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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17th September, 2019

Decided on: 30th September, 2019

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W.P. (C) 8469/2009

ASHWINI KHULLAR

... Petitioner

Through: Mr.Saurabh Kirpal, Mr.Pankaj
Yadav, Ms. Varsha Yadav and
Mr. Priyaranjan Dubey,
Advocates.

versus

DDA & ORS.

.... Respondents

Through: Mr. Arun Birbal and Mr. Ajay
Birbal, Advocates for DDA.

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W.P.(C) 8479/2009 & CM APPL. 7948/2019

AMBUJ SOOD

..... Petitioner

Through: Mr.Shanker Raju, Mr.Pankaj
Yadav, Ms. Varsha Yadav and
Mr. Priyaranjan Dubey,
Advocates.

versus

DDA & ORS.

..... Respondents

Through: Mr. Arun Birbal and Mr. Ajay
Birbal, Advocates for DDA.

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**W.P.(C) 13931/2018 & CM APPL. 54517/2018, 27092/2019,
31896/2019 & Review Petition 331/2019**

KANWAL KUMAR

..... Petitioner

Through: Mr.Shanker Raju, Mr. Pankaj
Yadav, Ms. Varsha Yadav and
Mr. Priyaranjan Dubey,

Advocates.

versus

UNION OF INDIA AND ORS.

.... Respondents

Through: Mr. Manish Mohan, CGSC with
Ms. Manisha Saroha, Advocate
for respondent no.1/UOI.
Mr. Arun Birbal and Mr. Ajay
Birbal, Advocates for DDA.
Mr. Anuj Aggarwal, Advocate
for R-7.
Mr. Kriya Shankar Prasad, Ms.
Ekta Rani and Mr. Pramod
Kumar Singh, Advocates.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH**

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The vexed question in these petitions is one of seniority and consequent promotion in the Planning Department of the Delhi Development Authority (DDA) between diploma holders on the one side and degree holders in architecture on the other.

2. While W.P. (C) Nos. 8469/2019 and 8479/2019 are directed against an order dated 17th February, 2009 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (CAT) in TA Nos. 108/2007 and 9/2008 respectively, W.P.(C) No.13931/2018 is directed against an order dated 2nd November, 2018 passed by the CAT in OA No. 682/2016.

Background

3. In terms of the Recruitment Rules (RRs) of the Delhi Development Authority (DDA), to be eligible for the post of Assistant Director (Architecture) [AD (Arch)], the essential qualification for appointment by way of promotion in the 50% quota is that the candidate should have had at least three years of regular service in the post of Architectural Assistant (AA) and a degree in architecture or its equivalent. The alternative was that the incumbent should have had at least eight years of service as AA.

4. As far as eligibility for appointment by way of promotion in the 50% quota to the post of Assistant Director (Planning) [AD (Planning)] is concerned, the RRs laid down that a candidate must have served in the post of Planning Assistant (PA) for a minimum a five years and have a degree in Town Planning/Architecture. In the alternative, the incumbent should have had at least eight years of service as PA.

5. The above RRs were modified by a notification dated 11th December, 2003, whereby the following note was added in Column No. 11 of the RRs:

“NOTE: - the eligibility list for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grade/post”.

6. Since promotions had to be made from among AAs and PAs, it was necessary to prepare an eligibility list of AAs and PAs for deciding on

promotion to the next higher post of AD (Arch) and AD (Planning) respectively.

Facts in W.P. (C) 8469/2009

7. Mr. Ashwini Khullar, the Petitioner in W.P.(C) No. 8469/2009 was appointed as an AA in the Directorate General of Health Services (DGHS), Ministry of Health, Government of India in 1977. He applied for the post of PA and was appointed as such in the DDA in 1985. Mr. Khullar possessed a Diploma in Architecture Assistantship and at the time of his appointment, he had eight years of experience.

8. The posts above that of PA are AD (Planning), Deputy Director (DD) and Director. There was a 50% promotion quota for appointment to these posts. Promotions from the post of PA to AD (Planning) were being made by the Department Promotion Committee (DPC) on the basis of seniority-cum-fitness. In other words, the senior most among the PAs would be promoted as AD (Planning).

9. DDA circulated a tentative eligibility list of PAs on 17th September, 2004 and called for objections. Mr. Khullar figured at Sl.No.11. According to Mr. Khullar, persons above him in the said eligibility list were already appointed as AD (Planning). Mr. Khullar filed his objections to the list inasmuch as according to him, the benefit of possessing a higher qualification had already been given to degree holders at the time of their initial appointment. According to him, there was a common seniority list of PAs and once a person found himself in

that list, it should not be necessary to fulfil the conditions set out in the note. Further, it was contended that the said note could only have prospective application and that vacancies that arose prior to the said note being inserted in the RRs, should be filled in accordance with the unamended RRs.

10. However, these objections of Mr. Khullar were not decided and the tentative Eligibility List was acted upon. A DPC was held on 16th March, 2005 and Mr. A.K. Saini, who was above Mr. Khullar in the seniority list, was promoted as AD (Planning) in terms of the unamended RRs. The grievance of Mr. Khullar was that another DPC was held on 20th April, 2005 for one post of AD (Planning) in the promotion quota. Although Mr. Khullar was the most senior PA in the cadre, he was not promoted to the said post. Aggrieved by this action Mr. Khullar filed W.P.(C) No. 8001/2005 in this Court in which the following order was passed on 11th May, 2005:

“The grievance of the Petitioner is that whilst he is the senior most person in die cadre of Planning Assistant he has been shown at Sr.No.11 in the Tentative Eligibility List. Persons junior to him have been placed higher in that List solely on the grounds that they had become eligible on a prior date.

