

23

OA 911/89

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI.

O.A.No. 911/89

New Delhi this 24th day of August, 1994.

Hon'ble Mr. S.R. Adige, Member(A)

Hon'ble Mrs. Lakshmi Swaminathan, Member(J)

1. Smt. S.D. Pasricha w/o Shri G.S. Pasricha,
R/O D-833, DIZ Area, Gole Market,
New Delhi

2. Mrs. R. Mathai, w/o Shri P.G. Mathai,
r/o E-10, Gole Market, New Delhi

....Applicants

By Advocate Shri P.P. Khurana.

Versus

1. Union of India
through Secretary, Ministry of Health,
New Delhi

2. The Director General of Health Services,
Nirman Bhawan,
New Delhi

3. The Medical Superintendent,
Dr. Ram Manohar Lohia Hospital,
New Delhi

4. Mrs. T. Stephen,
Nursing Sister,
Dr. Ram Manohar Lohia Hospital,
New Delhi

5. Mrs. M. Messey,
Nursing Sister,
Dr. R.M.L. Hospital,
New Delhi

.....Respondents

By Advocate Shri Madhav Panikar for official
respondents and Shri B.T. Kaul, Advocate for responden
no. 4 and 5.

JUDGMENT

By Hon'ble Mr. S.R. Adige, Member(A)

In this application, Smt. S.D. Pasricha and
Smt. R. Mathai, both Nursing Sisters in Dr. Ram
Manohar Lohia Hospital have impugned the action
of the respondents in holding a review DPC for
the post of Nursing Sisters in the said hospital
as prayed for
and quashing of the minutes of the DPC dated 5.2.88

and have ^{also} prayed for restraining the respondents from making any changes in the seniority list and restrain -ing the respondents from issuing any order promoting the respondents no. 4 and 5 from any date prior to 1.5.69. and 9.7.69 viz. the dates of their actual promotions respectively.

2. Applicant No. 1 entered Govt. service as a Staff Nurse in Dr. Ram Manohar Lohia Hospital (RML) on 10.4.64 and was promoted as Nursing Sister on 16.12.68. She was confirmed on the said post on 1.2.71. Similarly, applicant No. 2 joined Govt. service as a Staff Nurse on 16.8.63 in Dr. R.M.L. Hospital and was promoted as Nursing Sister on 16.12.68 and was confirmed on 1.2.71. Respondent No. 4 Mrs. T. Stephen joined Govt. Service as a Staff Nurse on 15.6.62 and was promoted as Nursing Sister in the same hospital on 1.5.69 while respondent no. 5 Mrs. M. Messey joined Govt. service as a Staff Nurse on 15.6.62 and was promoted as Nursing Sister on 9.7.69. From the ^{of Nursing Sisters} provisional seniority list/dated 21.10.83 at Annexure-A1, it is clear that applicants no. 1 and 2 were ^{placed} senior to respondents No. 4 and 5.

3. The applicants contend, and this fact is not denied by the respondents that the Recruitment Rules for the post of Nursing Sisters came into existence in 1973, by which it was made a non-selection post, to be filled up 100% by promotion from amongst Staff Nurses with three years' experience. The applicants contend that

prior to these Recruitment Rules, there were no rules in existence, and the authorities in Dr. Ram Manohar Lohia Hospital had filled up the post of Nursing Sisters through selection and although the respondents No. 4 and 5 had joined service as Staff Nurses earlier than the applicants, they have been superseded by the applicants, after being considered by the DPC, as the applicant enjoyed a better record of service. This position continued from 1969 onwards, but upon pressure being brought to bear by the respondents no. 4 and 5, the official respondents had been compelled to hold a review DPC on 5.2.88 i.e. after a passage of nearly 19 years, behind the back of the applicant in a secretive manner, and to grant promotion to the respondents as Nursing Sisters with effect from a date earlier to the promotion of the applicants i.e. 16.12.68. Further more the respondents had revised their seniority list dated 21.10.83 to the prejudice of the applicants without giving them an opportunity to represent, which was illegal, arbitrary, malafide and violative of Articles 14 and 16 of the Constitution.

