

#J-1

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 16.10.2020
Judgment Pronounced On: 10.02.2021

W.P.(C) 12680/2019 & CM APPL. 51768/2019 (Stay)

DR. S.N. SHARMA

..... Petitioner

versus

UNION OF INDIA AND ORS.

.....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Vikas Singh, Senior Advocate alongwith Mr. Varun Singh
Mr. Akshay Dev, Advocates.

For the Respondent: Mr. Jaswinder Singh, Advocate for R-1 Union of India, R-2
Central Soil & Materials Research Station (CSMRS), R-3
Ministry of Personnel, PC & Pensions; Mr. Naresh Kaushik and
Mr. Vardhman Kaushik, Advocates for R-4 UPSC

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE TALWANT SINGH

J U D G M E N T

SIDDHARTH MRIDUL, J (via Video Conferencing)

1. The present writ petition under Article 226 and 227 of the Constitution of India has been instituted by Dr. S.N. Sharma, the petitioner herein, assailing the order dated 27.08.2019 passed by the

learned Central Administrative Tribunal, Principal Bench, New Delhi, (hereinafter referred to as the 'learned Tribunal'), dismissing OA No. 463/2016 titled as '*Dr. S.N. Sharma & Anr. vs. UOI & Ors.*', whereby the petitioner's plea for setting-aside and quashing the order dated 28.08.2014 issued by the Department of Personnel & Training (hereinafter referred to as the 'Respondent-3'), and communication dated 10.11.2014 issued by the Ministry of Water Resources, Government of India (hereinafter referred to as the 'Respondent-1') addressed to Central Soil & Materials Research Station (for short 'CSMRS') (hereinafter referred to as the 'Respondent-2'), determining the proposal of regularisation of services of Scientist 'B' officers of CSMRS who were promoted on ad-hoc basis, in the negative, and holding that the period of ad-hoc service rendered will not be counted towards eligibility service for promotion to post of higher grade, was rejected. The petitioner had essentially sought the relief of issuance of directions to the official respondents to count the *ad hoc* service rendered by him as Scientist 'B', towards his claim for promotion to the post of Scientist 'C'; and to consider him for promotion to the latter post from the date the petitioner completed 3 years of service as Scientist 'B'.

2. This is the 4th round of litigation instituted by the petitioner. The brief backdrop of the present case as is germane for the adjudication of the present writ, is adumbrated as follows:

- a) Petitioner, who worked as Assistant Research Officer (ARO) under CSMRS, attached office of the Ministry of Water Resources, was discontented with previous existing Recruitment Rules (RRs) 1983 of the Organization and in particular the one pertaining to Senior Research Officer; whereby outside candidates were purportedly at a favourable position as they could enter the cadre on the said post at a young age, and as a result thereof, there was stagnation at the post of ARO and Research Officer (RO) in CSMRS, which assertedly resulted into lack of availability of promotional avenues from the existing post to higher post/grade of Scientist. This sentiment of stagnation on the same post, prompted the petitioner alongwith other similarly situated ARO's to file O.A. No.317/2003, through their association before the learned Central Administrative Tribunal, challenging the Recruitment Rules 1983, essentially assailing the apathy shown by the official Respondents' therein, *qua* the former's promotional

avenues. The said OA was allowed vide order dated 29.04.2004 directing the Respondents to amend the Recruitment Rules *in vogue* whilst restraining Respondents from effectuating any outside selection/appointment, till the said Recruitment Rules were suitably amended.

b) Feeling aggrieved by the aforesaid direction of the learned Tribunal, the official Respondents filed writ petition W.P. (C) No.1483/2005 before this Court challenging the order dated 29.04.2004 in O.A No.317/2003. The High Court vide order dated 28.09.2010 in W.P. (C) No.1483/2005 was pleased therein to direct the Secretary of Respondent-2, Respondent-3, and Respondent-4, to resolve the issue and accordingly amend the subject Recruitment Rules within 45 days. Consequently, the requisite amendment was carried out and new Recruitment Rules dated 23.11.2010 were duly notified.

c) In pursuance thereto, the petitioner alongwith 16 other ARO's were promoted on ad-hoc basis to the post of Scientist 'B', in terms of the directions issued by the High Court, vide order dated 01.12.2010, wherein Respondents were asked to grant one time relaxation/exemption to promote the eligible ARO's to the

re-designated post of 'Scientist B'.