In almost similar circumstances, the Hon'ble Supreme Court had decided in **R. B. Desai and another Versus S. K. Khanolker and others (1999) 7 Supreme Court Cases 54** that "if at the time of consideration for promotion the candidates concerned have acquired the eligibility,' then unless the rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over die date of eligibility. The rule under consideration does not give any such priority to the

candidates acquiring earlier eligibility and, in our opinion, rightly so. *In service law, seniority has its own weightage and unless and until the rules specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same.*"

In that case, Note 1 of the amendment rules prescribed that the Eligibility List for promotion shall be prepared with reference to the date of completion by the officer of the prescribed qualifying service in the respective grade/post. This is in para materia with the proposed change in the Recruitment Rules applicable to the parties.

It has also been submitted that the Petitioner had filed objections against the tentative Eligibility List as well as the Amendment in September, 2004. Ms. Salwan states that these representations were disposed of yesterday i.e. 10 May, 2005. Meanwhile, the DPC has been constituted, and has interviewed prospective incumbents. Although, the Petitioner is the senior most he has not been even considered by the DPC.

Notice be issued to Respondents to show cause as to why rule nisi be not issued, returnable on 22nd August 2005.

Till the next date of hearing, no appointments to the post of Assistant Director (Planning) shall be effected." (emphasis in original)

11. On 18th April, 2006 this Court considered an application filed by the Respondents i.e. the DDA, seeking vacation of the aforementioned stay order. The following order was passed in the said application:

"Since the matter is already fixed for 10th May, 2006, we are of the view that this application should be allowed to a limited extent that is the respondents/DDA are permitted to make appointments to the post of Assistant Director (Planning) subsequent to the interviews conducted by them subject to the following conditions:

(a) the appointment order shall state that the appointment shall be subject to the result of writ petition and all the appointees shall be asked to give their undertaking(s) that they shall not claim any seniority over the petitioner in the event of his succeeding in the main writ petition.

(b) one post in the promotees quota shall be kept reserved for the petitioner.

It is further made clear that the appointments will only be made subject to the aforesaid conditions and are naturally subject to the result of the writ petition.

Application stands disposed of accordingly.

List on 10th May, 2006, the date already fixed.

A copy of this order be given dasti to the counsel for the parties.”

12. When the matter was next listed on 16th May, 2006, this Court noted that the Petitioner’s case was entirely founded on the decision of the Supreme Court in *R.B. Desai v. S.K. Khanolkar (1999) 7 SCC 54* and that if the note appended to the RRs in Column 11 were to be interpreted in terms of the said judgment, there would be no need to challenge the constitutional validity of the amendment to the RRs by the notification dated 11th December, 2003 for the post of AD (Planning). Learned counsel for the Petitioner then sought time for instructions.

13. It appears that thereafter the writ petition itself got transferred to the CAT, Principal Bench and was re-numbered as TA No. 108/2007.

Facts in W.P (C) 8479/2009

14. The Petitioner in W.P. (C) No. 8479/2009 Mrs. Ambuj Sood joined the DDA as Architect (Draftsman) on 26th February, 1990. She was promoted as AA with effect from 17th July, 1996. She too was aggrieved by the amendment to the RRs by which the note was inserted. She filed W.P.(C) No. 7289/2006, which was heard together with the aforementioned W.P.(C) No.8001/2005 and an identical order dated 16th May, 2006 was passed in the Petitioner's case as well. The above case was transferred to the Principal Bench of the CAT and registered as TA No. 9/2008.

15. Meanwhile, a third transfer petition was already there before the CAT i.e. TA No.113/2007 by K. M. Saxena, Trilochan Singh and K. K. Marwah, all of whom were ADs (Planning).

16. The three petitions i.e. TA Nos. 108/2007, 113/2007 and 9/2008 were disposed of by the CAT by the impugned common order dated 17th February, 2009. Interpreting the note appended to the RRs, it was observed that the note envisaged two lists, viz., the seniority list and the eligibility list. It was held that persons included in the eligibility list “could aspire for promotion by their own right so recognised, as seniority becomes irrelevant” and that “a person who becomes eligible should get the first slot, irrespective of whether or not by the time his bypassed senior also had attained eligibility.”

17. Distinguishing the decision in ***R.B. Desai*** (*supra*), the CAT

observed that the impugned note was inserted with the intention that seniority would no longer be the criteria. Relying on the decision of the Supreme Court in *State of Jammu and Kashmir v. Triloki Nath Khosa AIR 1974 SC 1*, the CAT observed as under:

“A classification founded on variant educational qualifications, for purpose of promotion to the post of an Executive Engineer, was held to be not unjust on the face of it.”

18. Resultantly, the said petitions were dismissed by the CAT.

19. Aggrieved by the above decision of the CAT, while Ashwini Khullar filed W.P.(C) No. 8469/2009 in this Court, Mrs. Ambuj Sood filed W.P.(C) No. 8479/2009. Both the writ petitions were first listed for hearing on 13th May, 2009. On that date, while directing notice to issue in both petitions, this Court directed that “promotions already made or further promotions, if any, would be made subject to the outcome of the writ petition.”

20. Subsequently, even when the pleadings were not complete, this Court on 2nd September, 2009 ordered that since the record of the CAT was on record, there was no need for the Respondents to file further affidavits. On 24th November, 2009 Rule DB was ordered in both petitions.

Facts in W.P. (C) 13931/2018

21. Now, turning to the third petition W.P.(C) No. 13931/2018 by Mr.

Kanwal Kumar. The background facts in this petition are that the Petitioner joined the DDA as Architect (Draftsman) on 19th November, 1998 and was subsequently promoted as AA with effect from 24th August, 2004. It must be noted that Mr. Kanwal Kumar holds a diploma in architecture and not a degree. According to Mr. Kanwal Kumar, he became eligible for the post of AD (Arch) on 24th August, 2012 i.e. after eight years of service.

