

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.886 of 2018

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Manju Kumari W/o Raj Kumar Gupta, Posted as Staff Nurse Grade I
Employee No-090891 at Medical Department N.T.P.C

... .. Petitioner/s

Versus

1. The Union Of India
2. The General Manager, N.T.P.C. Ltd Kahalgaon, District-Bhagalpur.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Md. Imtiyaz Hussain, Adv.
For the Respondent/s : Mr. Tuhin Shankar, Adv.

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CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN
ORAL JUDGMENT
Date : 31-10-2023

Heard learned counsel for the petitioner and
learned counsel for the N.T.P.C

2. The present writ application has been filed for
grant of promotion to the petitioner from Grade- W-7 to Grade-
W-8 *w.e.f.* 01.05.2007, the date since when the petitioner is
entitled in the light of the case of ***Union of India & Ors. Vs. K.***
V. Jankiraman & Ors. reported in ***AIR 1991 SC 2010 : 1991***
(4) SCC 109.

3. Learned counsel for the petitioner submits that
the petitioner was entitled for promotion from Staff Nurse
Grade- I (W-7) to Senior Staff Nurse Grade- III (W-8) in the
year 2007 itself but she was neither granted promotion in the
year 2007 nor in 2008 nor in 2009 rather a letter dated

04.03.2010 was issued in which the stand has been taken by the N.T.P.C. that in the year 2007, the petitioner was not granted promotion due to vacancy constant. In the year 2008, the petitioner was not granted promotion due to lack of vigilance clearance and the recommendation of DPC 2008 was kept in sealed envelop, where in 2009, she was granted promotion due to the reason that charge-sheet memorandum has been served on her on 29.07.2009.

4. Learned counsel for the petitioner further submits that the H.R. Department of N.T.P.C. has issued a corporate H.R. Circular No. 660 of 2009 dated 24.08.2009 according to which services of workmen under different grades have been divided into three different clusters. Cluster-A, Cluster-B and Cluster-C.

5. It has also been mentioned in column 1.2 that for promotion from category W-1 to W-8, revised eligibility period is only four years. Counsel further submits that in the Rule of 2009, particularly, in Clause 1.4.1, the promotion subject to vacancy was applicable only from one cluster to another *i.e.* from W-2 to W-3 and W-6 to W-7 and this subject to vacancy has not available for the person as like that of the petitioner whose promotion was due from W-7 to W-8.

6. Learned counsel for the petitioner further submits that in the light of the said circular of 2009, there was no condition imposing that promotion shall be subject to vacancy in category W-7 to W-8. Counsel further submits that admittedly the charge-sheet has been made to the petitioner on 29.07.2009 but prior to that, the petitioner was entitled for promotion as her promotion was due *w.e.f.* 2007 and, therefore, in the light of Full Bench decision of the Hon'ble Supreme Court of India in case of ***Union of India & Ors. Vs. K. V. Jankiraman & Ors.*** reported in ***AIR 1991 SC 2010***, the question of promotion through sealed cover procedure applicable in cases where charge memo were issued to the government servant. Admittedly in the present case, the charge memo has been served upon the petitioner only on 29.07.2009 but according to Rule, the promotion of the petitioner was due either from 1st January or from 1st July.

7. Learned counsel for the petitioner fairly submits that the petitioner has earlier moved before this Hon'ble Court seeking promotion from category W-7 to W-8 in C.W.J.C. No. 5895 of 2011 but the said writ petition was dismissed for default vide order dated 09.11.2015 on the ground that even after granting time for filing reply, the order of this Hon'ble Court

has not been complied, therefore, the writ petition was dismissed due to non-fulfillment of the order.

8. Learned counsel for the petitioner further submits that the writ petition of the petitioner was dismissed due to default without considering the merit. Counsel also submits that he has not suppressed the material fact before this Court and since this case has not been decided on merit, therefore, he has filed the present writ petition, as filing fresh writ petition shall not create any bar in the light of the case of *Alka Gupta Vs. Narender Kumar Gupta* reported in *2010 SCC 141 (Civil Appeal No. 8321 of 2010)*.

9. Learned counsel for the petitioner further submits that it is true that in the departmental proceeding, petitioner was punished. The punishment order she has challenged in the appeal and the said punishment was also modified. But in the present case, she has confined her prayer only and only to grant relief of promotion *w.e.f.* the date of her entitlement *i.e. w.e.f.* 01.07.2007.

10. Learned counsel for the N.T.P.C. raised preliminary objection and submits that the writ petition of the petitioner is not maintainable and is barred according to the principles of *res judicata*, particularly, when on 09.11.2015 *i.e.*

the date of dismissal, the petitioner got knowledge that promotion was granted to her *w.e.f.* 01.01.2015 vide letter dated 13.10.2015 and the said letter was received by the petitioner herself on 14.10.2015.

