

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

+ **W.P.(C) 5864/2015**

Reserved on: 22nd November, 2016
Date of decision: 13th January, 2017

K.P. SINGH

..... Petitioner

Through Mr. Praveen Kumar Singh and Mr.
Rajeeve Gupta, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ORS..... Respondent
Through Ms. Biji Rajesh, Advocate for Mr.
Gaurang Kanth, Advocate for the respondent
No.1.
Mr. Sanjeev Narula, CGSC with Mr. Abhishekh
Ghai, Advocate.
Mr. Puneet Jain, Advocate for the respondent
No.5.
Mr. R.A. Iyer, Advocate for Mr. Gautam Narayan,
ASC for the GNCTD.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. CHANDER SHEKHAR

SANJIV KHANNA, J.

The petitioner, K.P. Singh, in this writ petition impugns the order dated 30th March, 2015 passed by the Principal Bench of the Central Administrative Tribunal, whereby TA No.384/2009 filed by him has been dismissed.

2. The petitioner had joined services of the erstwhile Municipal Corporation of Delhi as an Assistant Engineer (Civil) in 1989. Upon

trifurcation, the petitioner is now an employee of the North Delhi Municipal Corporation (NDMC, for short).

3. The petitioner was given look after charge as an Executive Engineer with effect from 23rd November, 1994 and ad-hoc charge on the same post vide order dated 3rd July, 1995 along with 27 others. The Departmental Promotion Committee (DPC) for filling up vacancies in the posts of Executive Engineers for the years 1994-95 and 1996-97 were held by the Union Public Service Commission from 10th December, 1996 to 14th December, 1996. On the basis of the recommendations of the DPC the petitioner was promoted to Executive Engineer (Civil) on regular basis with effect from 9th January, 1997.

4. As per provisional seniority list for Executive Engineers dated 8th October, 1999, the petitioner was shown at Sr. No.13 on the basis of the date of his regular appointment being 9th January, 1997.

5. The petitioner filed W.P. (C) No. 462/2000 before the High Court claiming, inter alia, that his seniority in the post of Executive Engineer (Civil) should be reckoned from the date he was assigned look after charge of the said post, i.e. with effect from 23rd November, 1994 or at least from the date when he was given ad-hoc charge of the said post, i.e. from 3rd July, 1995. Vacancies for the year 1994-95 should have been filled up during the year itself and if for administrative reasons vacancies were not filled up, the period of look after charge/ad-hoc appointment should be counted for the purpose of determining seniority inter se Executive Engineers (Civil). The petitioner, it was stressed, had worked continuously as an ad-hoc Executive Engineer with effect from 3rd July, 1995 till regularization without any interruption. The petitioner was also eligible for promotion as an Executive

Engineer after having completed five years as an Assistant Engineer on 5th May, 1994.

6. The writ petition was transferred to the Tribunal and registered as T.A No.384/2009. The transfer petition was first disposed of vide order dated 12th January, 2010, but on the said order being challenged in W.P. (C) No. 3363/2012, vide order dated 15th January, 2013, an order of remit was passed for fresh adjudication by the Tribunal.

7. Firoz Ahmed, Devender Singh, Ram Prakash, Jawahar Panjwani, I.M. Arora and P.C Meena are private respondent Nos. 5 to 10 to the present writ petition. Respondent Nos. 5 to 10 were impleaded in W.P. (C) 3363/2012 and proceeded against ex-parte.

8. The legal issue which arises for consideration is whether in the absence of rules relating to *inter se* seniority between promotees in the post of Executive Engineers, the petitioner's officiation on an *ad hoc* basis or on assignment of look after charge should be counted. As a legal issue arises for consideration, we would refer to the case law on the subject.

9. In ***Delhi Water Supply and Sewage Disposal Committee and Others Vs. R.K. Kashyap and Others***. 1989 Supp (1) SCC 194, the Supreme Court had examined the question of *inter se* seniority in the cadre of Executive Engineers. The question had arisen whether in the absence of any rules or order, the service rendered on *ad-hoc* appointment as Executive Engineer should be excluded while determining seniority. In other words, whether seniority is to be counted from the date of regular appointment as an Executive Engineer or *inter se* seniority in the lower cadre would be the proper basis to determine seniority in the higher cadre also? Reference was made to ***Baleshwar Dass Vs. State of U.P.***, (1980) 4 SCC 226, A.

