

O.A. No. 245/90

Dated 26.4.1995

HON'BLE MR. S.R. ADIGE, MEMBER (A)

HON'BLE MRS. LAKSHMI SWAMINATHAN, MEMBER (J)

Shri Krishan Kumar
S/o Shri Khushi Ram,
R/o Flat No.11, Vidhayapath Centre,
Katwara Serei, New Delhi-110016.
(By Advocate Shri Shyam B abu) APPLICANT

VERSUS

1. Delhi Administration,
Delhi through its
Chief Secretary,
5, Sham Nath Marg,
Delhi.
 2. Commissioner of Police,
Police Headquarters,
Indraprastha Estate,
New Delhi-110002.
 3. Dy. Commissioner of Police,
Crime Branch, Police Hqrs.,
Indraprastha Estate,
New Delhi.110002.
- (By Advocate Shri Rajindra Pandita) RESPONDENTS

JUDGEMENT

BY HON'BLE MR. S.R. ADIGE, MEMBER (A)

In this application, Shri Krishan Kumar, ASI (Ministerial), Delhi Police has prayed ^{for} a direction to the respondents to promote him as ASI w.e.f. 4.12.81, the date when his juniors were promoted with all consequential benefits.

2. The applicant joined service as a constable on 1.4.67 and was promoted as Head Constable (Ministerial) on 1.4.1970 and was confirmed w.e.f. 20.10.73. In September, 1976 disciplinary action was initiated against him on the charge that he visited the residence of one Shri Praveen Kumar on 2.1.76 and again on 4.1.76, ^{claiming} ~~claiming~~ to be an Inspector/Sub - Inspector of Police and misbehaved with Shri Praveen Kumar's family members, and demanded Rs.200/- as illegal gratification from him, in respect of a complaint alleged to be pending for inquiry against him.

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The applicant was suspended by the order dated 14.4.76, but was reinstated by order dated 13.1.77. The departmental proceeding culminated in an order of dismissal on 9.3.78 and the appeal was rejected on 3.6.78. A Revision petition was also rejected. The applicant challenged his dismissal order in the Delhi High Court, and upon the constitution of C.A.T. in November, 1985, the writ petition was transferred to the C.A.T., Principal Bench, New Delhi and was renumbered T-721/85. Judgement in that case was delivered by the Tribunal on ^{17th} September, 1987, setting aside the dismissal order passed against the applicant as confirmed by the appellate and revisionary authorities. The applicant was reinstated ^{vide order dated} ~~on~~ 20.11.87, and the suspension period was treated as period on duty for all purposes (Annexure 'C'). On 16.12.87, the applicant represented for his promotion as ASI (Ministerial) w.e.f. 4.12.81, i.e. from the date his juniors were so promoted (Annexure 'E'). The respondents by order dated 17.3.88 (Annexure 'G') informed him that his case for promotion has been considered by the DPC, but after evaluation of his service records, the DPC found him unfit for promotion on 30.11.81, 3.3.82, 11.11.85, 20.10.86 and 15.12.87 on the basis of overall assessment. Against that order, the applicant represented to the Commissioner of Police on 16.12.88 (Annexure 'H'), but the representation was rejected on 14.9.88 (Annexure 'I') and thereafter by letter dated 26.12.88 (Annexure 'J'), the applicant was informed that the DPC again considered his case for promotion on 1.12.88, but did not recommend his case on the basis of his overall assessment.

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3. Thereafter, the applicant filed CCP No. 10/89 containing that though he had been reinstated in service by the respondents by the order dated 20.11.87, he had not been given all the consequential benefits, and had not been put back in the same position before his dismissal from service on 9.3.78 alongwith his entitled benefits, interests and privileges accrued to him during the entire period including payment of back wages, promotion, seniority, etc. The Tribunal by its order dated 29.8.89 discharged the contempt petition, ^{in observing} inter alia

"The respondents have contended that these benefits are not admissible to the petitioner. Disputed question of law and fact arises for consideration and these cannot be gone into while discharging the contempt of court petition. In case the petitioner feels that he entitled to the various allowances mentioned above, which have not been given to him by the respondents, he will be at liberty to file a fresh petition in the Tribunal in accordance with law if so advised".