4. The official respondents have resisted the contention of the applicants and state that prior to the coming into force of the Recruitment Rules, 197 the post of Nursing Sister was proposed to be filled up 100% by promotion on the basis of selection. However, that proposal was not accepted and the Recruitment Rules, 1973 required the post to be filled up 100% by promotion on the basis of seniority-cum-fitness (non-selection). They contend that as

respondent No.4 graded 'average' in 1968, she could have been promoted to the post of Nursing Sister on the basis of her seniority if the provisions, contained in the Recruitment Rules, notified subsequently were there. In this connection, attention has been drawn to letter dated 29.8.86 from the Directorate General of Health Services to the Medical Superintendent, Dr. Ram Manohar Lohia Hospital, New Delhi (Annexure-R1) which contained the extracts from the notings of the Health Ministry on the representation filed by the respondent No.4 against her supersession as Nursing Sister. From those notings, it would appear that the Health Ministry had noted that pending notification of Recruitment Rules, ^{the} post of Nursing Sister was sought to be filled up on the basis of proposed Recruitment Rules on a regular basis which required promotion from the Staff Nurse by selection. The noting goes on to state that the DFC constituted for the purpose should have followed the procedure in making recommendations which required that the number of officers to be considered should ordinarily extend to 5 or 6 times, the number of vacancies expected to be filled within a year. The officers in the field of selection, excluding those considered unfit for promotion by the DFC were to be classified by the DFC on their assessment, as 'outstanding', 'Very Good' and 'Good' on the basis of their records of service. Thereafter, a panel was to be prepared by the DFC by placing the names of 'Outstanding' followed by 'Very Good' and 'Good' and maintaining interse seniority of the officers belonging to each of the three categories. The noting further states that the respondent No.4 was recommended by the DFC for promotion as

Nursing Sister and as such she was not categorised unfit for promotion. As the DPC record of 1968 was not available, it was not possible to state whether respondent No. 4 had been categorised as 'Outstanding', 'Very Good' or 'Good', but from the assessment sheet on the file, it could be assessed that the persons who had superseded the respondent No. 4 could not have been categorised more than 'Good' in their final assessment. Accordingly, the Ministry directed the DGHS to review the selection and take a final view in the light of above observations. Respondent No. 4 has also filed her reply in which it has been contended that she had been superseded in 1968 itself and has been representing right from then for correcting the wrong done. She has averred that the promotions to the post of Nursing Sisters were being made on non-selection basis, and she being senior to the applicants ought to have been promoted earlier than the applicants when there was nothing adverse against her. She has also contended that not only did the two applicants supersede her but two others Staff Nurses namely Miss O. Benjamin and Mrs. I. D. Candy had also superseded her, ^{but as} and those two had no objection to the correction of the wrong done to her. She has denied having ^{put in} any pressure upon respondents No. 1 and 2 to reopen the matter after such a long time. She has denied that her grading was only average while the grading of two applicants and other two persons were 'Good' or 'Very Good' or that such grading was the criteria for promotion. It has also been denied that the promotion in the year 1968 was on selection basis and it has been alleged that it was done only to help the

applicants and the two other persons at the cost of respondent No. 4 and was, therefore, malafide. Hence it has been claimed that the O.A. is fit to be rejected. Similar averment has also been made by respondent no. 5 in her reply.

5. Admittedly, the Recruitment Rules for the post of Nursing Sisters were notified in 1973. Neither side has been able to show us any rule or administrative instructions governing promotion to the post of Nursing Sisters which held the field prior to that date. The official respondents in reply to paragraph 4.6 of the O.A. have stated that prior to ^{the} notification of the Recruitment Rules in 1973, the posts in question were proposed to be filled 100% by promotion on the basis of selection, but those proposals were subsequently not approved as the Recruitment Rules notified in 1973 ultimately made the post of Nursing Sister a non-selection post. Under the circumstances, if the DPC, in the absence of any rule or administrative instructions on the subject, and in the background of the fact that the posts of Nursing sisters were proposed to be filled on selection basis, at the time the preparation of recruitment rules was under consideration, did resort to the selection method in 1968, and allowed applicants no. 1 and 2 to supersede respondents no. 4 and 5, the respondents cannot be said to have acted irregularly, arbitrary or malafidely. Further more, it is not the case of the respondents that the promotion of the

28

applicants as Nursing Sisters in 1968, on the recommendation of the DFC was on adhoc basis or was a purely stop-gap-arrangement made in administrative exigency till such time as the posts were regularly filled up after the recruitment rules were finalised and notified. In fact, the appointments of applicants no. 1 and 2 as Nursing Sisters in 1968 were regular appointments and they were also subsequently confirmed as Nursing Sisters in February, 1971.