- d) Resultantly, 17 ARO's including the petitioner herein, were appointed to the grade of Scientist B, in officiating capacity, on *ad-hoc* basis for period of one year, with effect from the date of their assumption of the charge of the higher post, vide order dated 27.04.2011 issued by Respondent-2. Upon the recommendation of Departmental Promotion Committee and Respondent-4, the President of India being the competent authority was pleased to appoint 21 ARO's including petitioner herein, on promotion to officiate as Scientist B in the pay scale of Rs. 15,600-39,100 (PB-3) + CP Rs.5,400 in CSMRS, New Delhi vide office Order dated 03.01.2012.
- e) It also undisputed that petitioner was sent abroad on deputation as Research Officer (Scientist B) by Respondent-1 for a period of 2 years, extended to 3 years at a scientific post to Punatsangchhu-II Hydroelectric Project Authority, Thimpu, Bhutan, for the period between 17.10.2014 to 29.10.2017.
- f) In the meanwhile, Respondent-3 DoPT issued an order dated 28.08.2014, categorically delineating that the period of ad-hoc service as Scientist B would not be counted as eligibility service

for promotion to Scientist 'C.

g) Feeling aggrieved by above-mentioned office memorandum, the petitioner filed Contempt Case (C) No.308/2015 before the Hon'ble High Court of Delhi, stating therein, that the order dated 28.08.2014 passed by Respondent-3, was violative of the directions issued by the High Court in W.P. (C) No.1483/2005 vide its order dated 01.12.2010. The said contempt petition was dismissed by this Court vide order dated 18.05.2015, giving liberty to petitioner to approach learned Tribunal, *qua* the fresh cause of action, that had arisen.

h) As a consequence, the subject O.A No. 463/2016 was filed before the learned Tribunal by the petitioner, which after due consideration and perusal of the relevant documents on record, was dismissed by Learned Tribunal vide impugned order dated 27.08.2019.

3. At the outset, it is an admitted position that the petitioner was promoted to Scientist 'C on 29.10.2017 as soon as he returned from the deputation from Bhutan.

4. Mr.Vikas Singh, learned Senior Advocate appearing on behalf of the petitioner submits that petitioner has faced grave injustice at the

hands of the official Respondents, inasmuch as he was promoted to the post of Scientist C from Scientist B on 29.10.2017, whereas his actual date of promotion should have been 26.04.2014 – the date when he completed 3 years of service reckoned from 27.04.2011 – the date when petitioner alongwith 17 ARO's was appointed to the grade of Scientist B, on *ad-hoc* basis. Thus the petitioner has been constrained to spend additional 3 years than the eligible time criteria desideratum for promotion to the post of Scientist C, which has eclipsed his chance to be promoted to Scientist D, as is due to retire in November, 2020.

5. It was further submitted by the Id Senior Advocate that, despite the petitioner being over-qualified with good performance and academic credentials, he had to languish at the same position for many years due to the inaction of the Respondents, who arbitrarily have not considered the period served by the petitioner on Ad-hoc basis for the purpose of promotion to the higher post.

6. It was urged on behalf of the petitioner, that Rule 6 (9) of Recruitment Rules, 2010 doesn't stipulate the non-consideration of ad-hoc service rendered by the petitioner whilst considering eligibility for promotion. Moreover, Rule 6 (15) stipulates that period spent on deputation or Foreign Service to another scientific post, shall be

counted towards qualifying period for promotion.