22. In 2015, a vacancy arose in the post of AD (Arch). A circular dated 26th November, 2015 was issued by the DDA enclosing the tentative Eligibility List of AAs for promotion to the post of AD (Arch). Mr. Kanwal Kumar filed an objection to the said list that his ranking as per the seniority list was not considered. According to Mr. Kanwal Kumar, without considering any of his objections, the DDA issued the Final Eligibility List of AAs for promotion to the post of AD (Arch) by a circular dated 27th January, 2016. Whereas Mr. Kanwal Kumar was placed at Sl.No.1 in the seniority list issued on 31st December, 2013, he was placed at Sl.No.10 in the Eligibility List. He pointed out that in the Eligibility List there were many AAs who were junior to him in terms of their joining date and way behind him in becoming/joining as AAs, who were now above him in the Eligibility List.

23. Mr. Kanwal Kumar challenged the Final Eligibility List by filing OA No. 682/2018 before the Principal Bench of the CAT. By the impugned order dated 2nd November, 2018 the CAT dismissed the said petition holding that the issues were squarely covered by its earlier

decision dated 17th February, 2009 in TA No. 108/2007 (*Ashwini Khullar v. DDA & Ors.*). It was further noted that the challenge to the said decision of the CAT was already pending in this Court in two writ petitions.

24. Learned counsel for Mr. Kanwal Kumar sought to point out to the CAT that in his petition the DDA had filed affidavit dated 19th February, 2018 enclosing the letter dated 5th January, 2018 changing its stand and interpreting the note in the impugned RRs as implying that promotions already made and seniority already decided would not be disturbed. Nevertheless, the CAT felt that since the issues were already pending in this Court in two writ petitions and notwithstanding that the DDA has changed its stand on the interpretation of the impugned note in the RRs, the matter was still held to be covered by the earlier decision of the CAT in TA No. 108/2007 (*Ashwini Khullar v. DDA & Ors.*).

25. Aggrieved by the above order dated 2nd November, 2018 of the CAT dismissing OA No. 682/2016, Mr. Kanwal Kumar filed W.P.(C) No. 13931/2018. While directing notice to be issued in the petition, this Court by an order dated 21st December, 2018 passed an interim order that “till the next date of hearing, the DPC for promotion to the post of AD (Arch) shall not be held”.

26. Subsequently, CM No.27092/2019 was filed in this Court by Respondent No. 8 for vacation of stay. Meanwhile, another CM

No.33986/2019 was filed by Respondent No. 7 for vacation of the stay granted by the Court in holding the DPC for making promotions to the post of AD (Architecture) in the DDA. This application was heard on 29th July, 2019, when the following order was passed:

“Issue notice. Learned counsel for the petitioner accepts notice.

This application has been moved on behalf of respondent No.7 for vacation of stay granted by this Court to the holding of the Departmental Promotion Committee for making promotions to the post of Assistant Director (Architecture) in the Delhi Development Authority.

We have heard learned counsels for the applicant and the petitioner, as well as Mr. Birbal, learned counsel for the DDA at some length. Mr. Birbal submits that there is acute shortage of Assistant Director (Architecture) in the DDA and even in the writ petition already pending arising from the decision of TA 108/2017, no stay was granted by this court. On 13.05.2009, an order was passed by the Court that any promotions made would be subject to the decision in the writ petition.

Our order dated 21.12.2018 does not record any detailed reasons for grant of stay for promotion to the post of Assistant Director (Architecture).

Mr. Aggarwal, learned counsel for the respondent No.7/applicant submits that the process for making direct recruitment to the post of Assistant Director (Architecture) is underway and the continuation of the stay granted by this Court would affect not only the petitioner but the private respondents since the direct recruits, if appointed earlier, would claim seniority over those seeking promotion, which includes the petitioner as well as the private respondents.

Keeping in view the aforesaid circumstances, we vacate the stay

granted by us vide order dated 21.12.2018. We make it clear that any promotion made by the DDA to the post of Assistant Director (Architecture) would be subject to further orders in the writ petition.

The application stands disposed of in the aforesaid terms.

The Registry is directed to ensure that the names of the concerned counsels are shown in the cause list.”

27. Soon thereafter, the Petitioner Kanwal Kumar filed a Review Petition No. 331/2019 seeking modification of the order dated 29th July, 2019. In the said Review Petition on 22nd August, 2019 this Court passed the following order:

“Issue notice. Counsels for the respondent nos.2,3,6 and 8 accept notice. Let notice issue to unrepresented respondents.

At the outset, we may observe that though the application is registered as review petition, the same is merely an application to seek modification of the order dated 29.7.2019, since it raises aspects which were not considered by the Bench while passing the order dated 29.7.2019. The Registry is, therefore, directed to re-number the application as a Civil Misc. Application.

The only aspect considered by this Court while vacating the stay against promotions on 29.7.2019, was that the DDA is embarking upon the process of making direct recruitments, and the continuation of the stay was neither to the advantage of the petitioner-who is a diploma holder, nor to the advantage of the private respondents-who are degree holders, since they would all lose out in favour of the direct recruits in case they come to be recruited prior to the promotion of the petitioner/private respondents to the post of Assistant Director (Architecture). The petitioner now seeks modification of the said order dated 29.7.2019 on the premise that the “Eligibility List” framed in

terms of Note-2 to the Recruitment Rules cannot be construed as a seniority list, as seniority is gained by length of service in the cadre and the eligibility list is only a list of those who are eligible for consideration for promotion. Mr. Kripal who represents the petitioner-diploma holder has sought to place reliance on the decisions *R. B. Desai & Anr. Vs. S. K. Khanolkar and Ors.* (1997) 7 SCC 54. He also places reliance on the stand taken by the respondent/DDA before the Tribunal in the affidavit dated 19.2.2018.

On the other hand, learned counsel for the respondent no.8/private respondent/Direct Recruit submits that the Tribunal rejected the Original Application of the petitioner placing reliance on its earlier decision in the case of *Ashwini Khuller Vs. Delhi Development Authority and Ors* passed in TA No.108/2007 and other applications, dated 17.2.2009. The view taken by the Tribunal in *Ashwini Khuller* (supra) was that the eligibility list was a seniority list of those eligible, and promotions have to be made by respecting the seniority fixed in the eligibility list. It is submitted that the Tribunal while deciding *Ashwini Khuller* (supra) had placed reliance of another decision of a co-equal Bench of Supreme Court in *Shailendra Dania & Ors. Vs. S. P. Dubey & Ors.* (2007) 5 SCC 535.

