

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-23464-2011 (O&M)

Date of Decision: August 14, 2019

Kaushal Kumar

... Petitioner

vs.

State of Punjab and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present : None.

ARUN MONGA, J.

Challenge herein *inter alia* is to the rejection of the claim of the petitioner (Safai Sewak/Sweeper) for promotion to the vacant post of Driver by committing hostile discrimination vis-a-vis another Class-IV employee (Chowkidar/Watchman) who despite being junior to the petitioner, was granted promotion vide order dated 28.04.2008 (Annexure P-5).

2. The petitioner had earlier also approached this Court vide CWP -799-2011 wherein vide order dated 17.01.2011, the respondents were directed to consider the case of the petitioner and pass speaking order. Pursuant thereto vide order dated 07.06.2011 (Annexure P-9), impugned herein, the petitioner was held not eligible for promotion to the post of Driver on the ground that he did not fulfill the eligibility for the post of Driver. The ostensible plea, specious though, is that there is no rule for promoting Sweeper as a Driver. Other than this, the so called speaking order is completely silent on the other contentions of the petitioner.

3. Hence the second round of litigation by the petitioner before this Court.

4. Petitioner was appointed as Sweeper in respondent-Municipal Council Nangal on 02.06.1986. The qualification of the petitioner has neither been stated in the petition nor mentioned by the respondents in its return or even in the speaking order. It transpired in one of hearings before this Court that the petitioner is 5th pass. He is skilled in driving and has got valid driving license. Based thereon, he has been assigned duties of a driver as a reliever/substitute since 1996 from time to time. Later on, the petitioner got his driving license upgraded in the year 1998 to Light Motor Vehicle (LMV) and his services were also accordingly used regularly without any break for driving LMV etc. by the Municipal Council.

5. It is stated in the petition that Class-IV employees of respondent-Municipal Council are taken into driver cadre from time to time and specific illustrations thereof are, one Satpal who was also recruited as Safai Sewak just like the petitioner and was later made Cleaner by passing a Resolution in the year 1989, Vijay who was appointed as Safai Sewak on compassionate grounds was promoted as Driver in year 2008, Ramesh Chaudhary who was appointed as Mali was promoted as Driver in year 2000. On the other hand, the petitioner, despite having performed his duties as driver since year 1998, has been denied the same benefit. It is stated that the record of the petitioner of his discharging driving duties continuously and regularly is available with the respondent-Municipal Council, as is reflected from the log book for staff car/jeep pertaining to the months of October and November, 2001 at Annexure P-2. The petitioner has also appended duty pass and duty allocation letter of year 2006 contained at Annexure P-3 alongwith duty allocation certificates/passes/letters for the year 2009-2010 contained at Annexure P-4.

6. It is stated in the petition that the petitioner, throughout, had legitimate expectation that as and when vacancy on the post of Driver arises, he would be promoted as Driver. Notwithstanding, to the utter surprise of the petitioner, his junior in service i.e. one Jatinder Kumar, Chowkidar was promoted as Driver on 29.04.2008, who is a much later appointee of year 1992. Said Jatinder Kumar has also been performing duties of the Driver though from the much later date than the petitioner i.e. year 1999 as against the petitioner who has been serving as Driver since 1996.

7. In the return filed by respondent No.3-Municipal Council, the promotion of Jatinder Kumar from Chowkidar to Driver is not denied. However, the same is justified on the ground that he was middle class passed employee and, therefore, was rightly promoted. As regards the promotion of another Safai Sewak i.e. Satpal, there is no denial that, though junior to the petitioner, but he too was promoted as a Cleaner by passing a Resolution dated 19.11.1999. There is no mention with regard to his being more qualified than the petitioner as in the case of Jatinder Kumar. It is also not denied that the services of the petitioner were being utilized as a Driver. Though it is stated, that in certain peculiar circumstances, the petitioner's services were utilized to carry out urgent work only during *Hola Mohalla/Jore Mela*, for short interregnum. It has been asserted that the petitioner is otherwise performing his duties under the Municipal Council as Safai Sewak.

8. It is further stated that there is no post of Driver vacant in the office of Municipal Council. Even otherwise, the claim of the petitioner is not covered under Civil Services Rules.

9. In nutshell, the entire defence of the respondent-Municipal Council is that the petitioner's services have never been availed as a Driver on regular basis and it was only during emergency/peculiar circumstances, that he was put on Driver's duty. He continues to be a Safai Sewak and due to his lack of requisite qualification, juniors have been rightly promoted.

10. I have gone through the rival pleadings and am of the opinion that the impugned order rejecting the claim of the petitioner is not sustainable in the eyes of law and is liable to be set aside for the reasons stated hereinafter.