Janardhana Vs. Union of India, (1983) 3 SCC 610, *G.P. Doval Vs. Chief Secretary, Government of U.P.*, (1984) 4 SCC 329 and *G.S. Lamba Vs. Union of India*, (1985) 2 SCC 604 to observe that a fair and normal rule of seniority should ordinarily take into account the entire past service in whatever capacity at the post if it is followed by confirmation, unless a contrary rule is shown. The decision in the case of *Ashok Gulati Vs. B.S. Jain*, 1986 Supp SCC 597 was distinguished on the ground that observations made therein had to be read in the context and in the background of facts, for the service rendered by the officers in the promotional post therein was a purely stopgap and fortuitous arrangement. Nevertheless, the Supreme Court had cautioned as to the exact ratio and had observed as under:-

“26. So much as regards to general principle governing seniority in service jurisprudence. There is, however, one other important and fundamental principle which should not be forgotten in any case. The principle of counting service in favour of one should not be violative of equality of opportunity enshrined in Articles 14 and 16 of the Constitution. If ad hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not be counted for seniority in the cadre. The length of service in ad hoc appointment or stopgap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not be reckoned for the purpose of determining the seniority in the promotional cadre. To give the benefit of such service to a favoured few would be contrary to the equality of opportunity enshrined in Articles 14 and 16 of the Constitution. But if the claims of all eligible candidates were considered at the time of ad hoc appointments and such appointments continued uninterruptedly till the regularisation of services by the Departmental Promotion Committee or the Public Service Commission there is no reason to exclude such service for determining the seniority. Of course,

if any statutory rule or executive order provides to the contrary, the rule or order will have supremacy. In the absence of any rule or order the length of service should be the basis to determine the seniority.”

The aforesaid dictum according to us is the correct precept applicable to the present case. The ratio being that appointment on *ad-hoc* or officiating basis to be counted for seniority, should not result in violation of equality of opportunity enshrined in Articles 14 and 16 of the Constitution. In other words, the promotion should not be without considering the claims of seniors in the cadre. If seniors, who are eligible and suitable, have been ignored, to give benefit of current duty charge at the promotional post, it would be contrary to right to equality of opportunity enshrined in Articles 14 and 16. In such case, benefit of ad hoc/ officiating appointment cannot be given for counting seniority.

10. ***Direct Recruit Class II Engineering Officers’ Association Vs. State of Maharashtra and Others***, (1990) 2 SCC 715, was a case relating to dispute in seniority between direct recruits and promotees and to this extent would not be squarely applicable to the present matrix. However, the Supreme Court in this case referring to the decision in ***S.B. Patwardhan Vs. State of Maharashtra***, (1977) 3 SCC 399, has observed that the period of continuous officiation after appointment following the rules applicable, followed by substantive appointment has to be taken into account for determining seniority. The important and relevant words being “appointment following the rules”. Seniority could not be determined on the sole test of confirmation, for confirmation is ingloriously uncertain in government service, as it depends neither on efficiency nor on availability of vacancies. Pertinently, the *inter se* seniority has to conform to the principles of equality

spelt out by Articles 14 and 16 of the Constitution. Where promotion or appointment is made by way of a stopgap arrangement without considering the claim of eligible persons and without following the rules of appointment, experience on such appointment cannot be equated with the experience of a regular appointee. To equate the two would be unjust and would violate the equality clause, for other eligible candidates would be discriminated and prejudiced. To hold otherwise would be arbitrary.

11. ***Union of India and Ors. Vs. Harish Chander Bhatia and Ors***, (1995) 2 SCC 48, also relates to determination of *inter se* seniority between promotees and direct recruits in the context of Delhi and Andaman and Nicobar Islands Police Service Rules, 1971. Effectively, in the said case, the Supreme Court had accepted the case of the respondents-employees, who had officiated for a long period of 12 years, which, it was observed cannot be treated as fleeting appointment with no service benefit. The respondents had rendered service equal to those of permanent employees for a long period. The said case is, therefore, distinguishable on facts and also on the ratio which relates to *inter se* seniority dispute between promotees and direct recruits. It was not a case relating to seniority dispute between promotees.

12. In ***Rudra Kumar Sain and Ors. Vs. Union of India and Ors.***, (2000) 8 SCC 25, the Supreme Court defined what is meant by the terms “stopgap” “fortuitous” and “ad-hoc”. Ad-hoc, it was observed, means for a particular purpose; specially, and “fortuitous” event means an event which happens by a cause which we cannot resist or is unforeseen and caused by a superior force. It was observed that if an appointment is made to meet the contingency arising on account of delay in completing the process of regular appointment due to any reason and it is not possible to leave the post vacant

till then, then it can be a stopgap arrangement and such appointments are ad-hoc. However, the Supreme Court cautioned that no strait jacket formula or exhaustive list of circumstances and situation can be given. It was also observed that in service jurisprudence if a person possesses requisite qualification for being appointed to a particular post and then he is appointed in consultation and approval of the appropriate authority and continues at the post for a very long period, the said appointment cannot be held to be stopgap or purely *ad-hoc*. The aforesaid decision also highlights that while applying any principle, care and caution has to be taken that it does not violate the right of equal opportunity to others. A claim, which is founded on unequal treatment and deprives and denies others the equal right, should not be accepted.