4. Eventually the applicant was promoted as ASI (Ministerial) w.e.f. 23.6.89 (Annexure L).

This prayer is now for promotion w.e.f. 4.12.81, the date when his juniors were so promoted with all consequential benefits.

5. We heard Shri Shyam Babu for the applicant and Shri Pandita for the respondents.

6. Shri Pandita raised the initial objection that consideration of this O.A. was barred by Res Judicata. He averred that in CCP No. 10/89

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alleging non-implementation of the judgement dated September, 1987 in case No. T-721/85, the applicant had specifically prayed for promotion and seniority and in the judgement dated 29.8.89 the said CCP was disposed of with the following observations:-

"Viewed in this light, we are of the opinion that the respondents have substantially complied with the judgement by reinstating the petitioner, by giving salary and allowances due to him and by considering him for further promotions. We do not wish to express any views on the grievance of the petitioner regarding non-payment of washing allowance, cycle allowance, children allowance extra pay with effect from 1979 onwards, house rent allowance etc. The payment of these allowances would depend on the relevant rules which have not been placed before us. It is also not clear whether these allowances would be admissible even if the employee concerned has not actually worked during the relevant period. The respondents have contended that these benefits are not admissible to the petitioner. Disputed questions of law and fact arise for consideration and these cannot be gone into while deciding a contempt of court petition. In case the petitioner feels that he is entitled to the various allowances mentioned above which have not been given to him by the respondents, he will be at liberty to file fresh application/ applications in the Tribunal in accordance with law, if so advised".

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7. Shri Pandita, therefore, stated that the applicant's claim for promotion and seniority had already been considered by the Tribunal, and the Tribunal could not reconsider the same. In this connection, he relied upon the judgement in B.R.K. Gauri Shanker Vs. Director, Signals and Telecom Engineers, S.E. Railway, 1994 (27)ATC 258.

8. On the other hand Shri Shyam Babu for the applicant argued that Res Judicata applied only where the relief claim had been finally adjudicated upon. In the order dated 29.8.89 on the CCP the Tribunal had expressly refrained from recording the finding on the prayer for seniority and promotion, as was clear from a plain reading of the order quoted above, so much so that the applicant had been given liberty to file a fresh O.A. if so advised, in ^{the background of} ~~accordance with~~ his claims for various allowances flowing from his reinstatement.

9. We have considered the issue carefully, ^{in view of} that the judgement dated September, 1987 in T-721/85 was silent on the claim of ante-dated seniority and promotion, following reinstatement. The CCP No. 10/89 was only for implementation of the Tribunal's judgement dated 7.9.87. In fact in para 9 of the order dated 29.8.89 in CCP No. 10/89, the Tribunal ^{saw} ~~not~~ force in the applicant's contention that his mere reinstatement, without being put into the same position with all consequential benefits, would not amount to sufficient compliance of the Tribunal's judgement, but because they could not enlarge on the scope of the CCP by adjudicating upon the ^{arrival} ~~arrival~~ contention^s of both parties as regards the various

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benefits flowing from the judgement, which had not been specified, they made no observations on this claim which is now agitated in the present O.A. Hence it cannot be said that the order dated 29.8.89 in CCP No.10/89 operate as Res Judicata upon this Tribunal in considering the relief prayed for in this O.A., and hence this objection raised by Shri Pandita is rejected.

10. Coming to the merits of the case the main ground taken by the applicant is that consequent to setting aside of the dismissal by the Tribunal Judgement of 9/87, it is as if he was never punished or dismissed, more so as the suspension period was directed to be treated as on duty for all purposes. Thus upon the consequent reinstatement in service, there was no material on record which could justify his not being recommended for promotion by the DPC and hence it is evident that the DPC illegally took into account his dismissal, in forming the opinion that the applicant was unfit for promotion on 30.11.81, 3.3.82, 11.11.85, 20.10.86 and again on 15.12.87. The applicant states that he was communicated adverse remarks only in 1976 and contends that the adverse remarks recorded for one year could not have been so lasting as to hamper his chances for promotion right from 4.12.81 till 23.6.89. It is also urged that the DPC which met on 30.11.81, 3.3.82, 11.11.85 and 20.11.86 was vitiated for the reasons that when the applicant was considered by this DPC, ^{as} he was not in the Police Department, having been dismissed on 9.3.78 and no DPC could select a person who stood dismissed. Hence it has been argued that when he was reinstated vide

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judgment dated September, 1987 he ought to be promoted with effect from the date his junior Shri Raj Kumar was promoted viz. 4.12.81 as he fulfilled the criteria for promotion as laid down in the Delhi Police (Promotion and Confirmation) Rules except that he could not appear for the professional test held in August, 1981 for no fault of his own as he stood dismissed at that point of time.