7. In order to buttress these submissions, learned counsel for petitioner has placed reliance on various judicial precedents, as hereunder:

- i. **S.Sumayan and Ors. vs. Limi Niri and Ors.** reported as 2010 (6) SCC 791;
- ii. **L.Chanrakishore Singh vs. State of Manipur** reported as 1999 (8) SCC 287;
- iii. **Direct Recruit Class II Engineering Officers Assn. vs. State of Maharashtra** reported as 1990 (2) SCC 715;
- iv. **G.P.Doval and Ors. vs. Chief Secretary, Government of UP and Ors.** reported as 1984 (4) SCC 329.

8. *Per contra*, Mr. Jaswinder Singh, appearing on behalf of all the Respondents including Union of India, except Respondent 4—UPSC, primarily contends that the validity of Rule 6 (15) was not the subject matter of adjudication before Ld Tribunal. Moreover, it is a matter of fact, which warrants factual determination and therefore can't be broached in the present writ petition at the stage of arguments *de-novo*.

9. It was submitted by the Respondents that petitioner was

promoted to post of Scientist B w.e.f 03.10.2012; and as per Recruitment Rules 2010, the mandatory stipulation for consideration for the promotion to the post of Scientist 'C' from Scientist 'B', under the Flexible Complementing Scheme, notified by the DoPT, requires the minimum qualifying period of 3 years of regular service only. Moreover, as per Rule 6 (11) of Recruitment Rules 2010 for CSMRS Group 'A' post, the eligible applicant will be entitled to the benefit of promotion to higher post only w.e.f. the date he is repatriated and assumes the assignment of higher post at CSMRS. Therefore, the petitioner herein was accordingly promoted to the post of Scientist 'C', as soon as he returned from deputation from Bhutan on 29.10.2017.

10. It was further contended that the claim of the Petitioner to declare his ad-hoc promotion/ service as Scientist 'B' from 27.04.2011 to 03.01.2012 as regular promotion and as a qualifying service for promotion to the higher post of Scientist 'C' is untenable, as ad-hoc appointment cannot be counted for seniority or promotion. It was also urged that such measure of granting of a regular promotion with retrospective date will also affect the inter-se seniority between the direct Recruits and Promotees, who are not parties to the proceedings.

11. It is also submitted by the Respondents that petitioner was recommended by the Board of Assessment and UPSC under Flexible Complementing Scheme for promotion to post of Scientist 'C' alongwith 18 other officers vide office order No.18/14/2015- E II/36 dated 11.01.2016, but petitioner did not assume the appointment of Scientist 'C' as he preferred to continue to be on deputation as Research Officer (Scientist B) with Punatsangchhu-II Hydroelectric Project Authority, Thimpu, Bhutan since 16.10.2014. Though, petitioner submitted a representation dated 22.01.16 for promotion as Scientist 'C' on proforma basis while continuing on deputation in Thimpu, Bhutan, which was duly considered by the Respondent-1, the same was not found to be viable, since there is no provision of giving the benefit of proforma promotion.

12. It is also urged that petitioner was sent on deputation to Thimpu as Research Officer (Scientist B) but doesn't fulfil the educational qualification requirement of Senior Research Officer, and was also promoted to higher post of Scientist C w.e.f 29.10.2017, the date he repatriated and assumed the assignment of higher post at CSMRS, in accordance to Recruitment Rule 6(11) of the extant rules.

13. To strengthen his contention learned counsel for respondent has placed reliance on **Keshav Chand Joshi & Ors. Vs. Union of India & Ors.** reported in 1992 Supp (1) SCC 272, wherein it was held by the Hon'ble Supreme Court that ad-hoc appointment cannot be counted for seniority or promotion. It is submitted that in the light of the facts of present case such a direction of a regular promotion with retrospective date will also adversely affect the inter-se seniority between direct Recruits and Promotees. The relevant extract of the Apex Court dicta has been reproduced hereinbelow:

“30. In *Massor Akhtar Khan v. State of M.P.* [(1990) 4 SCC 24 : 1990 SCC (L&S) 580 : JT (1990) 3 SC 295] , a Division Bench considered, after *Direct Recruits case* [(1990) 2 SCC 715, 745, para 47, Prop. ‘B’ : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] , the question whether the subsequent selection would entitle an employee to the benefits of the entire temporary service for seniority. Sawant, J. speaking for the court held (with which we respectfully agree) that when the rules of advertisements and the orders of appointments indicate that the appointment is only for a limited period, subject to recruitment by Public Service Commission, the appointments are only emergency arrangement pending regular selection by the Public Service Commission. Therefore, the entire length of service cannot be counted for seniority.