Therefore, the issue that arises for consideration in the present writ petition really is whether the ratio of the decision in *R. B. Desai* (supra) or *Shailendra Dania* (supra) would be applicable in the present case.

We are, therefore, of the view that the Bench can consider disposing of the writ petition in the light of the limited controversy which we have taken note of hereinabove.

List the application on 3.9.2019, the date already fixed.

In the meantime, till the next date only, the DDA may hold its hands and not to carry out the promotions by following dictum of *R. B. Desai* (supra) or *Shailendra Dania* (supra).

We make clear that this matter is not a part heard matter. The respondent shall file their reply to the application in the meanwhile.

Dasti. ”

28. In effect, therefore, the review petition was allowed and the earlier stay order was restored by this Court.

29. At this stage, it should be noticed that in W.P.(C) No. 13931/2018, there is a sole Petitioner Mr. Kanwal Kumar. Union of India through the Secretary, Ministry of Housing and Urban Affairs (MoHUA) is Respondent No.1; the DDA is Respondent No.2; the Commissioner (Personnel) of DDA and the Director (Personnel) have been impleaded as Respondent Nos. 3 & 4 respectively. Respondent Nos. 5 to 8 are private Respondents, whose seniority would be affected if Mr. Kanwal Kumar succeeds in his writ petition.

30. Pursuant to the notice issued in this petition, counter affidavits have been filed by DDA and some of the private Respondents separately. Thus, there are separate counter affidavits by Respondents Nos. 6 and 8 as well as Respondent No.2.

Stand of the DDA

31. As far as the stand of the DDA (Respondent No. 2) is concerned, the following has been stated:

“keeping in view the seniority position in the feeder cadres,

it was recently decided by DDA that henceforth the seniority will be given preference among those who have become eligible on the basis of prescribed qualifying service while making promotions to the posts of Assistant Directors and Deputy Directors in Planning and Architectural wing of DDA.”

32. Accordingly a letter dated 5th January, 2018 was written by the DDA to the MoHUA for approval of its decision as it was to “change the way the appended note to the RRs was being interpreted by DDA till date.” It was clarified that promotions already made and seniority already decided will not be disturbed. The MoHUA wrote a letter dated 19th October, 2017 and another letter dated 19th January, 2018 conveying its approval to the proposal of the DDA. In paragraph 4 of its counter affidavit, the DDA states as under:

“That having regard to the totality of the facts and circumstances, DDA has referred the matter to the Ministry of Housing and Urban Affairs, Union of India to have a look/re-look into the matter and forward appropriate directions of the Ministry so that further action may be taken in the matter. The re-look of the matter may involve appropriate amendment to the recruitment regulations.”

33. It was prayed that the DDA should be permitted to make the promotions subject to the outcome of the petition. In response to the DDA’s letter, the MoHUA by a letter in 25th February, 2019 communicated that the earlier decision conveyed by letter dated 19th January, 2018 was “still valid” and that there was “no reason to keep it in abeyance”.

34. By its letter dated 29th March, 2019 the DDA informed the MoHUA as under:

“In this regard, I am directed to intimate that it has been directed by VC to refer back the matter as DDA is contemplating to take a relook at the RRs in order to avoid further litigation. It has been viewed to examine whether separate quota for categories in the feeder grade as per qualifications can be considered in RRs. Consequently, the panel lawyer of DDA has been directed to seek time for making submissions before the Hon’ble Court. Further communication to Ministry will follow in due course.”

35. However, as of the date of hearing of the petition, the position remained unchanged. The stand of the DDA has been that promotions would continue to be made in the order of date of eligibility and that the earlier promotions not made on that basis would be reviewed, while the decision regarding the earlier promotions would be kept in abeyance till the decision of this Court.

36. This Court has heard the submissions of Mr. Saurabh Kirpal, learned counsel appearing for Mr. Ashwini Khullar and Mr. Shankar Raju, learned counsel appearing for Mrs. Ambuj Sood and Mr. Kanwal Kumar. Mr. Arun Birbal, appeared for the DDA in all the matters and Mr. Manish Mohan, learned Central Government Standing Counsel for the Union of India. In W.P.(C) No. 13931/2018, Dr. K.S. Chauhan, appeared for Respondent No.6, Mr. Anuj Aggarwal appeared for Respondent No.7 and Mr. Pramod K. Singh appeared for Respondent No.8.

Submission of the Petitioners

37. The submissions on behalf of the Petitioners in all three petitions may be summarised thus:

i) The Eligibility List cannot be the sole criteria for making promotions. Given that the language of the note is similar to that of the language in the note in the decision of the ***RB Desai*** (*supra*), the seniority of the eligible candidates could not be ignored for the purposes of making the further promotion to the post of AD (Planning) or AD (Arch).

ii) While granting approval to the amendment of the RRs by its letter dated 10th November, 2017, the MoHUA by its letter dated 5th January, 2018, while conveying its approval to the DDA stated as under:

"henceforth the seniority will be given preference among those who have become eligible on the basis of the prescribed qualifying service while making promotions to the post of Assistant Director and Deputy Director in Planning and Architectural wing of DDA".

iii) Later the DDA filed an additional affidavit before the CAT conveying the above decision of the MoHUA. Thereafter, the DDA promoted an AD (Architecture) as Deputy Director (DD) (Architecture) in 2017-2018 on the basis of the seniority list. Any attempt at overlooking the seniority of the Petitioners, would be contrary to the note appended to the rules and the law explained by the Supreme Court in ***R.B. Desai*** (*supra*).

Submission of the Respondents

38. Mr. Arun Birbal, learned counsel appearing for the DDA sought to adopt a stand different from what was adopted when the matter was argued before the CAT. However, he repeatedly urged that the DDA would be guided by the decision of this Court on how to interpret the note. He did not dispute that there was a change in the stand in the affidavit filed by it before the CAT and the affidavit filed in W.P.(C) No. 13931/2018.

