

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

+ **Date of Decision: 10th July, 2017**

% **W.P.(C.) No. 2090/2016**

+ W.P.(C) 2090/2016 & CM No.8961/2016

NORTH DELHI MUNICIPAL CORPORATION & ORS

..... Petitioners

Through: Ms.Biji Rajesh with Ms.Eshita
Baruah, Advocates.

versus

V.K. KADYAN

..... Respondent

Through: Mr.Rajeev Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J. (ORAL)

1. The Petitioners-NDMC has by the present petition impugned the order dated 13.08.2015 in OA No.1318/2015 and order dated 16.02.2016 in CP No.548/2015 passed by the Central Administrative Tribunal, Principal Bench, New Delhi.

2. The admitted facts, as noticed by the Tribunal, are that the Respondent was appointed as an Assistant Engineer (Civil) in the year 1990 in the erstwhile Municipal Corporation of Delhi (MCD). As per the

Recruitment Rules in MCD for the post of Executive Engineer (Civil), the following criteria was prescribed:-

- (i) Assistant Engineer (Civil) with five years regular service in the grade for those possessing degree in Civil Engineering.
- (ii) Assistant Engineer (Civil) with ten years regular service for those possessing diploma in Civil Engineering.

3. Based on his seniority and eligibility, the Respondent was vide order dated 08.04.2004 promoted to the post of Executive Engineer (civil) on *ad hoc* basis. On 07.02.2006, the Respondent and some other officers were terminated from service, which termination was challenged by him before the Tribunal. At this stage, when the Respondent stood terminated from service and challenge to his termination was pending before the Tribunal, a DPC was held in July/August, 2008 for considering officers for regular promotion to the post of Executive Engineer (Civil), but since the Respondent was not in service, his case was not considered for regular promotion to the post of EE (Civil).

4. The Respondent's challenge to his termination succeeded and the Tribunal vide its order dated 26.03.2009 directed his reinstatement. Aggrieved by the order of the Tribunal directing the Respondent's reinstatement, the Petitioners preferred a writ petition which was disposed of on 09.09.2010 with liberty to the Petitioners to initiate fresh proceedings. The Respondent, was accordingly, reinstated in service on 10.09.2010 and disciplinary proceedings were initiated against him in which he was exonerated on 23.07.2012.

5. After his exoneration in the disciplinary proceedings on 23.07.2012, the Respondent made representations seeking regular promotion as Executive Engineer (Civil) at par with his batch-mates, but since no action was taken by the Petitioners to consider him for regular promotion, he approached the Tribunal which vide its order dated 23.08.2013 allowed his OA and directed the Petitioners to hold a review DPC with reference to the DPC held in July/August 2008, to consider the name of the Respondent for regular promotion to the post of EE(Civil). It was also directed by the Tribunal that in case, the Respondent was found fit for promotion in the Review DPC, he would be given all consequential benefits as had been given to his juniors.

6. In compliance of the aforesaid order of the Tribunal, the case of the Respondent was considered by a review DPC, which found him fit for promotion and accordingly, vide order dated 11.07.2014, he was promoted as a regular Executive Engineer (Civil) w.e.f. 08.09.2008 and his name was placed at Serial No.125-A in the seniority list.

7. After being granted promotion to the post of Executive Engineer (Civil) w.e.f. 08.09.2008, the Respondent learnt that 35 officers had already been promoted as Superintending Engineer (Civil) (hereinafter referred to as 'SE(C)') on *ad hoc* basis or look after/current duty charge basis and these 35 officers included three officers namely, Shri R.P. Garg, Shri K.P. Singh and Shri Susheel Kumar, who had still not even been promoted to the post of Executive Engineer (Civil) on a substantive basis. Therefore, the Respondent approached the Tribunal by OA No.1318/2015 seeking a

direction to the Petitioners to promote him to the post of Superintending Engineer (Civil).

8. Before the Tribunal, the main contention raised by the Respondent was that once these three officers - who were only holding the substantive post of Assistant Engineers and had admittedly not been promoted as regular Executive Engineers had been granted *ad hoc* promotion to the higher post of Superintending Engineer(C), there was no justification on the part of the Petitioners to not grant him promotion to the post of Superintending Engineer, despite it being an admitted fact that he was holding the substantive post of EE(Civil) w.e.f. 08.09.2008.

9. In its Reply before the Tribunal, the Petitioners admitted that the Respondent was eligible for promotion to the post of SE (Civil), having completed 5 years regular service in the grade of Executive Engineer (Civil), but contended that since all the 33 sanctioned posts of SE were already filled up at that stage, there was no vacancy of SE(C) available for consideration of the Respondent for promotion. The Petitioners had, therefore, contended that the name of the Respondent would be considered for *ad hoc* promotion to the post of SE(C) along with his seniors as and when a vacancy of the said post is made available.

