the post of Technical Officer w.e.f. 09.08.2004. The learned Tribunal also clearly held that as per the Rules and Regulations, the said posts of Technical Officer were to be filled by promotion and direct recruitment on 50-50% basis. The Tribunal also recognised the fact that before the year 2002, there were only two posts of Technical Officers, which had increased by creation of additional four posts, thus making a total of 6 sanctioned posts. It is in this background that the learned Tribunal gave a direction to the respondents to consider the case of the petitioner for promotion against an SC category vacancy under the Promotion Quota or even under the Direct Recruitment Quota (to compensate the diversion of 1996) from the date of his acquiring eligibility by a speaking and reasoned order, keeping in view the instructions on the subject, the dates of the vacancies among other.

16. Once the Tribunal states that the case of the petitioner was to be considered keeping in view the date of his acquiring eligibility, then manifestly the eligibility of the petitioner is to be reckoned from the

completion of his five years' regular service and in that event his case would be required to be considered for promotion with 'retrospective' effect and not from 'prospective' effect. This little error on the part of the previous bench of the Tribunal led the petitioner to take various rounds of the Courts which has certainly caused him prejudice, discomfort and unavoidable delay in the consideration of his case.

17. We are conscious of the fact that service jurisprudence doesn't recognize the concept of retrospective promotion and as a rule, retrospective appointment or promotion to a post should not be resorted to unless on a sound reasoning and foundation it becomes necessary to sparingly do so (*Ref: K. Madhavan & Anr. v. UOI & Ors, 1987 (4) SCC 566*). However, apropos the controversy which we are confronted with, we are just clarifying the position to the limited extent that the case of the petitioner should be considered for promotion with 'retrospective effect', considering the fact that the learned Tribunal in para 11.5 of the order dated 14.09.2010 itself envisaged that the petitioner had acquired eligibility for being considered for promotion to the post of Technical Officer w.e.f. 09.08.2004. Therefore, it is apparent that the learned Tribunal was of the clear view that the eligibility of the petitioner should

be reckoned from the completion of five years' regular service and in the light of the said view the case of the petitioner deserves to be considered for promotion with 'retrospective effect'.

18. In view of the aforesaid discussion, the Writ Petition filed by the petitioner is allowed and the respondents are directed to consider the case of the petitioner strictly in terms of the direction given by the learned Tribunal in para 11.6 of the order dated 14.09.2010 making it clear that the use of the word 'prospective' shall be read as 'retrospective' in its place, within a period of three months from the date of this order.

19. With the aforesaid direction, the present petition stands disposed of. It is accordingly.

KAILASH GAMBHIR, J.

I.S.MEHTA, J.

MAY 28, 2015
Pkb/v