

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPS No. 296 of 2011**

- Rekha Lal Sudhakar S/o Shri Tek Singh Sudhakar, aged about 47 years, R/o Nagar Panchayat Gandaee, District Rajnandgaon, (CG)

---- **Petitioner****Versus**

1. State Of Chhattisgarh, Through Secretary, Town Administration & Development, DKS Bhawan, Mantralaya, Raipur (CG)
2. Commissioner, Secretarial, Town Administration & Development Department, Raipur (CG)
3. Nagar Panchayat Gandaee, Through Chief Municipal Officer, Gandaee, District Rajnandgaon (CG)
4. Chairman, District Selection Committee & Joint Director, Town Administration & Development, Raipur Division, Raipur (CG)
5. Khuman Singh Kashyap, S/o Mehater Singh Kashyap, Chief Clerk cum accountant at Nagar Panchayat Gandaee, District Rajnandgaon (CG)

---- **Respondent**

For Petitioner : Shri A.L. Singroul, Advocate.

For Respondent/State : Shri YS Thakur, Deputy Advocate General.

For Respondent No.3 : Shri Pragalbh Sharma under the authority of Shri Kshitij Sharma, Advocate.

For Respondent No.5 : None

Hon'ble Shri Justice Prashant Kumar Mishra**Order On Board****30/03/2016**

1. The petitioner has assailed the legality and validity of the order

dated 16.12.2010 (Annexure-P/1) and proceeding of the District Selection Committee (henceforth 'DSC') (Annexure-P/2) recommending respondent No.5 for promotion on the post of Chief Clerk cum Accountant. He has also prayed for promotion on the said post from 16.12.2010.

2. The petitioner was initially appointed as Safai Daroga (Sanitary Inspector) in the Nagar Panchayat, Gandai for a period of 2 years on 17.12.1986. He was later on recommended for promotion as LDC/AG-III in the DSC meeting dated 25.9.1993 and eventually promotion order was issued on 1.10.1993. The petitioner was thereafter promoted on the post of LDC/AG-II on 16.12.2005. On the other hand, respondent No.5 was working on daily wages in the said Municipality. He was regularized as LDC on 2.6.1995. In the DPC meeting dated 30.11.2005 the petitioner and respondent No.5 were considered for promotion on the post of UDC/AG-II, however, only the petitioner was recommended for promotion and not respondent No.5. Thus respondent No.5 remained on the post of LDC.
3. The DSC held its meeting on 6.10.2010 to consider promotion for the post of Chief Clerk cum Accountant. In the said meeting, the petitioner's case was not considered on the ground that his initial appointment being on the post of Safai Daroga (Sanitary Inspector), he is not coming within the zone of consideration. Respondent No.5 was posted at Municipal Council, Balod, yet his original Municipality being Nagar Panchayat, Gandai, his case was considered and recommended for promotion as Chief Clerk cum Accountant.
4. It is argued by learned counsel for the petitioner that respondent

No.5 being a LDC was not within the zone of consideration, yet his case was recommended. He would also submit that the petitioner was well within the zone of consideration and the observation to the contrary recorded in the minutes of the DSC has no legal basis. He would refer to the law laid down by the Division Bench of the Madhya Pradesh High Court in the matter of **Nirmal Kumar Mishra Vs. State of M.P.** {1990 (II) MPWN 95} and **Ramlal Patel Vs. State of M.P. and Others** {1995 MPLJ Note 24}.

5. Per contra, learned Deputy Advocate General and learned counsel for respondent No.3 would submit that the petitioner was not within the zone of consideration because as per the departmental setup and designation of posts provided in Schedule III, Rule 6 of the M.P. Municipal Services (Scale of Pay and Allowances) Rules, 1967 (for short 'the Rules, 1967'), the post of Chief Clerk cum Accountant was a post of the General Administration Department of the Municipality whereas the petitioner's original appointment as Sanitary Inspector was in the Medical and Public Health Department and not in the General Administration Department.
6. The respondent No.5 has not entered appearance despite service of notice.
7. Indisputably, promotion to the post of Chief Clerk cum Accountant is governed under the Madhya Pradesh Municipal Employees (Recruitment and Conditions of Service) Rules, 1968 (for short 'the Rules, 1968'). Rule 12 thereof provides for recruitment by promotion whereas Rule 15 provides for preparation of gradation list. Rule 16 speaks about seniority. The eligibility qualification for promotion on the post of Chief Clerk cum Accountant has been provided in Schedule III, Rule 6 of the Rules, 1967.