10. Before the Tribunal, the Petitioners while admitting that three officers namely, Shri R.P. Garg, Shri K.P. Singh and Shri Susheel Kumar were working as *ad hoc* SE(C), drew attention of the Tribunal to the fact that even though the competent authority of the Petitioners had vide its order dated 22.11.2010 withdrawn their *ad hoc* promotion to the post of SE(C), but the Tribunal had vide its order dated 21.12.2010 quashed and set aside their

reversion orders and, therefore, the Petitioners had withdrawn their reversion order vide office order dated 05.01.2011 due to which they were continuing to work as *ad hoc* SE. It was also contended by the Petitioners that *ad hoc* promotions to the post of SE(C) to the aforesaid three officers had been given in the year 2007 itself, i.e. even before the DPC for regular promotion to the post of Executive Engineer (Civil) had been conducted in 2008 and thus, it was evident that when the aforesaid three officers were granted *ad hoc* promotion as SE(C) in 2007 along with other employees, *ad hoc* promotions to the post of SE(C) had been made on the basis of their seniority position of Assistant Engineer (Civil).

11. The Petitioners, therefore, contended before the Tribunal that due to non-availability of vacancies in the post of SE(Civil), they were unable to consider the case of the Respondent, at that stage, for promotion to the post of SE (Civil).

12. On the other hand, the Respondent contended before the Tribunal that even if all the 33 vacancies of SE were already occupied, it would be appropriate that the last person amongst those 33 be reverted and he be placed amongst those 33 officers working as *ad hoc* SE(C). Since the Respondent was superannuating from service on 31.08.2015, the Tribunal, relying on an order dated 27.04.2015 passed by this Court in the case of one Shri Ram Beer Singh Bansal, Executive Engineer (Civil) - in whose case, keeping in view his impending superannuation a direction had been passed to hold a special meeting of the Departmental Screening Committee (hereinafter referred to as 'DSC') for promotion to the post of SE(Civil)

within a period of two days and thereafter promote him by creating a supernumerary post, if necessary, allowed the respondents claim.

13. The Tribunal, after considering the contentions raised by the Petitioner as well as Respondent, noticed that there was an utter chaos in the cadre management in the office of the Petitioners and sensitive posts of Executive Engineer, Superintending Engineer and Chief Engineer were mostly being manned on *ad hoc*/current duty charge basis for decades together. The Tribunal, by referring to the case of Shri Ram Beer Singh Bansal - who had been given promotion just before his retirement, came to a conclusion that even if the Petitioner-Corporation was unable to revert the three officers named hereinabove, they should immediately hold a meeting of the DSC and create a supernumerary post and place the Respondent at the appropriate level of seniority as SE, and simultaneously sort out the matter of the three officers. The Tribunal thus, while allowing the OA vide its order dated 13.08.2015, directed the Petitioners to hold a meeting of the DSC within a period of one week from the date of order, so that the decision to promote the Respondent to the post of SE(C), if he was otherwise found eligible, could be taken before he would retire on superannuation.

14. Aggrieved by the action of the Petitioners in not holding a meeting of the DSC within a period of one week i.e. by 20.08.2015, the Respondent herein preferred a contempt petition, alleging therein that the Petitioners had not taken any steps for implementation of the order dated 13.08.2015 passed by the Tribunal. In response to the contempt petition, the Petitioners filed a compliance affidavit before the Tribunal stating therein that the name of the Respondent had been duly considered along with other senior left out

Executive Engineers (Civil) by a DSC on 31.08.2015. The DSC found that as on 31.08.2015, there was only one vacancy of SE(Civil) and had accordingly recommended that the senior-most eligible Executive Engineer (Civil) Shri Brij Mohan Verma be granted *ad hoc* promotion to the post of SE(C). Based upon the recommendation of the DSC, Shri Brij Mohan Verma, who was admittedly senior to the Respondent, had been promoted as SE(C) vide order dated 07.09.2015.

15. The Petitioners had also contended before the Tribunal that names of all eligible officers in the feeder cadre of Executive Engineer (Civil) had been arranged according to their seniority and it was found that the Respondent was at Serial No.8 amongst these officers and, therefore, the DSC which had met on 31.08.2015 while recommending the name of the senior-most officer for promotion to the post of SE(C) on *ad hoc* basis against the only sole vacant post, had further recommended that the remaining officers could be considered only after occurrence of vacancy in the grade of SE(C).

16. The Tribunal, however, rejected the plea taken by the Petitioners regarding non-availability of vacancy, by relying on its observations on Para 11 of its order dated 13.08.2015 passed in OA observing that “In fact, in anticipation, we had also directed for creating a supernumerary post, if necessary.”

