

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

Reserved on: 11.02.2016

Pronounced on: 18.03.2016

+ **LPA 879/2004**

D.P. MULCHANDANI

.....Appellant

Through: Ms. Rajni Anand, Advocate along with
appellant in person.

Versus

FCI AND ORS.

.....Respondents

Through: Sh. Ajit Pudussery and Ms. Shruti Sarma
Hazarika, Advocates, for FCI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant impugns the judgment of a learned Single Judge dismissing his writ petition, challenging the seniority assigned to the second to fifth respondents, in the cadre of Joint Manager in the first respondent, i.e. the Food Corporation of India (FCI).

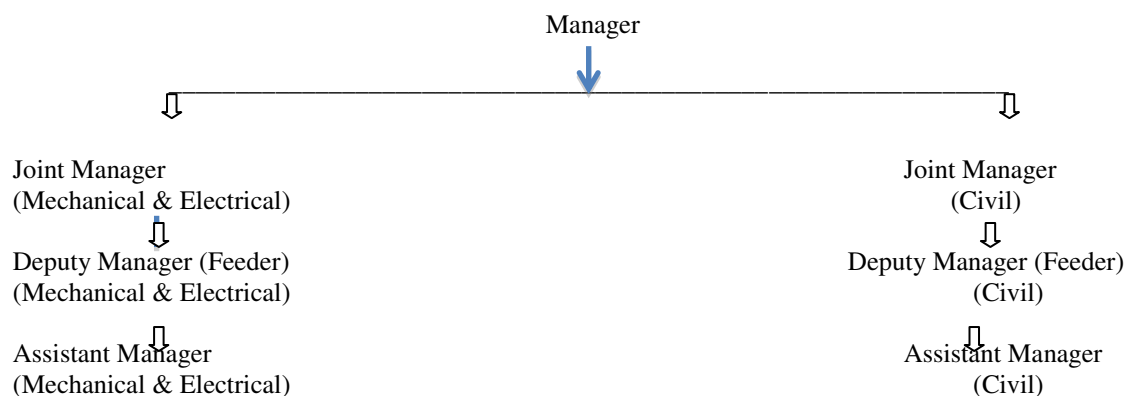
2. The brief facts of the case are that the appellant was appointed as Assistant Engineer (Electrical/Mechanical) in the Department of Food, Ministry of Food and Agriculture in 1967 through the Union Public Service Commission. On 01.03.1969, he was transferred to FCI as part of Department of Food and re-designated as Senior Assistant Manager (Engineer) w.e.f. 18.08.1969. He was promoted as Executive Engineer/Deputy Manager on 16.06.1971.

3. The appellant was further promoted as Joint Manager (Electrical

Engineering) on 1982 with notional basis w.e.f 02.07.1977 as a result of the judgment dated 10.12.1981, in a writ petition filed by him by the Bombay High Court.

4. The fourth respondent (hereafter called “Dhall”) was directly recruited on 15.05.1974 to the post of Deputy Manager (Civil) in FCI. The seniority list of two cadres – (i) Civil and (ii) Mechanical & Electrical are separate for the promotion to Deputy Manager and to Joint Manager. However, they are merged and a common seniority list is prepared for promotion to Manager from Joint Manager. If any irregularity occurs in promotion as Joint Manager in any cadre, it thus affects both cadres, i.e. (i) Civil and (ii) Mechanical & Electrical.

5. Dhall, joined the Municipal Corporation of Delhi (MCD) as a Municipal Engineer. That post was apparently equivalent in rank and status to that of Deputy Manager in the FCI. In the FCI, up to the level of Managers (which was the common promotional post for that of Joint Managers in the Mechanical & Electrical, on the one hand and the Civil wing on the other), separate cadres existed in the Engineering/Technical Division. The following chart may conveniently show these:



6. Upon the induction – as direct recruit – to the cadre of Deputy Manager (Civil), Dhall was granted pay protection (for the past service rendered in MCD). He was promoted as Joint Manager on 02.07.1977. At that time, promotion had to be made in the Electrical and Mechanical wing as well. Around this time, bifurcation of the Electrical and Mechanical wing occurred and one Sh. A.K. Roy was promoted. This aggrieved the appellant; he approached the Bombay High Court, in a writ petition. That petition was allowed; a review DPC was held on 07.07.1982. The FCI's review was in respect of three posts of Joint Manager in the joint cadre of Electrical and Mechanical wing. The fresh select panel placed the Appellant at No.3, below D.P. Roy and Munian Devan.

