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

+ W.P.(C) 2805/2018 and CM APPL. 11321-322/2018

PAWAN KUMAR AND ORS Petitioners
Through: Mr. Sajan K. Singh, Advocate

versus

NEW DELHI MUNICIPAL COUNCIL AND ORS..... Respondents
Through: Ms. Malvika Trivedi and Ms. Sriparna
Choudhary, Advocates for R-1/NDMC.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER
% **22.03.2018**

1. The petitioners have challenged an order dated 08.02.2018 passed by the Central Administrative Tribunal, dismissing O.A. No.2028/2016 filed by them, wherein they had sought quashing of the order dated 11.05.2016 issued by the respondent No.1/New Delhi Municipal Council (in short, 'NDMC'), cancelling their promotion order to the post of Fitter Grade-II and for restoration of their promotion with all consequential benefits.
2. The brief facts of the case as gathered from the pleadings in the O.A. placed on record are that the petitioners were initially appointed in the NDMC as Beldars. A Circular dated 18.09.2014 was issued by the respondent No.1/NDMC, inviting applications for filling up 24 vacant posts

of Fitters Grade-II in the Pay Band of Rs.8500-26300 plus Grade Pay of Rs.2000/-. The Recruitment Rules for the subject post prescribed the following educational and other qualifications for the subject post:-

“RRs FOR THE POST OF FITTER GRA

[illegible]

3 As noted above, the Recruitment Rules prescribe the method of recruitment for the subject post as 50% by direct recruitment and 50% by departmental promotion. The Circular dated 18.09.2014 issued by the respondent No.1/NDMC stated that applications were invited only from regular departmental candidates, who had completed five years of regular service in the Department as on 15.09.2013. The petitioners having fulfilled the eligibility criteria as prescribed in the Recruitment Rules, submitted applications as departmental candidates and they were promoted to the post of Fitters Grade-II in terms of the order dated 26.04.2016, on the basis of a DPC meeting held on 19.04.2016. In less than one month from the date of issuing their posting order dated 26.04.2016, the respondent No.1/NDMC passed an order dated 11.05.2016, cancelling the promotion order passed in respect of the petitioners on account of a discrepancy in the Seniority List of eligible candidates placed before the DPC held on 19.04.2016 and stated that a review DPC for promotion to the post of Fitter Grade-II would be held shortly.

4. Aggrieved by the aforesaid order, the petitioners approached the Tribunal taking a plea that they had been selected to the subject post upon fulfilling the requisite criteria and after proper verification; that there was no discrepancy in the Seniority List as alleged by the respondent No.1/NDMC; that the details of the alleged discrepancy in the Seniority List has not been disclosed by the respondent No.1/NDMC and the impugned order amounts to a reversion, without affording an opportunity of hearing to them.

5. The respondent No.1/NDMC had appeared through a counsel before the Tribunal and a counter affidavit was filed stating *inter alia* that the total number of vacancies in respect of the subject post in the departmental

promotion quota were 23. On issuance of the Circular dated 18.09.2014, applications were received from several candidates including the petitioners. Finally, 59 candidates were shortlisted as having qualified the prescribed trade test and the Seniority List was prepared by the NDMC on the basis of merit and the petitioners were promoted to the post of Fitters Grade-II vide posting order dated 26.04.2016. Immediately thereafter, some of the employees of the respondent No.1/NDMC, who were senior to the petitioners herein and had not been promoted, submitted representations to the Department, pointing out the discrepancies while preparing the Seniority List. On examining the said representations, the respondent No.1/NDMC prepared a fresh Seniority List of the eligible candidates, who had qualified in the trade test, from the date of their appointment. It was clarified before the Tribunal that the trade test is only a qualifying test and was erroneously made the basis of drawing the merit list in the first round. Reliance was placed on O.M. dated 10.11.2010 issued by the DOPT, wherein instructions were issued on seniority and it was declared that *“where promotions are made on the basis of recommendations of a DPC either by ‘selection’ or ‘non-selection’ method as per due procedure, the seniority of an officer assessed as ‘fit’, in the promotion grade shall be same as in the feeder grade from which they are promoted”*. The respondent No.1/NDMC explained that it had no option but to rescind the order dated 26.04.2016 and revise the Seniority List by carrying out necessary corrections, as the trade test being only a qualifying test and promotions were effected amongst those eligible candidates, who had qualified the same, in the order of their *inter se* seniority in the feeder grade.

6. After examining the stand taken by both sides, the Tribunal passed the impugned order, dismissing the O.A. filed by the petitioners with the following observations:-

9. The only relevant issue in this OA is as to whether the respondents have followed DOP&T OM with regard to the filling in of vacancies for the post of Fitter Grade-II. As per the DOPT instructions and guidelines on seniority, a simple reading of O.M. No.20011/1/2008-Estt.(D) dated 11.11.2010 clearly states as under:

“xxx

2.2 Seniority of Promotees

Where promotions are made on the basis of recommendations of a DPC either by ‘selection’ or ‘nonselection’ method as per due procedure, the seniority of an officer assessed as ‘fit’, in the promoted grade shall be same as in the feeder grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior, such persons shall not, if he/she is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him/her.....”