17. Thus, the Tribunal came to a *prima facie* view that the Petitioner-Corporation was guilty of contempt, as it had not created a supernumerary post for promoting the Respondent, and, therefore, vide its order dated 16.02.2016, the Tribunal directed the Commissioner of the Petitioner-

Corporation to be present in person before the Tribunal on the next date i.e. 11.03.2016. Aggrieved by both the aforesaid orders passed by the Tribunal in the OA and the contempt petition, the Petitioners preferred this writ petition wherein this Court while issuing notice on 10.03.2016 has stayed further proceedings in the contempt petition.

18. The main plea raised by the Petitioners before us, is that even though the Respondent was eligible for being considered for promotion to the post of SE(C) when the DSC held its meeting on 31.08.2015, but since there were candidates who were senior to him, the Respondent could not be promoted due to lack of vacancies. The Petitioners have also contended that there was no justification for the Tribunal to have issued a direction to promote the Respondent to the post of SE(C), as he could only have a right of consideration for promotion, which consideration was given to him but he could not be promoted due to availability of only one vacancy of SE(C) on 31.08.2015 against which the respondents senior was granted *ad hoc* promotion as SE(Civil). The Respondent he had been placed at Serial No.8 in the list of officers who were considered for promotion by the DSC on 31.08.2015.

19. Per contra, the counsel for the Respondent submitted that the direction of the Tribunal to create a supernumerary post for the Respondent was fully justified in the facts of the case, as it was an admitted case of the Petitioners that three persons namely, Shri R.P. Garg, Shri K.P. Singh and Shri Susheel Kumar, despite not having been appointed as regular Executive Engineers, had been granted further *ad hoc* promotion to the post of SE(Civil) and, therefore, it was apparent that justice has not been met out to the

Respondent, and keeping in view his impending superannuation, there was no illegality in the order of the Tribunal directing the Petitioners to create a supernumerary post for the Respondent.

20. Having heard the counsel for the parties, we have given our thoughtful consideration to the same.

21. From the facts which have emerged from the record and the arguments advanced before us, it is no doubt correct that three persons namely Shri R.P. Garg, Shri K.P. Singh and Shri Susheel Kumar who are facing disciplinary proceedings and who till date have not even been appointed on regular basis as Executive Engineers, had been given *ad hoc* promotion to the post of SE(C) in 2007, and the Respondent might have a better claim than those three persons for promotion to the post of SE(C), but there is no denial to the fact that the Respondent was placed at Serial No.8 in the seniority list when the DSC met to consider the cases of eligible officer for promotion to the post of SE(C) on 31.08.2015, and the Respondent - despite being considered for promotion to the post of SE(C) before his superannuation, was not able to get the aforesaid promotion only due to lack of vacancies. Even if the argument of the counsel for the Respondent that the three persons named hereinabove were wrongly occupying the promoted post of SE(C) was to be accepted, even then the Respondent being at Serial No.8 would not be able to get the said promotion to the single vacancy in the post of SE(C).

22. The facts of the case would, however, show that it is not as if the Respondent was not considered for promotion or any injustice was caused to him in not granting promotion of SE(C) to him, as many other persons

senior to him have also not been promoted as SE(C) which is apparent from the admitted position that only one person out of the eight persons considered for promotion to the post of SE(C) in the DSC held on 31.08.2015 was able to get the said promotion due to availability of only one vacancy of SE(C).

23. We are of the considered view that the direction to create a supernumerary post is to be given only in exceptional circumstances when the Court or the Tribunal comes to a conclusion that an employee has been deliberately denied promotion, or that a vacancy which he ought to have been given to him has been given to some other employee, and not merely because the Court/Tribunal feels that no vacancy is likely to arise before the said employee superannuates. We do not find that the case of the Respondent falls in any exceptional circumstances.

24. Having considered the facts of this case, we are of the considered opinion that the direction of the Tribunal to the Petitioners to create a supernumerary post to accommodate or to promote the Respondent as SE(C) was wholly unwarranted and as a consequence, the order dated 13.08.2015 of the Tribunal is liable to be set aside to this extent.

25. As noticed above, it is not denied by the parties that in compliance of the directions given in the order dated 13.08.2015 passed by the Tribunal, the Petitioners had duly convened a DSC on 31.08.2015, which Committee after considering all eligible officers including the Respondent had recommended the name of the senior-most officer for promotion to the post of SE(C) on *ad hoc* basis against the only available vacant post. The Tribunal, in its order dated 16.02.2016 passed in CP No.548/2015 has - by

relying on its directions given in the order dated 13.08.2015 to create a supernumerary post, come to *prima facie* view that the Petitioner-Corporation was guilty of contempt of the Tribunal and since we have set aside the direction of the Tribunal to create a supernumerary post, it is evident that the Petitioners had duly complied with other direction of the Tribunal given in the OA and, therefore, the order dated 16.02.2016 passed in the CP is also set aside.

26. In view of the above, the petition is allowed with no order as to costs.

REKHA PALLI, J

VIPIN SANGHI, J

JULY 10, 2017/gm