39. Appearing on behalf of Mr. Ashok Kumar (Respondent No. 6), Dr. K. S. Chauhan, learned counsel, stated at the outset that Respondent No.6 was totally unaware about the filing of the OA No. 682/2016 by Mr. Kanwal Kumar before the CAT as he was not made a party thereto. Further, the CAT did not issue any notice in the said OA. He pointed out that Respondent No. 6 had initially been appointed as Architectural Draftsman on 3rd December, 1998 and promoted as AA on 24th August, 2004. He was a degree holder having acquired the degree of AIIA/B. Arch in 2000. He pointed out that inasmuch as Mr. Kanwal Kumar was only an ITI certificate holder and had the educational qualification of Draftsman (Civil), he could not have any right for being considered for promotion to the post of AD (Architecture) under the RRs.

40. The final Eligibility List of AAs showed that while Respondent No. 6 became eligible for being promoted as AD (Arch) on 24th August, 2007, Mr. Kanwal Kumar being only an ITI certificate holder

was not entitled to such promotion, which was given only to degree holders. It is submitted that in view of the decisions in ***K. K. Dixit v. Rajasthan Housing Board (2015) 1 SCC 474*** and ***N. Suresh Nathan vs. Union of India (1992) 1 Supplementary SCC 584***, Mr. Kanwal Kumar could not be placed above Mr. Ashok Kumar.

41. It is submitted that inasmuch as Mr. Kanwal Kumar is not registered under the Architects Act, 1962 (Act), he could not be even appointed as AD (Arch). Dr. Chauhan referred to the communication addressed to the DDA by the Council of Architecture on 14th August, 2013 regarding appointment of non-architects to Architectural posts in the DDA in violation of the provisions of the Act. He referred to the observations in the order dated 14th February, 2017 passed by the Supreme Court in CA No. 3346-3348/2005 (***Council of Architecture v. Manohar Krishnaji Ranade***) holding that practice under the Act is restricted only to the Architects. It was specifically held that:

“It is no correct to say that anyone can practice as an architect even if he is not registered under the Architects Act, 1972. That being the position and with this clarification, we disposed of these appeals.”

Reference is also made to the further order dated 27th July, 2017 in CA No. 3346-08/2005.

42. Mr. Anuj Aggarwal appearing on behalf of Ms. Smriti Gupta Mittal (Respondent No. 7) submitted that she too was a degree holder and was therefore eligible for promotion prior to Mr. Kanwal Kumar,

who was only a diploma holder. He pointed out how six posts of AD (Arch) in the promotion quota were lying vacant and were required to be filled. Meanwhile, the DDA had advertised for filling up the direct recruitment quota in the post of AD (Arch) and if that quota was already going to be filled up, then in the cadre of AD (Arch), if the eligible promotees were not appointed, it would cause great prejudice. Reliance was placed on the decisions in (*Shailendra Dania vs. S. P. Dubey* (2007) 2 SCC (L &S) 202, *M. A. Khan v. New Delhi Municipal Council* (decision dated 19th October, 2011 in LPA 280/1997) and a recent decision dated 19th July, 2017 in W.P.(C) No. 6523/2011 of this Court (*R. P. Bharal v. DDA*).

43. Appearing on behalf of Respondent No. 8 (Ms. Nidhi Tyagi), Mr. Kripa Shankar Prasad pointed out that Respondent No. 8 was also a holder of the five-year degree of Architecture i.e. B. Arch, which is recognised by the Council for Architecture under the Act, and was a direct recruit AA. Although she had completed the three-year qualifying service for promotion as AD (Arch), she was not so promoted and was compelled to approach the CAT with OA 2895/2015 along with Ms. Smriti Gupta Mittal (Respondent No. 7) for a direction to the DDA to issue the Eligibility List for promotion. By an order dated 17th August, 2015 in OA No. 2895/2015 the CAT directed the DDA to issue the Eligibility List and consider the case of both Respondent Nos. 7 and 8 for promotion to the post of AD (Architecture). It is pointed out that in the said Eligibility List Ms. Nidhi Tyagi figured at Sl. No.5. Ms. Kalpana Khokhar at Sl. No. 1 and

Mr. Ashok Kumar at Sl. No. 2 had already been promoted and Ms. Nidhi Tyagi was next in line for promotion.

44. Learned counsel referred to the notes on file, which according to him indicated that the whole purpose of inserting the note in the RRs was to do away with the seniority rule and recognize the higher claim of degree holders to promotion as AD (Arch). Reference is made to Note –II in the RRs in the instance of Forest Officers, which was an additional requirement and which is not there as far as the present case is concerned. There was no training academy under the DDA which could provide any refresher course to facilitate Mr. Kanwal Kumar to acquire the degree in Architecture.

45. Reference is made to the decision in ***Roop Chand Adlakha v. DDA 1989 Suppl. 1 SCC 116*** where the differential treatment accorded to degree holders and diploma holders was upheld on the basis that the classification was reasonable one and passed the tests of Article 14 of the Constitution. This was reiterated in ***K.K. Dixit v. Rajasthan Housing Board (2015) 1 SCC 474***.

Analysis and Reasons

46. The above submissions have been considered. The notes on file of the DDA, leading to the insertion of the above note in column no. 11 of the RRs, traced the developments leading to its insertion. Way back in July, 2003, while dealing with the representations received from an AD

(Planning), possessing a post-graduate qualification in planning, a note was prepared in the DDA. It was pointed out that there were 23 posts in DDA (Planning). It was projected that in the year 2003, one of the 23 posts are likely to be held by diploma holders and 22 by post graduates/graduate holders. In the year 2008, only six diploma holders were likely to be considered. Keeping in view the above factors, the DDA was of the view that:

“A view will need to be taken keeping in view the administrative considerations of having qualified personnel to man senior positions in Planning Department.”

