

14-11-2007

Mr. Vinod Broyal, Proxy Counsel for
Mr. Virender Lodha, Counsel for applicant
Mr. Kunal Rawat, Counsel for respondents.

Heard learned Counsel for the
parties.

Order Reserved.

(J. P. Shukla)
M(A)

(M. L. Chauhan)
M(J)

16.11-07

order pronounced today
in the open court by the
afore said Bench

16/11/07.
C.O.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

Jaipur, this the 16th day of November, 2007

ORIGINAL APPLICATION No.561/2002

CORAM:

HON'BLE MR.M.L.CHAUHAN, JUDICIAL MEMBER
HON'BLE MR.J.P.SHUKLA, ADMINISTRATIVE MEMBER

Suneel Kumar Pathak,
aged about 35 years,
s/o Shri R.D.Pathak,
r/o Q.No.474/1,
MES Officers Enclave,
Pratap Lines,
Jaipur Cant. Jaipur

.. Applicant

(By Advocate: Shri Vinod Goyal, proxy to Shri Virendra Lodha)

Versus

1. Union of India
through the Secretary
to the Government of India,
Ministry of Defence,
New Delhi.
2. Engineer-in-Chief,
Engineer-in-Chief's Branch,
Army Headquarters, Kashmir House,
DHQ P.O., New Delhi.
3. Union Public Service Commission
through the Secretary, UPSC,
Dholpur House,
Shahjahan Road,
New Delhi.

.. Respondents

(By Advocate: Shri Kunal Rawat)

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O R D E R

Per M.L.Chauhan, M(J)

The applicant has filed this OA thereby praying that action of the respondents denying promotion to the applicant in the Grade of Surveyor of Works (SW) vis-à-vis similarly situated persons in the year 1995-96 may be declared null and void and the same be quashed and set-aside and also direct the respondent to promote the applicant on the post of Surveyor of Works from the panel of the year 1996-97 and assign him appropriate seniority from the year 1996-97 with all consequential benefits.

2. Briefly stated, facts of the case are that prior to joining the Military Engineering Service (MES) on the post of Assistant Surveyor of Works (ASW), the applicant was serving in the Central Water Commission (CWC) on the post of Assistant Director/Assistant Executive Engineer w.e.f. 25.1.1991 in the pay scale of Rs. 2200-4000 under the Ministry of Water Resources. Since there were better promotion avenues in the MES in comparison to the CWC, the applicant got his selection on the post of ASW in MES and joined the post on 10.11.93. The next channel of promotion from the post of ASW is SW, for which incumbent must have completed 4 years of regular service as ASW and should have passed the final examination of the Institution of Surveyors (India) or equivalent. It is stated that

the applicant completed 4 years' regular service on 25.1.95 and he has also passed the final examination of Institution of Surveyors (India) in the month of March, 1996. Therefore, he became eligible for promotion to the post of SW in the month of April, 1996, but the applicant was denied promotion on the post of SW in the panel of the year 1996-97 and 1997-98. The applicant has also given instances of certain persons who were promoted from the post of ASW to SW without completing 4 years of service as on 1.1.2001 whereas case of the applicant was not considered in the year 1996-97 and 1997-98 despite the fact that he has put in 4 years of service in the grade. Thus, according to the applicant, it is a case of discrimination.

The applicant has further stated that earlier he has filed OA No.404/95 before the Guwahati Bench of the Tribunal which was decided vide order dated 10.1.2000 with a direction to the respondents to consider representation of the applicant within one month from the date of receipt of the order. Accordingly, representation dated 21.3.2000 was filed by the applicant and the same was rejected vide order dated 19.6.2000. Thereafter the applicant submitted another representation dated 7.11.2000. Subsequently, the applicant was transferred from Shillong to Jaipur in June, 2001 and after joining at Jaipur notice for demand of justice was given by the applicant through

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his counsel but with no result. Therefore, the applicant filed OA No.232/02 before this Tribunal which was withdrawn with liberty to file fresh OA and thereafter the applicant filed the present OA before this Tribunal along with application for condonation of delay.