11. Before proceeding further, it would be apposite to reproduce Section 39 of Punjab Municipal Act, 1911 which is as below:

*“39. Employment of other officers and servants. - (1) Subject to the provisions of this Act and the rules and bye-laws made thereunder, **a committee may, and if so required by the State Government shall, employ other officers and servants and may assign to such officers and servants such remuneration as it may think fit,** and may suspend, remove, dismiss, or otherwise punish any officer or servant so appointed.*

[Provided that no person who is a member of a committee shall be employed by a committee during the tenure of his term and for a period of twelve months thereafter.

(2) Nothing in this Section shall prevent the State Government from making any provision in the rules under this Act for the reservation of appointments or posts and to lay down methods to secure such reservation in favour of members of the Scheduled Castes, the Scheduled Tribes and such other backward classes of citizens which in the opinion of the State Government are not adequately represented in the

services under the Municipal Committee.”

12. Keeping in view Section 39 *ibid*, the case of Jatinder Kumar, another Class-IV employee, was forwarded by respondent No.3 to respondent No.2. However, it was returned vide letter dated 28.04.2008 (Annexure P-5) stating that Municipal Council is fully competent to promote any Class-IV employee as a Driver. Consequent thereto, vide letter/order dated 29.04.2008 (Annexure P-6), said Jatinder Kumar was promoted. How then the same logic is not applicable to the petitioner? There is no answer to the same either in the speaking order or in the return filed to the writ petition.

13. On the other hand, when the petitioner approached Municipal Council seeking parity with said Jatinder Kumar, and even otherwise complaining of hostile discrimination, he was relieved from the duties as a Driver and was asked to revert to his duty as Safai Sewak. Completely unbecoming of model employer/welfare State! There is no manner of doubt that Municipal Council is an authority within the meaning of Article 12 of Constitution of India and is bound to treat its employees within the parameters of fundamental rights enshrined under Constitution of India, particularly, Articles 14 and 16 (1) thereof.

14. In the present case, respondent No.3-Municipal Council, Nangal, by granting promotion to a junior of the petitioner as Driver, on the ostensible but untenable ground that the petitioner was not eligible, has committed complete infringement of petitioner's right to parity and equal opportunity. The respondent-Municipal Council ought to have first determined the suitability and merit vis-a-vis the seniority before summarily rejecting the case of the petitioner. Had the respondent-Municipal Council

considered the case of petitioner and found him not suitable and meritorious, it could then promote his junior Jatinder Kumar. But while doing so, it had to keep in mind that there is/was no eligibility/qualification criteria prescribed by the Municipal Council for promotion to the post of Driver from amongst the Class-IV employees. The artificial reasoning adopted to grant promotion to said Jatinder Kumar saying that he was middle class pass is, therefore, unreasonable.

15. In this context, the relevant Rule as notified vide notification dated 07.11.1985 (Annexure R3/1) is reproduced hereinbelow-

“XXXXX
2. Definitions- In these rules, unless the context otherwise requires-
XXXXX
(c) 'direct appointment' means an appointment made otherwise than by promotion or by transfer of persons already in the service of a committee or a notified area committee;
XXXXX

Driver	Ten Percent	From amongst Class IV employees of the Committee as the case may be who are Middle Pass and who possess a valid driving licence to drive heavy Transport vehicle and who have not been convicted of any offence indicting him that he is incapable of performing the duties of the post of a Driver.
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16. The petitioner relies on instructions/letter dated 22.06.2016 (Annexure P-12) to contend that in view thereof, notification dated 07.11.1985 (Annexure R3/1), cannot be applied to the petitioner. Relevant extract of instructions/letter dated 22.06.2016 (Annexure P-12) is reproduced hereinbelow:

“The decision has been taken in the meeting held under the chairmanship of Honorable Minister, Local Government held on 30.04.2016 that same policy as given in Punjab Local Government (Group C) Service

Rules 2001 be applied for promotion of the safai karamchari/sewerman to the post of drivers be applied.

The following policy be applied to fill up the post of the drivers:-

The percentage of appointment to the said posts was as following:-

- (i)Promotion-20%*
- (ii)Direct Appointment-80%*

<i>Promotion</i>	<i>Direct Appointment</i>
From amongst Group D employees who have an experience of working as such on either or more of these posts for a minimum period of three years and should have valid license for driving heavy vehicle.	Should be middle passed with Punjabi language and should possess a license for driving heavy vehicle and should have an experience of driving heavy vehicle for a minimum period of five years and should qualify the driving test to be held by the appointing authority.