13. In ***Vireshwar Singh and Ors. Vs. Municipal Corporation of Delhi and Ors.***, (2014) 10 SCC 360, General Duty Medical Officers had made a claim that they should be granted regularisation with effect from initial appointment on *ad-hoc* basis and not from the date of recommendation of the Union Public Service Commission for regularisation. The claim of the doctors was rejected observing that the initial selection was not held by the Union Public Service Commission as mandated by the regulations in force. Other reasons were also given. Reference was also made to the decision of the Constitution Bench in ***Direct Recruit Class II Engineering Officers' Association*** (supra) and other cases to emphasize that appointment on *ad-hoc* or continuous officiation must be in accordance with law. Benefit of past service on *ad-hoc* and officiating basis cannot be granted if the initial appointment was not in accordance with law.

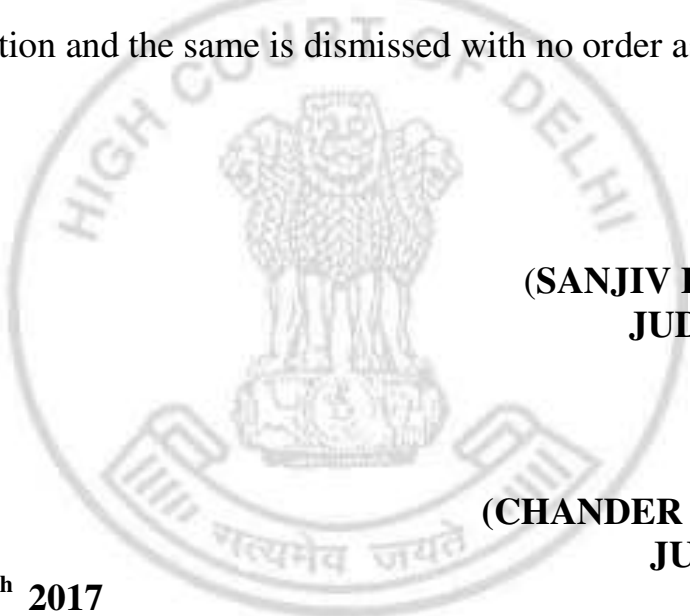
14. Recently in *Secretary, Minor Irrigation Department and RDS Vs. Narender Kumar Tripathi*, (2015) 11 SCC 80, referring to U.P. Regularisation of Ad Hoc Appointments (on Posts within the Purview of the PSC) Rules, 1979 and the amendments thereto and the principle as enunciated in *Direct Recruit Class II Engineering Officers' Association* (supra) and other cases, it was observed that the question must be decided by ascertaining whether the initial appointment was after due selection without violation of rules, if any. In *Narinder Kumar Tripathi* (supra), no violation of the Rules was observed. Therefore, the principle in *Keshav Chandra Joshi Vs. Union of India*, 1992 Supp (1) SCC 272 was not followed. *Keshav Chandra Joshi* (supra) would hold that *ad hoc* service, when contrary to the Rules and purely as a stop gap arrangement, cannot be counted for the purpose of seniority.

15. When we turn to the factual matrix of the present case, it is noticeable and beyond doubt that the petitioner has nowhere pleaded or stated that his initial appointment as *ad-hoc* or look after charge at the level of Executive Engineer (Civil) was in accordance with law and after considering the claims of others included in the seniority list. Section 97 of the Municipal Corporation of Delhi Act mandates that, appointment should have been made after seeking consultation from the Union Public Service Commission/Department of Personnel and Training as the post of Executive Engineer (Civil) is a Group A post. Further, the post of Executive Engineer (Civil) is a selection post. The initial appointment as *ad-hoc* or grant of current duty charge was a stopgap arrangement. It is also highlighted and it is an accepted position that at the time of *ad-hoc* appointment on 3rd July, 1995, 23 officers senior to the petitioner in the cadre were overlooked

without any justification and good reason. To grant seniority to the petitioner would result in violation of Constitutional and fundamental rights of the said officers. In these circumstances, we are clearly of the view that the Tribunal was justified and right in not counting the *ad-hoc* or current duty charge period for the purpose of seniority *inter se* the promotees.

16. The impugned order of the Tribunal also goes into the question of reservation in promotion. However, the said issue and contention has not been argued before us. We do not make any comment on the said aspect.

17. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed with no order as to costs.



(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

JANUARY 13th 2017
NA /ssn