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34. Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop gap

arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are dehors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority.”

14. At the outset, it is relevant to observe that it was specifically adverted to the petitioner at the very first instance – at the time of ad-hoc promotion to post of Scientist B – that it will not confer on him any right to claim regular promotion or seniority in the higher grade, in terms of the office order dated 27.04.2011. The said office order is reproduced hereunder:

“In pursuance of Ministry of Water Resources Office Order No. 18/9/2006-E.II(Pt.) dated 27th April, 2011, the following Assistant Officers of Central Soil and Materials Research Station, New Delhi are appointed to the grade of Scientist B in pay scale of PB-3, Rs. 15600-39100+GP-Rs.5400, in an officiating capacity, on ad-hoc basis, for a period of one year, with effect from the date of their assumption of the charge of the higher post, or till the posts are filled up on regular basis or until further order, whichever is the earliest.

S/Shri/Ms.

1. S.K. Khullar
2. Virender Kumar
3. Pushplata
4. Dr. Purabi Sen
5. Sudhir Kumar
6. Sandeep Dhanote
7. Gopal Sharan
8. Beena Anand
9. Sanjeev Bajaj
10. V.S. Chauhan
11. K. Prabhakar Ishwar Chandra
12. Ajay Kumar Malhotra
13. Dr. S.N. Sharma

14. Dr. R.P. Pathak
15. V.K. Jain
16. Bharti Chawre (SC)
17. K.H. Kenjadiyappa (ST)

2. The appointments of the above officers to the grade of Scientist B of Central Soil and Materials Research Station is purely ad-hoc, temporary, internal arrangement and will not confer on them any right to claim regular promotion or seniority, etc. in the higher grade.

3. The ad-hoc promotion of the above officers would be subject to the final outcome of the writ petition (civil) number 1483/2005 filed by Union of India in Hon'ble High Court, Delhi against judgement of Hon'ble CAT, principle Bench, New Delhi dated 29.04.2004 in O.A. No. 317/2003."

15. It is observed that pursuant to the order passed by the Hon'ble High Court of Delhi in W.P. (C) No.1483/2005, amendment to the Recruitment Rules were carried out on 23rd November 2010. The relevant Rule 6 (9), 6 (11) and Rule 6 (15) of above-stated Recruitment Rules, which envisage the promotion criterion, read as under:

"6 (9). The effective date of promotion of officers those found eligible for promotion under the Flexible Complementing Scheme shall be the date of approval of the promotion proposals by the Approving Authority of Assessment Board's recommendations but retrospective promotion shall not be admissible in any case."

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6 (11). The officers who are away on deputation shall be given promotion with effect from the date they repatriate and join in the Central Soil and Materials Research Station but proforma promotion shall not apply.

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6 (15). The period spent on deputation or foreign service to another scientific post which helps the officer to acquire scientific experience or field experience and period of study leave or any other leave availed for improving academic accomplishments, maternity leave sanctioned as per Central Civil Service (Leave Rules), 1972, leave of a maximum period of one year sanctioned in continuation of maternity leave as per said leave rules, earned leaves sanctioned for a period not exceeding 180 days at a time [the ceiling under Central Civil Services (Leaves Rules), 1972] shall count as qualifying period for promotion but periods spent on deputation or foreign service to non-scientific posts and period of leave including leave on medical grounds, extraordinary leave availed on personal ground shall not count towards qualifying period.”