11. On the other hand, the respondents in their reply have contended that the Tribunal's judgment of September, 1987 set aside the dismissal order only on technical grounds and nowhere mentioned that the adverse remarks/charges against the applicant stood expunged. Hence, it is argued by them that nothing illegal was committed by the DPC even if it did take into consideration the charges against the applicant, in forming their opinion that the applicant was unfit for promotion right upto 23.6.89.

12. In this connection, we had asked the respondents to produce the relevant DPC proceedings and also the applicant's ACR for our inspection, which they have done. We note that in the applicant's CR for the period 1.4.75 to 31.3.76 recorded on 25.4.76 by the reporting Officer, against the column whether he has been reprimanded for indifferent work, or for other cases, it has been noted that he was placed under suspension w.e.f. 14.4.76 as a result of a complaint of corruption received against him in January, 1976 and he is facing departmental inquiry. Against the column on integrity it is stated that it is doubtful and in the column on fitness for promotion to the rank of ASI, it is stated that he is not yet fit. He is summed up as an officer of doubtful integrity and his overall grading is given as 'C'. Those remarks have been accepted by the reviewing

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Officer on 5.5.76. These adverse remarks were communicated to the applicant and received by him on 10.5.76 vide his signed receipt dated 12.5.76, but no averment has been made by him that he represented against those adverse CRs. Again for the period 1.4.76 to 31.8.76 similar adverse remarks were recorded describing him to be a person of doubtful integrity with overall grading of 'C' and for the period 1.9.76 to 31.3.77 it was noted that he remained under suspension from 14.4.76 to 14.1.77 and hence no remarks were being recorded. The remarks for both these periods were also communicated to and received by him but he did not represent against those remarks either. No doubt, by the Tribunal's judgment dated 7.9.87 in T 721/85 setting aside the applicant's dismissal order dated 9.3.78, the applicant was reinstated in service w.e.f. 9.3.78 and his period of suspension from 14.4.76 to 13.1.77 was ordered to be treated as on duty for all purposes, but the adverse remarks referred to above still remained in his CR, and at no stage were expunged, modified or diluted. The Tribunal's judgment dated 7.9.87 also did not record any finding on the merits of the charges against the applicant and set aside the dismissal order only on the grounds of legal and procedural flaws. From 1.4.77 upto 26.11.87 no CRs of the applicant were recorded as he was reinstated only by orders dated 20.11.87. For the period 26.11.87 to 31.3.88 he received 'Very Good' remarks and his work was categorised as 'A'. Again for the period 1.4.88 to 31.3.89 the applicant earned 'Very Good' remarks and was placed in category 'A', but the DPC which met on 30.3.89 did not approve the applicant's promotion to ASI's

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grade on the basis of his overall assessment, presumably because they had only one year's Good remarks (1987-88) to go upon, after the earlier adverse remarks. After getting the applicant's remarks for the year 1988-89 also, it appears that the respondents reconsidered the applicant's case and the DPC recommended his promotion as ASI w.e.f. 23.6.89.

13. Shri Shyam Babu has argued that as the applicant remained out of duty from 14.4.76 upto 20.11.87 his CRs could not be written for that period for no fault of his own and his work for this period must, therefore, be taken as satisfactory. In this connection, he relies on the ruling in O.A.No.495/92 Ranbir Singh & others Vs. UOI & others decided by the Tribunal on 15.10.92. In that case, Ranvir Singh was a Head Constable whose services were terminated w.e.f. 10.2.78. He challenged the termination order and eventually he was reinstated in service on 9.8.89. The intervening period was treated as spent on duty. He was not promoted to the higher post of ASI on the ground that taking into account the totality of his record, no assessment can be made about his performance in the DPC held during 1986, 1987, 1988, 1989 and 1991 when he was out of service. Ranbir Singh had contended that when he was not in service nearly 11 years and no reports have been recorded about his conduct and performance for the above periods, the decision of the DPC/respondents in denying him promotion was arbitrary. In Ranbir Singh's case (Supra) reliance has been placed on the case of Smt. Neelam Lata Goswami Vs. UOI in O.A.No.137/91, decided on 31.10.91, in