8. Interpreting the qualification for promotion, the Division Bench of the Madhya Pradesh High Court in the matter of **Nirmal Kumar Mishra** (Supra) has held that in the hierarchy of the administrative set up, promotion from the post of LDC could only be made to the post of Upper Division Clerk and only after becoming a UDC, he could be entitled to consideration and selection for promotion to the post of Accountant. Thus for promotion as Chief Clerk cum Accountant, a candidate has to be born in the cadre of UDC.
9. At this stage, learned counsel for the respondents would draw attention of the Court to Schedule III, Rule 6 of the Rules, 1967 to contend that for promotion as Chief Clerk cum Accountant the qualification is that a candidate should have passed higher secondary examination or any other equivalent examination and should have 3 years experience of clerical work. Therefore, respondent No.5 having more than 3 years experience in the cadre of LDC was fully eligible for consideration for promotion and for this reason alone, his name was included in the gradation list.
10. Perusal of Schedule III, Rule 6 of the Rules, 1967 initially appears to support the arguments raised by the respondents, however, upon consideration of the posts mentioned at S. No.5, 6 and 7 together with the law laid down by the Division Bench of the M.P. High Court in the matter of **Nirmal Kumar Mishra** (Supra), it would appear that similar qualification of 3 years experience of clerical grade is mentioned for the post of Chief Clerk cum Accountant as well as for Upper Division Clerk, therefore, while considering the meaning and effect of said qualification, it would definitely mean that a candidate should have 3 years experience of clerical work in the cadre just below the cadre for which promotion is to be made.

In any event, the law laid down by the Division Bench of the M.P. High Court is binding on this Court.

11. There is no dispute about the fact that on the date of meeting of the DSC respondent No.5 was working as LDC, therefore, respondent No.5 was not eligible to be considered for promotion.
12. Learned counsel for the respondent Municipality has also argued that the petitioner has submitted a letter before the Municipality on 29.10.2010 withdrawing his objection dated 23.10.2010 against the promotion of respondent No.5, therefore, the petitioner is estopped from challenging the promotion of respondent No.5.
13. Learned counsel for the petitioner has strongly resisted this argument on submission that a Government servant or servant working in local authority is always concerned about his career, therefore, the petitioner was not willing to withdraw his objection but on threat being extended by the concerned officers he had written letter under duress. He would also submit that constitutional remedy under Article 226 of the Constitution of India is not barred and in any case, this Court would not permit promotion of a person who was not born in the feeder cadre or was not eligible for promotion. He would submit that it is precisely for this reason pressure was created on the petitioner because officers were aware that they are promoting a person who is not at all eligible.
14. Having heard learned counsel on the point, this Court is convinced that the petitioner having preferred Writ Petition within 3 months from the date of promotion, it cannot be termed as an afterthought. Prompt submission of writ petition lends credence to the

submission made by the petitioner's counsel that the letter was got signed from the petitioner by exerting duress. In any case withdrawal of objection would not validate an illegal promotion.

15. The argument raised by learned counsel for the respondents that the petitioner not belonging to department of General Administration, he was not within the zone of consideration is not supported by any provisions either under the Rules, 1967 or under the Rules, 1968. A bare reading of Schedule III Rule 6 of the Rules, 1967 would reveal that except for educational qualification of higher secondary pass and 3 years experience of clerical work, there is no other requirement that a person working in the feeder cadre i.e. clerical cadre should belong to any particular department of the Municipality. In a matter concerning promotion to a public post, the appointing authority or for that matter the Court cannot read any prohibition or restriction which is not provided under the Rules.
16. For the foregoing, the Writ Petition succeeds. The order dated 16.12.2010 promoting respondent No.5 on the post of Chief Clerk cum Accountant is quashed. The respondent Municipal Council is directed to consider the petitioner's case for promotion on the post of Chief Clerk cum Accountant as on the date when the District Selection Committee convened the meeting on 6.10.2010.
17. Before parting, this Court would like to consider the practice of filing documents along with covering memo in writ proceedings. In the present petition also, documents have been filed by the petitioner along with covering memo. Since the documents are the rules enacted under the Municipality Act and are not of a personal nature, this Court proceeded to consider the documents. However,

such practice of filing documents along with covering memo is nowhere provided under the High Court Rules. Writ proceedings are proceedings based on pleadings supported by affidavit. The documents filed along with covering memo cannot be considered part of the record because they are not supported with any affidavit nor there is any pleading in the Writ Petition or in the return concerning those documents.

18. Registry is directed not to accept any documents along with covering memo in the Writ Petitions unless the documents are filed along with application duly supported with affidavit of the party concerned.

Sd/-
Judge
(Prashant Kumar Mishra)

Barve