11. Learned counsel for the N.T.P.C. further submits that since the petitioner has not opted to challenge the said letter before the earlier writ petition and, therefore the point which the petitioner ought to raise, not raised, can't be raised and hence, the writ petition is fit to be dismissed on the preliminary point itself.

12. On the merit, counsel for the petitioner submits that the new circular has come in the year 2009, whereas prior to 2009, the Corporate Personnel Circular No. 95/1982 dated 04.05.1982 was applicable. Counsel submits that in clause 3.6 where it has been mentioned that promotion order will be issued by the concerned personal department as per the vacancies and will be effected from the two standard dates, namely, 1st of January & 1st of July of every calendar year.

13. Learned counsel further submits that the circular of 2009 is not applicable in case of the present petitioner, as clause 2.0 of the corporate H.R. Circular No. 660 of 2009 clearly states that provision of the corporate H.R.

circular shall come into force from DPC 2009. Counsel further submits that from the letter dated 04.03.2010 and the decision of D.P.C. 2008, it is very much clear that at the time of consideration of DPC 2007-08, the vacancies to the post on which the petitioner demanding promotion were not available and as such, the petitioner is not entitled for the promotion in the year 2007-08 and promotion has not been granted by the DPC of 2009 only due to the reason that the day on which her promotion was under consideration, charge-sheet memo has been served upon the petitioner.

14. Learned counsel further submits that the letter dated 13.10.2015 which the petitioner has received on 14.10.2015 has never been challenged at any stage of the proceeding by the petitioner till today and, therefore, it amounts to acceptance of her promotion *w.e.f.* 01.01.2015, as mentioned in the letter dated 13.10.2015.

15. Upon going through the pleadings made by the parties and perusal of the record, the only issue which is to be decided before this Court that the petitioner is entitled for her promotion from which effective date and what shall be the collective effect of shifting the date of promotion and the punishment order imposed against the petitioner.

16. So far as the question of preliminary objection is concerned in the case of *Alka Gupta Vs. Narender Kumar Gupta* reported in *2010 SCC 141* (supra), this Court has drawn a conclusion that question of constructive *res judicata* or question of applicability of Order 2 Rule 2 of C.P.C. shall arise only when the facts has been decided on merit.

17. Here in the present case, particularly, in the earlier writ petition, namely, C.W.J.C. No. 5895 of 2011 which was disposed of on 09.11.2015, it transpires that the said order was a peremptory order and due to non-compliance of the order, the said writ petition was dismissed. It is due to this reason, the preliminary objection raised by the counsel for the N.T.P.C. in the present writ petition is not fit to be accepted in the opinion of this Court.

18. This Court is adjudicating only the issues relating to the effective date of promotion, as admittedly the promotion as already been granted by the respondent N.T.P.C. to the petitioner from letter dated 13.10.2015 *w.e.f.* 01.01.2015. The basic law on the basis of which the petitioner is entitled for promotion is the corporate H.R. circular of 1982 and corporate H.R. circular of 2009. From the corporate circular 1982, particularly, from its clause 3.6, it is very much clear that the

promotion to the employee shall be subject to the availability to the vacancy from the effective date of 1st of January or 1st of July of the year from which any employee is entitled for promotion but the effect of the circular ended by virtue of the new circular which came into existence in the year 2009 in which there was no embargo created for the post of promotion from category W-7 to W-8 and, as such in the opinion of the Court, the petitioner is entitled for promotion in the light of the corporate H.R. circular of 2009 and, therefore, in the opinion of the Court and, particularly, considering the case of ***Union of India & Ors. Vs. K. V. Jankiraman & Ors.*** reported in ***AIR 1991 SC 2010*** (supra), particularly, when the petitioner got entitlement for her promotion in the year 2007 itself which continued in 2008 but promotion was not granted to her only and only due to the reason that vacancy was not available and admittedly during that period of time, no memorandum of charge-sheet was served upon the petitioner.

19. As per the law, the entitlement of the promotion to the petitioner was either *w.e.f.* January 2009 or from July 2009 but the circular has come in the month of August 2009, whereas charge memo has been issued only in the month of September 2009.

20. Considering that aspect of the matter, this Court is of the view that the petitioner is entitled for promotion *w.e.f.* 1st July 2009 and as such, it is directed to the N.T.P.C. to modify the letter dated 13.10.2015 and shift the date of promotion from 01.01.2015 to 01.07.2009.

21. It is made clear that this Court is not interfering in the punishment order passed by the disciplinary authority or/and any subsequent order passed by the appellate authority in the disciplinary proceeding, but only directs the H.R. Department of N.T.P.C. to consider the effect of punishment only after granting promotion to the petitioner *w.e.f.* 01.07.2009 onwards.

22. With this observation, the present writ application stands allowed.

(Dr. Anshuman, J.)

sadique/-

AFR/NAFR	AFR
CAV DATE	NA
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