16. Further it is evident from the Communication dated 28.08.2014 of Department of Personnel & Training addressed to Ministry of Water Resources, indicating that ad-hoc promotion does not bestow on the person a claim for regular appointment nor the service rendered on ad-hoc basis in the grade concerned can be counted for the purpose of seniority in that grade and for eligibility for promotion to the next higher grade. The said communication has been reproduced hereinbelow:

“Ministry of Water Resources may kindly refer to their proposal on pre-pages.

The proposal has been examined. In this context, it is intimated that as per extant instructions in DoPT OM No. 28036/1/2001-Estt (D) dated 23.07.2001 the ad-hoc promotion does not bestow on the person a claim for regular appointment and the

service rendered on ad-hoc basis in the grade concerned also does not count for the purpose of seniority in that grade and for eligibility for promotion to the next higher grade. Accordingly, the period of ad-hoc service as Scientist 'B' would, therefore, not count as eligibility service for promotion to Scientist 'C'.

17. The perpetual quest for seniority in service is not uncommon.

Ld senior advocate on behalf of petitioner placed reliance on 5-Judges' Constitution bench Judgment of the Hon'ble Supreme Court of India in **Direct Recruit Class II Engineering Officers Assn. vs. State of Maharashtra** (*supra*) to assert that once a incumbent is appointed to a post according to the relevant rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. But we must also bear in mind that, if an appointment is made by way of makeshift arrangement without following the rules of appointment, the period spent on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. The relevant portion of the said judicial authority is extracted hereinbelow:

“The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules

of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause.”

18. The reliance placed by petitioner on **S.Sumayan and Ors. vs. Limi Niri and Ors** (*supra*) case does not come to his aid and assistance, as in facts and circumstances of that case the issue struck before Hon’ble Apex court was qua seniority list where initial appointment letter issued to the appointee’s for the post of Assistant Engineer was challenged at belated stage, and it was held that in absence of contrary rule to prescribed procedure of appointment, the date of appointment shall be considered to reckon the period of officiating service and not the date of confirmation. Whereas, in present case, Recruitment Rule 6(9) categorically prohibits the retrospective promotion, and Rule 6(11) stipulates the date for promotion of officers sent abroad on deputation to be the even date they repatriate and join back the CSMRS. The relevant extract of **S.Sumayan** (*supra*) has been reproduced hereinbelow for sake of clarity:

“38. The challenge appears to us to be belated and in this regard we would endorse the same view as expressed by this Court in *L. Chandrakishore*

Singh v. State of Manipur [(1999) 8 SCC 287 : 1999 SCC (L&S) 1460] which is extracted hereinbelow: (SCC p. 303, para 15)

“15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this Court in *G.P. Doval v. Govt. of U.P.* [(1984) 4 SCC 329 : 1984 SCC (L&S) 767] ”

19. Having regard to the settled position of law as described herein above, we cannot lose sight of the fact that petitioner willfully didn't return back to India from Bhutan when an opportunity was being offered to him to join CSMRS at post of Scientist C but rather chose to file representation for proforma promotion, which as per extant Recruitment Rules is not permissible.

20. It is a matter of record that when the applicant was promoted to post of Scientist-B on ad-hoc basis vide office order dated 27.04.2011, which was duly accepted by petitioner on 03.01.2012, it was categorically mentioned therein that the same did not confer any

right on the latter to claim regular promotion or seniority in the higher grade. If the petitioner was of the view at the relevant time that the ad hoc promotion deserved to be treated as regular promotion, he should have expressed his displeasure by instituting appropriate proceedings at that stage and ought not have accepted the same, which endeavor evidently seems not to have been made. Also, the recruitment rules axiomatically prescribe for 3 years of regular service and not ad-hoc service, for the consideration to promotion to the next higher grade.

21. In view of the foregoing discussion, we are of the considered view that the present writ petition is devoid of merit and the same is accordingly dismissed. Pending application also stands disposed of.

22. Copies of this Judgment be provided to the learned counsel appearing on behalf of the parties electronically and be also uploaded on the website of this Court forthwith.

**SIDDHARTH MRIDUL
JUDGE**

**TALWANT SINGH
JUDGE**

FEBRUARY 10, 2021
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