

\$~16 & 17.

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

+ **Date of Decision: 16.01.2019**

% **W.P.(C) 3081/2015 & C.M. No. 5515/2015**

NATIONAL INSTITUTE OF PUBLIC CO-OPERATION
& CHILD DEVELOPMENT & ANR. Petitioners

Through: Mr. Sanjiv Joshi, Advocate for
petitioner No.1/ NIPCCD.

versus

DARSHAN & ANR. Respondents

Through: Mr. M.K. Bhardwaj, Advocate for
respondent No.1/ Darshan.
Mr. L.R. Khatana, Advocate for
respondent No.2/ Hansraj.

% **W.P.(C) 4794/2015 & C.M. No. 8666/2015**

HANS RAJ Petitioner

Through: Mr. L.R. Khatana, Advocate.

versus

DARSHAN & ORS Respondents

Through: Mr. M.K. Bhardwaj, Advocate for
respondent No.1/ Darshan.
Mr. Sanjiv Joshi, Advocate for
respondent/ NIPCCD.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A.K. CHAWLA

VIPIN SANGHI, J. (ORAL)

1. These are two writ petitions preferred by the petitioner National Institute of Public Co-operation & Child Development (NIPCCD) [W.P.(C.) No.3081/2015], and the petitioner Hansraj [W.P.(C.) No.4794/2015], to assail the same order of the Tribunal rendered in O.A. No.1220/2013 on 09.10.2014. The petitioner Hansraj was arrayed as respondent No.3, whereas the petitioners in W.P.(C.) No.3081/2015 were arrayed as respondents No.1 & 2 in the said Original Application. Respondent No.1 herein has preferred the said Original Application.

2. A brief history may now be narrated which is relevant to understand the dispute.

3. In the petitioner organization, there was one post of Library Attendant, which was a feeder cadre for the next promotional post of Technical Assistant (Library). The posts of Technical Assistant (Library) are to be filled to the extent of 75% by Direct Recruitment, and 25% by promotion. Another isolated post of Documentation Attendant was created in the petitioner organization. There is no dispute that the pay scale, qualifications and the nature of responsibilities handled by the Library Attendant and the Documentation Attendant were the same. However, since the post of Documentation Attendant was an isolated post – to which respondent No.1 Smt. Darshan was appointed on 22.04.1993, she represented to the petitioner organization about her concerns regarding stagnation. She represented to the NIPCCD for providing for promotional avenues to the Documentation Attendants. The Executive Council of the

petitioner organization considered the said aspect in its meeting held on 31.03.2003 and resolved as follows:

“The Institute has one post of Documentation Attendant and one post of Library Attendant in the scale of pay of Rs.3050-4590. The job responsibility and essential qualification and experience as per respective Recruitment Rules for both the posts are same. A copy each of the Recruitment Rules is at Annexure-N & O. The post of Library Attendant is the feeder cadre for the post of Technical Assistant (Library) in the scale of pay of Rs.4500-7000 and as such the incumbent to the post has adequate promotional channel. However, though the job responsibility and essential qualification and experience for the post of Documentation Attendant are same to those of Library Attendant the incumbent to the post does not have any promotional channel.

2. Therefore, in order to provide promotion avenues and to do natural justice with the incumbent holding the post of Documentation Attendant it is proposed to merge the post of Documentation Attendant with the post of Library Attendant in the scale of pay of Rs.3050-4590. The merger of the posts does not have any financial implication.” (emphasis supplied)

4. Consequently, an office order was issued on 15.09.2003 bearing Office Order No.223/03 by the petitioner organization, merging the post of Documentation Attendant with the post of Library Attendant. The said office order, insofar as it is relevant, reads as follows:

OFFICE ORDER No.223/03

Consequent upon the approval of the Executive Council in its 52nd meeting held on 31.3.2003, the post of Documentation Attendant is hereby merged with the post of Library Attendant in the pay scale of Rs. 3050-4590. This merger will have no financial implication on the Institute.