3. This letter has been issued with the permission of Honorable Minister, Local Government.”

17. The above said reproduced instructions/letter dated 22.06.2016 clearly show that the only requirement for appointment of Drivers by promotion is that the candidate from amongst Group-D employees should have an experience of working as such for a minimum period of three years and should have a valid licence for driving heavy vehicle. As on today, the petitioner is thus entitled to the exemption from the said qualification in view of instructions/letter dated 22.06.2016.

18. In view of this and given the driving experience of the petitioner, relaxation could have been considered by Municipal Council from the requirement of middle pass, laid down in earlier Rules of 1985. Reliance may be had to a Division Bench judgment rendered by this Court

in LPA No. 681 of 2017, titled as **State of Punjab and another vs. Sukhminder Singh and others**, where his Lordship Surya Kant, J.(as he then was) speaking for this Court, observed as below:

*“Having pondered over the submissions, we are of the considered view that the learned Single Judge is right in concluding that the experience gained by the respondents while working on current duty charge basis or on officiating basis is as good as the experience as they would have earned after regular promotion as Headmasters/Headmistresses. Had the Rules required the respondents to complete 7 years 'service' as Headmasters/Headmistresses, the things would have been different, for the respondents became members of the service only on their regular promotion and in such a case, the appellants would have been right in contending that the respondents were ineligible till the completion of 7 years' regular 'service' as Headmasters/Headmistresses. But the Rules require 7 years 'experience' only. **The experience even if earned in a capacity which does not clothe an incumbent with a right to hold the post, would amount to valid experience for the purpose of gaining eligibility. We thus hold that the respondents, by virtue of current duty charge or by performing as acting Principals and Drawing and Disbursing Officers, have earned the desired experience.** The findings returned by the learned Single Judge to this effect are accordingly upheld.”*

19. Further the Hon'ble Supreme Court in **Union of India and another Vs. Hemraj Singh Chauhan and others, (2010) 4 Supreme Court Cases 290** has held categorically that promotion is virtually a part of a fundamental right guaranteed under Article 16 of the Constitution of India and the guarantee of fair consideration in a matter of promotion under

Article 16 of the Constitution of India virtually flows from guarantee of equality under Article 14 of the Constitution of India. In the said judgment in paragraph Nos.38, 39 and 40 the Hon'ble Supreme Court has held as follows:-

“38. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under [Article 16](#) of the Constitution. The guarantee of a fair consideration in matters of promotion under [Article 16](#) virtually flows from guarantee of equality under [Article 14](#) of the Constitution.

39. [In The Manager, Government Branch Press and Anr. vs. D.B. Belliappa](#) - (1979) 1 SCC 477, a three judge Bench of this Court in relation to service dispute, may be in a different context, held that the essence of guarantee epitomized under Articles 14 and 16 is "fairness founded on reason" (See para 24 page 486).

40. It is, therefore, clear that legitimate expectations of the respondents of being considered for promotion has been defeated by the acts of the government and if not of the Central Government, certainly the unreasonable inaction on the part of the Government of State of U.P. stood in the way of the respondents' chances of promotion from being fairly considered when it is due for such consideration and delay has made them ineligible for such consideration....”

20. There is no gain saying about the need and importance of satisfactory avenues for promotion in service. It would be useful to quote the following observations made by the Hon'ble Supreme Court of India in **State of Tripura and others vs. K.K.Roy**, reported as 2004 (1) S.C.T., 331:

*“In almost an identical situation, a Bench of this Court in **Council of Scientific and Industrial Research and Another v. K.G.S. Bhatt and Another** [(1989) 4 SCC 635] held :*

"...It is often said and indeed, adroitly, an organisation, public or private does not 'hire a hand' but engages or employs a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well. (See : Principles of Personnel Management by Flipo Edwin B., 4th edn.,

p. 246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors." (See : Personnel Management by Dr. Udai Pareek, p. 277). There cannot be any modern management much less any career planning, manpower development, management development, etc., which is not related to a system of promotions..."

The matter came up for consideration again in **Dr. Ms. O.Z. Hussain v. Union of India, [1990 (Supp) SCC 688]** wherein this Court in no uncertain terms laid down the law stating :

"....Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the non-medical 'A' Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers.....".

21. In view of my discussion above and the reasons contained therein, writ petition is allowed and order dated 07.06.2011 (Annexure P-9) is, hereby, quashed. Respondents are directed to consider the claim of the petitioner for promotion to the post of Driver as per policy circular dated 22.06.2016 (Annexure P-12) if any vacancy exists as on today and failing that, to consider the petitioner for the next available vacancy in future.

August 14, 2019
smriti

(ARUN MONGA)
JUDGE

Whether speaking/reasoned	: Yes/No
Whether Reportable	: Yes/No