6. It was contended during hearing by respondents' counsel Shri Kaul that even in 1969, the posts of Nursing Sisters were filled up on seniority-cum-fitness basis and in the absence of the Recruitment Rules, the normal method for filling up the posts by promotion is by seniority. It was further urged by Shri Kaul that merely because the Recruitment Rules originally proposed that the posts be filled up on selection basis does not vest the draft rules with the status of the administrative instructions, and in this connection, he has relied on the ruling 'Amar Chand Vs. Union of India'- 1986(3) SLJ 160. There is, however, no evidence to establish that these posts all along were filled up on non-selection basis and the procedure followed in 1968 was a departure from the extant procedure. In fact, an examination of the provisional seniority list of Nursing Sisters dated 21.10.83 (Annexure-A1) indicates that prior to mid 1973, the seniormost Nursing Sisters

30

were not necessarily those with the greatest length of service, from which it can be inferred that there may have been an element of selection, involving supersession in making promotion; even then, in the absence of any rule or administrative instructions on the subject relating to the period 1968, the DFC was competent to evolve its own procedure, provided the same was reasonable, in keeping with the general guidelines on the subject, and as per those guidelines, promotion through selection is a perfectly acceptable method for making promotion, to encourage good performance and ^{merit} ~~merit~~.

7. Shri Kaul is on firmer ground when he argued that respondent No. 4 had been representing against her supersession from 1969 itself, on which the official respondents took no action till 1988, but there is considerable force in applicant's counsel Shri Khurana's contention that upsetting the seniority list of 1968 by holding a review DFC, without giving the applicants an opportunity of being heard, cannot be perceived merely ^{as a} righting of a wrong, but is wholly unreasonable and violative of the principle of law laid down in K.R. Mudgal Vs. R.P. Singh-1986(4) SCC 531, wherein the Hon'ble Supreme Court has held that satisfactory service conditions postulate that there is no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years. It is essential that anyone who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of sense of insecurity in the minds of the Government servants,

there would also be administrative complications. A Government servant who is appointed to any post ordinarily should at least after a period of three or four years of his appointment be allowed to attend to the duties attached to the post peacefully and without any sense of insecurity. The judgment in Mudgal's case (Supra) has quoted the judgment in M.L.Cecil D'Souza Vs. UOI -1976(1)SCC 599, wherein the same view has been expressed that one of the essential requirements of contentment and efficiency in public services is a feeling of security. While it is difficult to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after the lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Shri Kaul has sought to distinguish the present case from Mudgal's case (Supra) on the ground that respondent No. 4 did not sleep over her right but kept representing all along, unlike in Mudgal's case. In our view the ratio in Mudgal's case is fully applicable in the present case. Further more, we note that not only ^{has} the applicants' seniority ^{been} disturbed after a number of years, but this has been done without even giving them an opportunity to show cause and be heard in the matter. The 1973 Recruitment Rules, which provide for promotions based on seniority-cum-fitness (non-selection) procedure, have been applied retrospectively by a review DPC in 1988 to nullify the recommendations of a regularly constituted DPC which had recommended

the promotion on selection basis in 1968, without giving any opportunity to the party¹⁶⁴ affected by the decision, of being heard in the matter, and¹⁶⁵ nullifying that decision, the seniority list has also been revised.