7. The appellant contends that a post of Manager (Engineering) had been kept in abeyance since 1978 was revived in end of June 1984. Likewise, another post of Manager (Products) which too had been kept in abeyance was revived. It was decided by FCI to utilize them for the purpose of managerial engineering of rice mills, and technical supervision of modern mills and processing units. DPC was held for filling up of this post. The appellant complains that before doing so, no seniority list – an integrated one of Joint Managers - of Civil Engineering or Mechanical & Electrical Engineering were circulated; no objections from the concerned individuals was sought. Instead, separate seniority lists were prepared on 21.06.1984 for Joint Manager (Civil Engineering) on the one hand and Joint Manager (Mechanical & Electrical Engineering) on the other. Dhall filled up this single post of vacancy of Manager. The appellant argues that Dhall was not only junior and beyond the zone of consideration, but was even ineligible.

Feeling aggrieved, the appellant represented to the FCI against this move, i.e. promotion of Dhall on 11.12.1984.

8. The appellant challenged Dhall's promotion in WP 2744/1985, before this Court. The appellant was joined by G.C. Tewari (as first petitioner). During pendency of the petition, the said Shri Tewari died. Therefore, the issue considered by the learned Single Judge, in the impugned judgment was the challenge to Dhall's promotion as Manager, on 11.12.1984.

9. The learned Single Judge was of the opinion that Dhall's promotion was in order; he held that the appellant could not challenge Dhall's entry into the FCI, by contending that he did not have the requisite experience. That Dhall belonged to the Civil Engineering cadre, as opposed to the fact that the appellant belonged to the Electrical & Mechanical stream was another factor that weighed with the impugned judgment. The learned Single Judge concluded that the appellant could not claim seniority over Dhall, the fourth respondent.

10. The appellant argues that Dhall could not be considered as his senior. It is pointed out that the appellant was absorbed into the FCI on 01.03.1969 and later promoted as Deputy Manager/Executive Engineer on 16.06.1971. However, Dhall was recruited directly to that post only in 1974. Therefore, he did not even have the requisite experience necessary for promotion as Joint Manager at the time he was given that post, in view of the recruitment rules, which mandated 5 year's experience. It is submitted that the relaxation of the essential experience condition was utterly unauthorized.

11. Ms. Rajni Anand, learned counsel relies on the minutes of the FCI's

Board of Directors of 28.06.1977 and says that one Director had disagreed and recorded a dissent note, against the proposal to relax the experience norms in respect of Dhall, who was clearly lacking in the prescribed experience. It was also urged that Dhall could not claim the benefit of past service in MCD, in an equivalent rank, because he competed for a direct recruitment post of Deputy Manager in FCI. He was beneficiary only of a pay protection order, and could not claim the service privilege of reckoning previous employment experience for seniority purposes in the FCI.

12. Ms. Anand relied on a judgment of the Supreme Court, reported as *P. Sadagopan v Food Corporation of India* 1997 (4) SCC 301, where it was held that executive instructions cannot be resorted to for the purpose of relaxation. The Supreme Court held, in the said decision, as follows:

“Regulation 10 of the Staff Regulations, 1971 reads under:

"All promotions shall be considered by a Promotion Board duly constituted for purpose and shall be regulated by the general instructions to be issued by the Corporation from time to time in regard to the field of choice of candidates, the size of the panel and validity of the panel."

The Regulation provides that such of the candidates who have put in three years experience as Assistant Category I are eligible to be considered for promotion as Assistant Managers in Category II post. It is now settled legal position that executive instructions cannot be issued in derogation of the statutory Regulations require that experience of three years is a pre-condition to consideration for promotion to Category II post from Category I post, it would be obvious that any relaxation was in defeasance of the above Regulations."

The appellant's counsel contends that the above decision is binding and the promotion of Dhall, made on the basis of a mere executive instruction or at

the whims of some officers, was, therefore, unsupportable in law.

13. It was argued that the FCI cannot defend the promotion of Dhall on the basis that there was a separate quota for direct recruits in the post of Joint Managers; that quota was introduced after amendment, made much after the promotion actually took place in 1977. It was submitted that all these circumstances were not appreciated in their correct perspective by the impugned judgment, which is erroneous.

14. Mr. Ajit Pudussery, learned counsel for FCI, argues that the appellant's argument that Dhall was far junior to him is incorrect. He points out that Dhall joined the MCD in the cadre of Municipal Engineer, which was equivalent to the post of Deputy Manager in FCI, on 05.01.1971. The appellant, however, went to that cadre on promotion in FCI, only on 16.06.1971. It is submitted that the fourth respondent, Dhall was promoted on 02.07.1977 since a large number of vacancies in the cadre of Joint Managers existed, because fresh posts came into existence in the civil wing. These posts were created pursuant to a World Bank project for construction of storage spaces to hold food grains. The fourth respondent had the requisite experience, because he had served in FCI for three years, and another three years in an equivalent position, doing construction work, in the MCD. These facts prevailed with the FCI when it decided to relax the experience criteria in his case, to ensure that the vacancies were filled.