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which the Tribunal had held that the DFC should consider the period during which Smt. Neelam Lata Goswami had remained out of service as fit for promotion, from the point of view of performance, and then her suitability should be judged taking into account the other factors mentioned in ^{Rule 17(1)} Delhi Police (Promotion and Confirmation) Rules. In Ranbir Singh's case also the Tribunal held that where there were no reports for the period the applicant was out of service and he had been reinstated with retrospective effect, it would not be appropriate to take the performance of such an employee during such an aforesaid period as adverse.

14. However, ^{in the case of} V. Kashyap and another Vs. Indian Airlines & others - JT 1994(3) SC 246, the Hon'ble Supreme Court has taken a different view. In that case, the two appellants were appointed as Deputy Directors (Finance) on promotion vide notification No. 14 of 1991. The validity of the same came to be challenged on the ground that while promoting the appellants, the guidelines were not adhered to. These guidelines laid down that in judging the suitability of the persons within the zone of consideration, the last three years Annual Performance Appraisal (APR) would have to be considered. In other words, the APRs for the years 1987-88, 1988-89 and 1989-90 were to be considered. However, as the APRs for the years 1988-89 and 1989-90 were not written as the then incumbent had resigned in February, 1990, the respondents promoted the appellants after considering the APRs of the three preceding available years i.e. 1985-86, 1986-87 and 1987-88. The Delhi High Court held that this was not permissible because that would amount to adding the word 'available' in the guidelines, but the Hon'ble Supreme Court set aside the Delhi High Court's decision

holding that the consideration of the APRs of the years 1985-86, 1986-87 and 1987-88 which were the APRs of the three preceding available years, had to be taken as a due compliance of the guidelines.

15. In the case before us the applicant is claiming promotion w.e.f. 4.12.81. Taking the preceding five years record, the applicant's CRs for the years 1976-77 to 1980-81 would be relevant. For the year 1976-77, the applicant earned an adverse entry (for the period 1.4.76 to 31.8.76) as being a person of doubtful integrity, which was communicated to and received by him, but against which no representation was filed. Hence these remarks stand. He was under suspension and then out of service from 14.4.76 till he was reinstated with retrospective effect on 20.11.87. Shri Shyam Babu relying upon Ranbir Singh's case (Supra) would have us treat the applicant's record of service for the period 1977-78, 78-79, 79-80 and 80-81 as satisfactory, although the applicant was out of service, performed no work and no CRs were recorded. He has argued that if on that ^{date} ~~date~~ the DPC does not find the applicant fit for promotion, they should consider the next ^{successive} dates on which he became eligible for promotion and conduct, similar exercise, and even if, ^{in the process,} for the entire block of 5 preceding years, the applicant was out of service and no remarks were recorded, there being no performance to evaluate, his record should be treated as satisfactory for the purposes of promotion. Anything else according to Shri Shyam Babu would be arbitrary and hence hit by Articles 14 and 16 of the Constitution.

16. However, in the background of the Hon'ble

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Supreme Court's ruling in Kashyap's case (Supra) which we are bound to follow, the CRs for the preceding available years is what has to be taken into account. One CR which was available was for the year 1976-77 which, as stated above, was adverse. Even if for arguments sake that CR is disregarded, in the background of the Tribunal's judgment dated 7.9.87, we have to note that no CRs were thereafter available upto 4.12.87. The next CR which became available for the year 1987-88, was 'Very Good', but the respondents cannot be said to have acted unreasonably or arbitrarily or in violation of Articles 14 and 16 of the Constitution in wanting to satisfy themselves that the applicant's work and conduct continued to be good, and accordingly they wanted for another year and when they found that the applicant earned 'Very Good' remarks for the year 1988-89 too, in the light of the CRs for the preceding ^{available} years, they promoted him w.e.f. 23.6.89.

17. Viewed in this ^{perspective}, we are unable to see any legal infirmity in the action taken by the respondents which warrants our interference. This application fails and is dismissed. No costs.

Lakshmi Swaminathan
 (LAKSHMI SWAMINATHAN)
 MEMBER (J)

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 (S.R. ADIGE)
 MEMBER (A)