2. The above merger will be effective immediately and there will be a cadre of Library Attendant only. The incumbent holding the post of Documentation Attendant will now be called "Library Attendant"

3. This issues with the approval of the Competent Authority." (emphasis supplied)

5. It appears that post the said merger, no seniority list was circulated, and in a short span of about 3 months, petitioner/ Hansraj was promoted on regular basis to the post of Technical Assistant (Library) on 03.12.2003.

6. Respondent No.1 then started representing for fixation of her seniority by counting her service as Documentation Attendant since 22.04.1993. She repeatedly represented in this regard, and only on 14.05.2009, the representation of respondent No.1 was rejected by the petitioner organization. Consequently, she preferred O.A. No.2925/2009 before the Tribunal. Pertinently, apart from the petitioner Institute, Sh. Hansraj was also impleaded in the said proceeding. The said Original Application was contested on merits and the Tribunal quashed the order dated 14.05.2009 passed by the petitioner organization. The operative part of this order dated 13.05.2010 reads as:

"10. We note that the merger of two cadres is the decision of the Respondent No.2 and in public interest. Though the impugned order refers to the Applicants' request/representation for creating avenues for her promotion, the Office Order on merger does not say so. If the merger is due to her own request she would be the last in the cadre of LA with pay protection but if it is on public interest,

she would be entitled to carry her past service put in as DA to get her seniority in LA.

11. In view of the above, we are of the considered opinion that the Applicant's case needs to be reconsidered in view of our above observation for fixing her seniority in the post of Library Attendant vis-a-vis Respondent No.3 in NIPCCD. We, therefore, quash the impugned Memorandum dated 14.05.2009 passed by the Respondents rejecting the Applicant's claim and direct the Respondent No.2 to consider her request afresh in view of our findings and as per law and fix her seniority as Library Attendant taking into account her services put in the post of Documentation Attendant and the merger decision taken by the Executive Council of NIPCCD. In the process, if the Respondent No.3 is likely to be affected, it goes without saying that he should be put to notice and representations received before finalizing the inter se seniority of the Applicant in the post of Library Attendant. Interim directions passed on 28.10.2009 would continue till the Respondent No.2 passes order in the matter." (emphasis supplied)

7. The said order dated 13.05.2010 was carried to this Court by the petitioner Institute in W.P.(C.) No.7156/2010. However, that challenge failed and the said writ petition was dismissed on 04.02.2011.

8. In terms of the said order, the petitioner organization passed the order rejecting the representation of respondent No.1 vide Office Memorandum dated 06.07.2012, denying her seniority in the cadre of Library Attendant from the date of her initial appointment, i.e. 22.04.1993. Consequently, she preferred the Original Application, wherein the impugned order has been passed.

9. The Tribunal has held in favour of respondent No.1 herein, that since

the merger of the post of Documentation Attendant with that of Library Attendant was made in public interest, she was entitled to carry her past service with her and, accordingly, her seniority should have been fixed on the basis of her length of service from 22.04.1993. The petitioner Institute has been directed to re-fix the seniority of respondent No.1 herein as Library Attendant by counting her past service in the post of Documentation Attendant and to grant her consequential benefits in accordance with the rules/ law.

10. The primary submission raised by learned counsel for the petitioners is that the merger of the post of Documentation Attendant with that of Library Attendant had taken place at the request of respondent No.1 and, therefore, she was not entitled to carry her past service with her when she came into the cadre of Library Attendant. The submission is that since the said merger was undertaken only at the behest of respondent No.1, it could not have been said that the merger was in public interest. A reference is made to the Office Order No.223/03 dated 15.09.2003 to say that the same does not proclaim that it was passed in public interest.