47. At the same time, it was felt that:

“However, any decision to provide quota for promotion to the post of DD in favour of Assistant Directors (Planning) Post Graduate/ Graduate in Planning will adversely affect the promotional prospects of the lesser qualified persons to this extent.

In case, it is considered to provide for separate quota in favour of qualified own Planners, the same would require amendment of RRs with the approval of Authority.”

48. A query was raised as to what the corresponding provisions were in the Town and Country Planning Office (‘TCPO’) and the Municipal Corporation of Delhi (‘MCD’). In response to the query, it was pointed out that there were three feeder channels for the post of AD (Planning). One was AD (Planning) with five-year service and a PG qualification in planning. The other was AD (Planning) with eight years of service and graduate qualification in planning. The third was AD (Planning),

but with ten-year service and diploma in Town Planning and Architecture/Civil Engineering. It was pointed out that the basic purpose of according weightage to a higher qualification would be defeated, if the post fell vacant after ten years and it might lead to a situation where an ineligible person in 2003 may be DD in 2004, who had been supervising ADs, eligible since 1999, and this “defies the basic tenets of justice”. It was in this context that a reference was made to the DoPT’s guidelines for framing RRs, which read as under:

“In some cases, different periods of qualifying services in the respective grade/post on account of different scales of pay are prescribed for promotion in the recruitment rules. In order to facilitate preparation of an eligibility list for promotion, in cases where no separate quotas for each different grade have been prescribed, a “Note” as under may be added:

NOTE: The eligibility list for promotion shall be prepared with reference to the Date of completion by the officers of the prescribed qualifying service in respective grade/post.”

49. Therefore, it was suggested that a similar note be added to the RRs of the DDA as well so that the anomaly could be corrected and the DDA could get qualified personnel for the post of AD (Planning). It would also encourage personnel in the department to get a higher qualification. A second option was of keeping certain percentage from the three categories, but it was felt that this would be too harsh. It is pointed out that in DDA itself, for the selection to the post of Assistant Engineer (‘AE’), there is a separate quota for engineers and diploma holders.

50. The second alternative which was framed, and which ultimately got adopted, was worded thus:

“Drawing of eligibility list in order of the dates on which the officials become eligible for consideration in accordance with general guidelines of DOPT referred to under Para 3.1 above. This would imply persons who become eligible earlier are placed above those who become eligible later.

With the adoption of above guidelines, the present anomalous situation as brought in para 2 above, would get corrected and the premium for higher qualification would continue to remain available to the persons possessing/acquiring higher qualification, at all times.”

51. However, when it came to paragraph 8 of the note, while stating that they should go for the second alternative, the wording of the note, as suggested, read as under:

“We may, perhaps, go for Alternative No. II at Para 6(b) above by stipulating following Note below the Recruitment Regulations for the posts of Deputy Director (Planning), Assistant Director (Planning), Deputy Director (Architecture) and Assistant Director (Architecture):

“NOTE: The eligibility list for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grade/post.”

Thus, the personnel possessing higher professional qualifications of Graduation/Post graduation in the specified disciplines will continue to get preferential treatment as was originally envisaged in the scheme of recruitment by way of specifying different length of

qualifying services based on professional qualifications possessed.”

52. It may straightway be noticed that while suggesting the alternative, although it had been intended that the persons who became eligible earlier would be placed above those who would become eligible later, no such line was included in the note. Consequently, the ultimate shape of the note, as was adopted by way of amendment into the RRs, was what figured in paragraph 8.0. The crucial line that would have indicated that those who became eligible earlier would be senior to those who became eligible later, was missing in the final note that was inserted.

53. It is this wording of the note that has led to this entire litigation. The Court will have to interpret the note as it appears. The two major decisions to be discussed in this context are that of the Supreme Court in ***R. B. Desai*** (*supra*) and ***Shailendra Dania*** (*supra*).

54. By way of introductory remarks, it requires to be kept in mind that in terms of the RRs as they stand, once the two streams fulfil their respective conditions of eligibility, they merge into a common stream. In other words, the degree holders and diploma holders, in the instance of both the Planning and Architectural wings of the DDA, are not treated separately, once they cross the eligibility threshold. This will distinguish the present case from certain other cases where there may have been specific provisions for treating the two differently. For

example, for the post of AE in the DDA, these two streams (diploma and degree holders) are treated differently for the purposes of the promotions.

55. In ***K. K. Dixit v. Rajasthan Housing Board*** (*supra*), for instance, it was held that the Project Engineers (Junior) recruited on the basis of a diploma, upon acquiring the qualification of AMIE are not entitled to count their experience in service prior to their possession of qualification for the purposes of eligibility for promotion to the post of Project Engineer (Senior) against the 20% quota “fixed for promotion of degree holder PE (Junior)”. Since there was a separate quota in that case, it was held that in order to claim promotion against “such 20% quota”, the three-year experience in service must be acquired “after obtaining the qualification or degree of AMIE”. In the present case, however, there is no requirement under the RRs that the diploma holders must acquire a degree in architecture in order to be considered eligible for promotion to AD (Arch) or AD (Planning). For compensating for the lack of a degree, a greater emphasis in the Petitioners’ case is given to the number of years of experience. This explains why there is a distinction between the years of experience in the case of degree holders in architecture, where a three-year experience is sufficient to be considered eligible, whereas for diploma holders eight years of experience is required to be considered eligible.

56. This major distinction factor also explains why the decision in ***Shailendra Dania v. S.P. Dubey*** (*supra*) would not be applicable to

the facts of the present case. The decision of the Supreme Court in that case was rendered in the context of employees of the Slum Wing Department ('SWD'), which was a part of the Municipal Corporation of Delhi ('MCD') before 1974. In that year, it was transferred from the MCD to the DDA, but was again transferred to MCD in 1978. In May, 1980, it was transferred back to the DDA, with stipulation that it would remain a separate entity and its employees would not be merged with that of the DDA.