15. Mr. Pudussery distinguished the *P. Sadagopan (supra)* decision by stating that Proviso (c) to Regulation 7(2) of the Food Corporation of India (Staff) Regulations, 1971 enabled FCI to, in appropriate cases, relax the provisions relating to experience, etc. It was submitted that since sufficient

civil engineering officers were not available with the required experience, Dhall's experience was considered necessary, even though some part of it was not with the FCI. It was highlighted that the appellant could well have agitated his grievance when he had earlier approached the Bombay High Court against his being overlooked for the post of Joint Manager; however, he did not challenge the promotion of Dhall. Furthermore, contended counsel for FCI, Mr. A.K. Roy, against whom the appellant had claimed seniority, was held to be senior. He was promoted later than Dhall and therefore he could not claim that Dhall was junior.

Analysis and Conclusions

16. It can be gathered from the above discussion that the main issue, which has to be decided in this appeal, is whether the fourth respondent was incorrectly and unjustifiably promoted as Joint Manager, before the present appellant. That the appellant approached the Bombay High Court which held that his non-promotion was contrary to law. Therefore, a review of promotions was conducted and he was promoted in 1982, with notional benefits, from 1977. A significant aspect in this regard is that the Bombay High Court ruled against his claim for seniority against A.K. Roy. The High Court judgment (dated 10th December 1981) stated that “...*The challenge to the Seniority Lists Exh J and O is turned down and the seniority of Respondent No. 4 over that of the Petitioner is maintained.*” The fourth respondent, in the writ petition before the Bombay High Court, was A.K. Roy. He was promoted as Joint Manager on 16.08.1977. Such being the case, the question of Dhall being junior to the appellant could not arise, because he was promoted on 02.07.1977.

17. The first issue, which is to be decided, is whether the promotion of Dhall as Joint Manager was not authorized by the rules, inasmuch as he did not possess the requisite experience. No doubt, the Staff Regulations prescribed that the minimum experience for promotion to the said post is 5 years in the feeder post (Deputy Manager). The FCI has two-fold submissions: one, that the previous service of Dhall in the MCD was to be taken into consideration and two, that the minimum experience was relaxed by the Board of Directors of the FCI. The appellant's argument is that Dhall's previous experience could not have been taken into consideration because he was not absorbed after deputation tenure, but inducted into FCI as a direct recruit. It is argued also that as a result of the law declared in *P. Sadagopan (supra)*, FCI could not have relaxed the minimum experience criteria.

18. So far as the first point argued is concerned, there is no document on the record which suggests that the continuity for seniority and all other service purposes could have been given, in respect of Dhall's previous employment with MCD. No doubt, the FCI had provided pay protection. The agenda note for the meeting held by the Board of Directors, which considered the case, noted that eligible officers with sufficient experience were not available. Here, it is to be understood that whether the FCI had an integrated cadre of Electrical & Mechanical and Civil at the Joint Manager level, or a separate one, functionally, it was in its interest to ensure that for the Civil Engineering unit, there were sufficient senior and middle level officers. Thus, the concern about ensuring that those with the requisite qualification and sufficient experience in fact manned the position of Joint

Manager, was a reasonable one. If Dhall's previous experience in the MCD (3 years) were to be taken into consideration the statutory provision (Proviso to Regulation 7(2)(c)) empowered it to relax the experience criteria. The said stipulation reads as follows:

“provided further that the Board may relax, by order, any of the provisions of the Recruitment Rules contained in Appendix I, if in their opinion, it is necessary or expedient to do so.”

Now, the existence of this regulation has not been disputed; it cannot also be disputed. Indeed, the copy of the Regulations filed by the appellant itself contains the above provisions. The said Regulation is not also under challenge. In these circumstances, without any material supporting the allegation that the fourth respondent Dhall was given undeserved relaxation, it is not possible to accept the appellant's plea in that regard. The minutes no doubt record a dissent note by one of the Directors; however, it is also not disputed that the other members of the Board granted the exemption; by all accounts, it was justified, because at the level of Joint Manager (Civil) there were no officers with sufficient experience of five years as Deputy Manager (Civil) in FCI. However, Dhall had previous 3 years' experience. Considering these facts, the FCI relaxed the norm; it fell within the condition of the employer considering that such relaxation was “expedient”.

19. As noticed earlier, Mr. A.K. Roy's seniority as against the appellant was upheld and the latter's challenge to it was declined by the Bombay High Court. The said Mr. Roy was junior to Dhall in the cadre of Joint Manager, having been promoted on 16.08.1977 (as against Dhall's promotion on 02.07.1977). On this count too, the appellant's contention had to fail.

20. Last - but not the least: the learned Single Judge, in this Court's opinion, was justified with his observation that the appellant did not challenge Dhall's promotion within reasonable time; he could and should have done so, when he approached the Bombay High Court. However, he approached this Court only when Dhall was promoted as Manager. The long delay of about 7 years in challenging a promotion, therefore, was fatal to his claim.

21. For the foregoing reasons, this Court is of opinion that there is no merit in the appeal; it is accordingly dismissed without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

MARCH 18, 2016