8. Shri Kaul has relied upon the ruling in 'K.P. Srinivasan Vs. The Financial Adviser (Mysore)-1970 (4) SLR 166 in support of the contention that when posts were available, the promotion of the junior persons, and exclusion of the senior persons was illegitimate and indefensible, and ¹⁶⁶is a normal process by which promotion is to be made, ¹⁶⁷to promote the seniors ¹⁶⁸and then ¹⁶⁹to juniors. As stated above, in the absence of any rule or administrative instructions on the subject, the official respondents in 1968 had adopted the selection method, and respondents No. 4 and 5 have nowhere alleged that they were not considered at the time the selections were made. They were, however, superseded by applicants no. 1 and 2 on the basis of a conscious decision and the facts of Srinivasan's case (Supra) ¹⁷⁰are distinguishable with those in the present case. The ruling in N. Rudrayadha Vs. State of Mysore-AIR 1961 Mysore 247 also does not avail the respondents in the present case.

9. Shri Kaul also relies on the ruling in 'State of Madhya Pradesh Vs. Srikanth Chaphekar'-1992(4) SCC 689, which lays down that the Tribunal should not substitute itself ¹⁷¹from the DPC, and it is not the function of the Tribunal to assess the service record of the Government Servant and to order on that basis. Where the Court/Tribunal

comes to the conclusion that a person was considered for promotion or the consideration was illegal, then the only direction which can be given is to reconsider his case in accordance with law. In that case, Shri Chaphekar, Assistant Director, Town & Country Planning Office, Madhya Pradesh was considered along with other Assistant Directors in March, 1981 for promotion to the post of Deputy Director, but was not found fit for promotion on the basis of adverse remarks in his service record for the years ^{1977-78 and 1978-79}. His representation against the adverse remark was accepted and the remarks for the year 1978-79 were completely expunged and for the year 1977-78 were partially expunged. In May, 1984 he represented for being considered for the post of Deputy Director and was promoted as Dy. Director in January, 1986. He filed an application before the M.P. Administrative Tribunal seeking promotion to the post of Dy. Director w.e.f. 1981 when his junior was promoted. The Tribunal vide order dated 21.2.92 allowed the application, against which the State of Madhya Pradesh filed a SLP before the Hon'ble Supreme Court, who by their order allowed the appeal and set aside the M.P. Administrative Tribunal's order dated 21.2.92 holding inter alia that the Tribunal should not ^{have} substituted itself ^{the} for DFC and ^{directed} recommended the respondents ^{in that applicant} for promotion from the date his junior was promoted as Deputy Director. This judgment also does not avail the respondents because the question here is not one of the Tribunal substituting ^{ing} itself ^{the} for DFC but whether the impugned action of the respondents is reasonable, non-arbitrary and in accordance with Articles 14 and 16 of the Constitution, or not.

10. In our view, having regard to the facts and circumstances of the case and the principle of law laid down in Mudgal's case (Supra), the action of the official respondents in holding the review DPC in 1988 and applying the 1973 Recruitment Rules which provide promotion based on seniority-cum-fitness (Procedure) retrospectively to nullify the recommendations of a regularly constituted DPC which had recommended promotion on selection basis in 1969, and after nullifying that decision, revising the seniority list without giving any opportunity to the affected party to show cause in the matter, cannot be sustained in law, as the same is unreasonable, arbitrary and violative of Articles 14 and 16 of the Constitution.

11. In this connection, it must be remembered that in the case 'The Direct Recruitment Class II Engineering Officers Association & others Vs. State of Maharashtra & others'-AIR 1990 SC 1607, a Constitution Bench of the Hon'ble Supreme has held that if the initial appointment was made deliberately in dis-regard to the rules and the incumbent was allowed to continue on the post for well 15 or 20 years without reversion and still the date of regularisation of service in accordance with rules, the period of officiating service has to be counted towards seniority. The applicants' case if anything is even stronger, in as much as their appointments were made not on officiating basis but on substantive basis as Nursing Sisters, and not in dis-regard to any rule, and have continued as such for well ~~20~~^{near 20} years.

12. In the result, this application succeeds and is allowed. The impugned action of the respondents

in holding the review DFC in 1988 and revising the seniority list of Nursing Sisters consequent to review DFC's recommendations, is quashed and set aside. The seniority of Nursing Sisters as it stood before the review DFC met in 1988 and its recommendations, is restored. No costs.

Lakshmi Swaminathan
(LAKSHMI SWAMINATHAN)
MEMBER (J)

S.R. Adige
(S.R. ADIGE)
MEMBER (A)

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