57. The dispute between the degree holders and diploma holders was for the post of Junior Engineers ('JEs'), Assistant Engineers ('AEs') and Executive Engineers ('EEs'). The Appellants before the Supreme Court were graduates with an engineering degree and had joined as direct recruit JEs. The next higher post was that of AE, with 50% posts required to be filled by direct recruitment by candidates having civil engineering degrees. The remaining 50% of posts were to be filled up on a promotional basis from the roll of JEs. In the posts of JEs, the post was to be filled up entirely by direct recruitment and the qualification prescribed was that of a diploma in civil engineering with a two-year experience, with their being no bar on persons possessing higher qualification, namely, a degree in engineering. When it came to further promotion from AE to EE, the minimum qualifying experience for promotion was a graduate degree in engineering with eight years' experience in the grade of AE, whereas for diploma holders, it was ten years in the grade of AE.

58. In the first round of litigation, in ***Roop Chand Adhlakha*** (*supra*), the Supreme Court reversed the findings of this Court, which had struck down the resolution dated 16th June, 1971, allowing the DDA to distinguish between the diploma and degree holder AEs in the matter of experience in promotions. The second phase of litigation arose as regards the note appended to the RRs by the DPC in 1974, relaxing the RRs in favour of the diploma holders “who while in service acquired degree qualification”. The question then arose whether the entire experience gained by the diploma holders prior to obtaining the degree could be counted for determining eligibility.

59. It is this question that was answered by the Supreme Court in ***Shailendra Dania*** (*supra*), where it was observed in paragraphs 43, 44 and 45 as under:

“43. Taking into consideration the entire scheme of the relevant rules, it is obvious that the diploma-holders would not be eligible for promotion to the post of Assistant Engineer in their quota unless they have eight years' service, whereas the graduate Engineers would be required to have three years' service experience apart from their degree. If the effect and intent of the rules were such to treat the diploma as equivalent to a degree for the purpose of promotion to the higher post, then induction to the cadre of Junior Engineers from two different channels would be required to be considered similar, without subjecting the diploma- holders to any further requirement of having a further qualification of two years' service. At the time of induction into the service to the post of Junior Engineers, Degree in Engineering is a sufficient qualification without there being any prior experience, whereas diploma-holders should have two years'

experience apart from their diploma for their induction in the service. As per the service rules, on the post of Assistant Engineer, 50% of total vacancies would be filled up by direct recruitment, whereas for the promotion specific quota is prescribed for a graduate Junior Engineer and a diploma-holder Junior Engineer. When the quota is prescribed under the rules, the promotion of graduate Junior Engineers to the higher post is restricted to 25% quota fixed. So far as the diploma- holders are concerned, their promotion to the higher post is confined to 25%. As an eligibility criterion, a degree is further qualified by three years' service for the Junior Engineers, whereas eight years' service is required for the diploma-holders. Degree with three years' service experience and diploma with eight years' service experience itself indicates qualitative difference in the service rendered as degree-holder Junior Engineer and diploma- holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the eligibility criteria for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acquired a degree during the tenure of his service, has gained experience as an Engineer just because he has acquired a Degree in Engineering. That would amount to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer's experience cannot be substituted with diploma-holder's experience. The distinction between the experience of degree-holders and diploma-holders is maintained under the rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The rules provide for

different service experience for degree- holders and diploma-holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma- holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the rule itself makes differentia in the qualifying service of eight years for degree-holders and 10 years' service experience for diploma- holders. The rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma-holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialized job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different.

44. After having an overall consideration of the relevant rules, we are of the view that the service experience required for promotion from the post of Junior Engineer to the post of Assistant Engineer by a degree-holder in the limited quota of degree-holder Junior Engineers cannot be equated with the service rendered as a diploma-holder nor can be substituted for service rendered as a degree-holder. When the claim is made from a fixed quota, the condition necessary for becoming eligible for promotion has to be

complied with. The 25% specific quota is fixed for degree-holder Junior Engineers with the experience of three years. Thus, on a plain reading, the experience so required would be as a degree- holder Junior Engineer. 25% quota for promotion under the rule is assigned to degree-holder Junior Engineers with three years' experience, whereas for diploma-holder Junior Engineers eight years' experience is the requirement in their 25% quota. Educational qualification along with number of years of service was recognized as conferring eligibility for promotion in the respective quota fixed for graduates and diploma-holders. There is watertight compartment for graduate Junior Engineers and diploma-holder Junior Engineers. They are entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. Fixation of different quota for promotion from different channels of degree- holders and diploma-holders itself indicates that service required for promotion is an essential eligibility criterion along with degree or diploma, which is service rendered as a degree-holder in the present case. The particular years of service being the cumulative requirement with certain educational qualification providing for promotional avenue within the specified quota, cannot be anything but the service rendered as a degree-holder and not as a diploma- holder. The service experience as an eligibility criterion cannot be read to be any other thing because this quota is specifically made for the degree-holder Junior Engineers.

45. As a necessary corollary, we are of the view that the diploma-holder Junior Engineers who have obtained a Degree in Engineering during the tenure of service, would be required to complete three years' service on the post after having obtained a degree to become eligible for

promotion to the higher post if they claim the promotion in the channel of degree-holder Junior Engineer, there being a quota fixed for graduate Junior Engineers and diploma-holder Junior Engineers for promotion to the post of Assistant Engineers.”

60. It will thus immediately be seen that the fact situation in *Shailendra Dania v. S.P. Dubey (supra)* envisaged diploma holders acquiring a degree and then seeking to count their years in service prior to acquiring such degree, for the purposes of eligibility to the promotion to the next higher post.

61. In the present case, however, there is no question of the diploma holders acquiring the regular degree and seeking to count their years of experience prior to acquisition of such degree. On the same grounds, the decision in *R.P. Bharal v. DDA (supra)* would also not apply. That again arose in the context of promotion from JEs to AEs in the DDA. Those rules again do not apply in the present case at all.