11. We do not find any merit in this submission of the petitioners. No doubt, respondent No.1 raised a grievance with regard to her not having any promotional avenues since the post of Documentation Attendant was an isolated post. However, that does not mean that the merger of the post of Documentation Attendant with that of Library Attendant was made only and only on her request. The injustice faced by respondent No.1 was brought to the notice of the petitioner organization, and the petitioner organization, on

its own, decided to merge the two posts considering the fact that both the posts of Documentation Attendants and Library Attendant carry the same pay scale; the same qualifications and; the same nature of responsibilities. Thus, it was a correction made by the petitioner organization in its institutional structure. Pertinently, what were merged with the two posts. It is not that respondent No.1 migrated from the post of Documentation Attendant to the post of Library Attendant – with the post of Documentation Attendant still remaining in existence. There was no question of the posts being merged, if the migration had taken place only on the request of respondent No.1. Therefore, we are of the view that the merger took place in public interest since the petitioner organization is not expected to act otherwise. Moreover, the Office Order No.223/03 does not proclaim that the same is an office order in personam i.e. order only qua respondent No.1. The merger of the two posts is a permanent and structural change, and was not confined only to respondent No.1. Therefore, we are of the view that respondent No.1 was entitled to carry her seniority with her when the two posts were merged. Respondent No.2 joined the post of Library Attendant on 12.10.1995. Thus, respondent No.1, without any dispute, was senior to him.

12. In the normal course, following the conclusion that respondent No.1 was senior to the petitioner Hansraj, the consequential effect would have been to dislodge the petitioner Hansraj from the post of Technical Assistant (Library) and to offer that post to respondent No.1 Darshan. The difficulty in the present case arises on account of the course that the disputes have taken since the said merger of posts, which occurred on 15.09.2003. As

noticed above, on 03.12.2003, respondent No.1 was promoted to the post of Technical Assistant (Library) on regular basis. Respondent No.1 may not have been aware of her seniority position at that stage. It appears that she woke up to that reality on 17.04.2004, when she started to represent thereagainst. She did not initiate any proceedings till after her representation was rejected on 14.05.2009.

13. Though the petitioners have sought to urge that the first Original Application, i.e. O.A. No.2925/2009 itself was barred by limitation – on application of Section 21 of the Administrative Tribunals Act, we cannot get into the said issue for the reason that the said issue was not raised, either by the respondents in that Original Application, or by the Tribunal itself, and that Original Application came to be decided on merits on 13.05.2010. Even when the petitioner Institute approached this Court, no such issue was raised and W.P.(C.) No. 7156/2010 was dismissed on 04.02.2011. Thus, the issue whether O.A. No.2925/2009 was barred by limitation, in our view, cannot be raised at this belated stage.

14. During the course of arguments, this Court has been informed that respondent No.1 was granted ad-hoc promotion to the post of Technical Assistant (Library). However, she has been reverted to her substantive post. As noticed above, the posts of Technical Assistant (Library) are required to be filled to the extent of 75% by Direct Recruitment, and 25% by promotion. It appears that there are no other posts available in the promotion quota in the cadre of Technical Assistant (Library). However, there are posts available in the Direct Recruitment quota.

15. Considering the fact that the respondent No.2 has been holding the post of Technical Assistant (Library) on regular basis since 03.12.2003, we are of the view that, to meet the ends of justice, respondent No.2 Hansraj should not be disturbed from the post held by him. Instead, respondent No.1 should be granted ad-hoc promotion to the post of Technical Assistant (Library) against one of the vacant posts meant for Direct Recruitment quota. However, this arrangement should continue only till so long as Direct Recruitments are not made. We wish to clarify that we are not suggesting that Direct Recruitment quota should not be filled, only to accommodate respondent No.1. In any event, even if respondent No.1 has to be reverted back to her substantive post as Library Attendant, being senior to respondent No.2, her pay and seniority has to be protected and her pay cannot be less than that drawn by respondent No.2. In case any further promotions are made to the next higher post, the seniority of respondent No.1 qua respondent No.2 shall be protected, and the fact that she has not occupied the higher post of Technical Assistant (Library) on regular basis shall not be taken against her for the purpose of considering her eligibility or experience.

16. With these directions, we dispose of these petitions.

VIPIN SANGHI, J.

A.K. CHAWLA, J.

JANUARY 16, 2019

B.S. Rohella