10. From the above, it is clear that this was a non-selection post and as per prescribed procedure the seniority of an officer is only to be assessed as fit in the promoted grade. Hence, this follows that as a norm where a trade test is prescribed for promotion such a trade test is treated as qualifying and promotion affected from amongst the persons

who had qualified such a trade test in order of their inter-seniority list in the feeder grade subject to fulfilment of other eligibility criteria and there are no orders to disturb/refix the seniority in those cadres where the recommendations of a DPC are simple promotion via trade test. We do not find that there was any instruction which prescribes that the eligibility of persons holding post in the feeder grade for the post of Fitter Grade-II should be prepared in order of merit as had been done in the case of initial DPC held on 19.04.2016. Accordingly, the review DPC held on 08.09.2016 is found to be in accordance with the orders dated 23.07.2016 passed by this Tribunal on the basis of corrected seniority list of eligible candidates. From the facts of this OA it becomes clear that the respondents have acted as per the rules and as per the DOP&T instructions contained in O.M. No.20011/1/2008-Estt.(D) dated 11.11.2010.

11. Accordingly, we find no merit in this OA and the same is dismissed. No order as to costs.”

7. Learned counsel for the petitioners submits that the Tribunal has erroneously applied the principle of promotion that mandates merit-cum-seniority, particularly when the respondent No.1/NDMC had previously taken merit into consideration for making promotions to the post of Carpenter and Mason and the Recruitment Rules for the post of Fitter Grade-II are the same as those of Carpenters and Masons; that trade test being qualifying in nature, merit ought to have been adopted as a criteria for

making promotions; that the Tribunal wrongly arrived at the conclusion that the post of Fitter Grade-II was a non-selection post; that the impugned order mentions an alleged discrepancy but does not state what the same is.

8. Learned counsel for the respondent No.1/NDMC, who appears on advance notice, supports the impugned judgment and reiterates the stand taken before the Tribunal to the effect that the impugned order was necessitated on account of discrepancies in the Seniority List of eligible candidates for promotion to the subject post, as placed before the DPC that was held on 19.04.2016; that the reason for correcting the Seniority List was that in the earlier round, the respondent No.1/NDMC had wrongly prepared the list of eligible candidates by assuming that merit in the trade test was prescribed for making promotion to such a post, whereas it being a non-selection post, trade test was only a qualifying test and could not be treated as the basis of drawing the merit list for promotion. In other words, the submission made is that the merit list had to be prepared from amongst the eligible candidates in the post in the feeder grade on the basis of their *inter se* seniority, subject to their fulfilling other eligibility criteria.

9. We have heard the counsels for the parties, gone through the records and perused the impugned judgment.

10. There is no dispute about the legal position that the subject post is a non-selection post and the procedure for making promotions as prescribed in the O.M. dated 10.11.2010 contemplates that seniority of candidates is only to be assessed as “fit” in the promoted grade and the trade test is only treated as a qualifying test. In the absence of any rules that prescribes that eligibility of persons holding posts in the feeder grade for promotion to the post of Fitter Grade-II ought to be prepared in the order of merit on basis of their

performance in the trade test, which was only qualifying in nature, the respondent No.1/NDMC had apparently erred in doing so and had prepared an incorrect Seniority List for being placed before the DPC in the said manner. It was in this background that the decision taken in the earlier DPC held on 19.04.2016, was reversed and a review DPC was conducted on 08.09.2016, on the basis of the corrected Seniority List of eligible candidates. No doubt, before passing the impugned order dated 11.05.2016 whereby the earlier order dated 26.04.2016, promoting the petitioners to the post of Fitter Grade-II was rescinded, the respondent No.1/NDMC ought to have invited objections from the petitioners, but by now, the said grievance no longer survives for the reason that the grievance of the petitioners was duly ventilated before the Tribunal and taken into consideration at the time of passing the impugned order.

11. Reliance placed by learned counsel for the petitioners on an order dated 31.05.2011 passed by the Tribunal in T.A. No.258/2009 filed by applicants therein, who were posted as Beldars with the NDMC, would not be of any assistance for the reason that in the said case, the grievance raised before the Tribunal was that inspite of being eligible, the applicants therein had not been appointed to the post of Pump Attendants, whereas persons, who were junior to them, had been appointed though the Recruitment Rules provided for non-selection method, i.e., on the basis of seniority-cum-fitness. It was argued on behalf of the applicants therein that the post of Pump Attendant is a non-selection post and the only consideration for promotion to such a post would be seniority subject to fitness and that such selections could not be based on comparative evaluation of merit of the candidates in the departmental test for the post. In other words, the

applicants were only required to qualify in the departmental test and then be promoted as per their seniority and not on the basis of merit-cum-seniority, as was done by the respondent/NDMC.

12. The aforesaid argument was turned down by the Tribunal in the captioned case with the observation that selection for the post of Pump Attendants was required to be made from the pool of all Group D employees, who had applied for the same and not just from the feeder cadre of Beldars. Noting that there did not exist any common seniority list of Group D employees and apart from Beldars, it included Chowkidars, Khalasis, Peons, Maids, Drivers etc., the Tribunal held that it was not feasible to place the candidates in the order of seniority. It was in the above circumstances that the DPC had to fix some cut-off marks for making selection of candidates so as to avoid having a larger number of persons in the panel, vis-à-vis a fixed number of posts. Once a list of successful candidates was prepared on the basis of cut-off marks, they had to be placed in the list as per their merit, since there was no common Seniority List of various Group D of employees to be selected for the subject post. Given the above position, the Tribunal had expressed the view that the question of making comparative evaluation of the merits of the candidates had been necessitated as the selection was being made from a mixed group of employees, there being no common seniority for them.

13. In the instant case, promotion to the post of Fitter Grade-II has been made by the respondent No.1/NDMC only from the feeder grade of Beldars. Therefore, the fact situation here being entirely different, the reasoning given by the Tribunal in the captioned case, cannot be applied to the case in hand.

14. In the given facts and circumstances, we do not find any illegality or perversity in the impugned order that warrants interference. As a result, the present petition is dismissed alongwith the pending applications.

HIMA KOHLI, J

PRATIBHA RANI, J

MARCH 22, 2018

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