62. The decision in *M.A. Khan v. New Delhi Municipal Council (supra)* is also of no assistance to the Respondents. Akin to the aforesaid cases, here also the diploma holders acquired a degree during the course of their service and were claiming that the service rendered by them, even prior to possession of such degree, should be counted for promotion to the post of AEs.

63. Consequently, these decisions do not help the Respondents to correctly interpret the note appearing in the present case. That takes us

to the decision in *R.B. Desai v S.K. Khanolker* (*supra*). There, the Appellants were promotee Range Forest Officers ('RFOs') and the Respondents were direct recruits. According to the RRs applicable in that case, the Appellants were required to have a service of ten years, while the Respondents were required to have five years of qualifying service for further promotion as Assistant Conservator of Forest ('ACF'). The relevant RRs read as under:

“(i) "Range Forest Officers with 5 years regular service in the grade and possessing diploma of Forest Rangers Training from Forest Rangers College in India or equivalent.

(ii) Unqualified Range Forest Officers trained in Forest School with 10 years regular service in the Grade.

Note: 1. The eligibility list for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grade/posts.

Note: 2 Unqualified Range Forests Officers shall after promotion as Assistant Conservator of Forests would be required to complete successfully refresher courses at F.R.I & C.”

64. The above amendment, by which the note was added, was made in 1988. The post was a selection post and 75% of the recruitment was by promotion and 25% by direct recruitment. The above clause fixed the 'eligibility criteria' for promotion.

65. It was contended by the Respondents that on the basis of the above eligibility criteria, they should be senior to the Appellants in the seniority list of RFOs. The Appellants, on the other hand, contended

that once they entered the Eligibility List, it was the date of eligibility that was relevant and it was only the seniority vis-a-vis the eligible candidates that should be taken into consideration.

66. While the High Court upheld the contention of the Respondents, the Supreme Court reversed the High Court and upheld the contention of the Appellants. In paragraph 9, it was held as under:

“We are unable to agree with this reasoning of the High Court. As noticed above, promotion to the post of ACFOs. is made from the post of RFOs to the extent of 75% of the vacancies. There is no dispute that both the appellants and the first respondent belong to the cadre of RFOs. The only difference between them being that the appellants were promotees in the said cadre while the first respondent was a direct recruit. It is an accepted principle in service jurisprudence that once persons from different sources enter a common cadre, their seniority will have to be counted from the date of their continuous officiation in the cadre to which they are appointed. On facts, there is no dispute that the appellants entered the RFOs' cadre on a date anterior to that of the first respondent, therefore, in the cadre of R.F.Os., the appellants are seniors to the first respondent. However, to be considered for promotion, the Rule required the RFOs. to acquire the eligibility as provided therein. Therefore, the question for consideration is: can the acquisition of an earlier eligibility give an advantage to the first respondent as against the appellants when an avenue for promotion opens in the cadre of ACFs. even though at that point of time the appellants had also acquired the required eligibility. We are of the opinion that if at the time of consideration for promotion the candidates concerned have acquired the eligibility, then unless the Rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. The Rule under

consideration does not give any such priority to the candidates acquiring earlier eligibility and, in our opinion, rightly so. In service law, seniority has its own weightage and unless and until the Rule specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same.”

67. The Court finds that in the present case also, the contention of the Respondents that once they become eligible, they should be considered senior to the present Petitioners, cannot be sustained. Whatever may have been the reasons for introducing the note, the ultimate wording of the note is what has to be interpreted. The note only determines the eligibility criteria and does not suggest that those eligible earlier will be senior to those eligible later, if both have crossed the stage of eligibility and have come into a common stream. The Court is, therefore, inclined to accept the case of the Petitioners that their case is squarely covered by the above decision in ***R. B. Desai*** (*supra*).

68. The decision in ***R.B. Desai*** (*supra*) also acknowledges that eligibility and seniority are two different concepts. This was highlighted by the Supreme Court in its subsequent decision in ***Palure Bhaskar Rao v. P. Ramaseshaiah*** (2017) 5 SCC 783 where in paragraph 16, it was held as under:

“16. Seniority and eligibility are also distinct concepts. As far as promotion or recruitment by transfer to a higher category or different service is concerned if the method of promotion is seniority-cum-merit or seniority per se, there is no question of eligible senior being superseded. Other things being equal, senior automatically gets promoted. But in the case of selection based on merit-cum-seniority,

it is a settled principle that seniority has to give way to merit. Only if merit being equal senior will get the promotion.”

69. More recently, the Supreme Court has in *Sudhakar Baburao Nangnure v Noreshwar Raghunathrao Shende 2019 SCC OnLine SC 326* reiterated the above and held in paragraphs 103 and 104 as under:

“103. ...

Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor can override it in the matter of promotion to the next higher post.”

104. Seniority and eligibility are distinct concepts in service jurisprudence. Seniority by itself cannot prevail where a senior lacks eligibility for promotion to a higher post [See in this context *Palure Bhaskar Rao v. P Ramaseshaiah*]. Even if the contention of the appellant on the applicability of the catch-up rule were to be accepted, that will not obviate the requirement of his fulfilling the condition of eligibility for promotion to the next higher post, on the date when the vacancy occurred.”

70. For all of the aforementioned reasons, this Court is unable to sustain the impugned judgment of the CAT in *Ashwini Khullar* and hereby sets it aside. Consequently, the decision of the CAT in the case *Kanwal Kumar*, which follows its own decision in *Ashwini Khullar* is also hereby set aside.

71. This judgment, however, will not prevent the DDA in further amending the RRs for future promotions to make it clear that those who complete the eligibility criteria earlier, would be senior to those who meet the eligibility criteria later. However, with the note standing as it does at present, the Court is of the view that the interpretation placed by the CAT was incorrect.

Conclusion

72. The petitions are hereby allowed. The pending applications are also disposed of. All consequential orders will now be passed by the DDA within a period of four weeks. No costs.

S. MURALIDHAR, J.

TAWANT SINGH, J.

SEPTEMBER 30, 2019

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