3. Notice of this application was given to the respondents. The respondents have filed reply. In the reply, the respondents have stated that as per the prescribed recruit rules published under SRO No.37 dated 25.1.85, ASW with 4 years' regular service in the grade and having passed the final examination of the Institution of Surveyors (India) are eligible for promotion to the grade of SW. The applicant appeared in the final examination during the year 1995 and the result was declared in the month of March, 1996. It is also stated that the applicant completed 4 years of regular service in the year 1997. Accordingly, he was promoted on 23rd November, 98 in the grade of SW. According to the respondents, the services rendered by the applicant in the capacity of Assistant Director/Assistant Executive Engineer in CWC under the control of Ministry of Water Resources from 25.1.91 till 9.11.93 cannot be counted for the purpose of promotion to the grade of SW as per the provisions contained in SRO 37 dated 25.1.85.

The respondents have also filed reply to the Misc. Application No.24/03 for condonation of delay thereby stating that there is inordinate delay on the part of the applicant in filing the OA.

4. The applicant has filed rejoinder reiterating the submissions made in the OA.

5. We have heard the learned counsel for the parties and gone through the material placed on record.

6. We are of the view that the applicant is not entitled to any relief for more than one reason as stated hereinbelow.

As can be seen from the pleadings of the parties, the main grievance of the applicant is that service rendered in the capacity of Assistant Director/Assistant Executive Engineer in the CWC alongwith service rendered by the applicant in the capacity of ASW should be counted for promotion to the post of SW in terms of provisions contained in SRO 37 dated 25.1.85 and since the applicant has completed 4 years service and also passed the final examination of the Institution of Surveyors, he was entitled to be considered for promotion to the post of SW vide panel of the year 1996-97 and 1997-98. Now the question which requires our consideration is whether the services rendered by the applicant in CWC can be

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counted for the purpose of eligibility for promotion to the post of SW in terms of the aforesaid SRO/Recruitment Rules. Further, question which requires our consideration is whether the applicant is entitled to the relief as prayed for especially when he has not impleaded the persons who have been empanelled in the year 1996-97 and 1997-98 and will certainly be affected in case relief is granted to the applicant. Further question also requires our consideration is whether the present OA is barred by time and the same is liable to be dismissed, even if the applicant has made out a case on merit.

First of all we wish to consider the question of limitation raised by the respondents. The applicant has also filed written arguments. In Para 4, it is stated that immediately after joining new department, the applicant applied to the Head of Department viz. Engineer-in-Chief (through proper channel) for counting of his previous service for various benefits vide letter dated 5.1.94. However, due to bureaucratic hurdles, the said application of the applicant remained un-disposed of for the year altogether. From the material placed on record and the averments made in the application for condonation of delay, it is also clear that the applicant for the first time made a representation to the Secretary, Ministry of Defence vide letter dated 18th May, 98 against non-consideration of his name for promotion to the post of

SW followed by reminder when his case was once again not considered for promotion in the panel of 1997-98. According to the applicant, reply to the representation was only received vide letter dated 6.8.99 intimating therein that the past services cannot be counted for seniority. Thereafter the applicant filed OA No.404/99 in CAT-Guwahati Bench which was disposed of on 10th January, 2000 with direction to consider representation of the applicant afresh and pass reasoned order within a month. Pursuant to the order passed by the Guwahati Bench, representation of the applicant was rejected vide reasoned order dated 19th June, 2000 and subsequently amended vide letter dated 10th July, 2000. Thereafter, the applicant again made representation dated 7th November, 2000 followed by reminder dated 25th April, 2001 and then he filed OA No. 232/2002 which OA was dismissed as withdrawn and ultimately, the present OA was filed on 13.12.2002 after a period of more than one year. From the facts as stated above, it is clear that though the applicant was negligent in pursuing the matter and making repeated representations, but if the matter is seen from the totality of the circumstances of the case, we are of the view that it is a case where delay in filing the OA should be condoned. Accordingly, MA No. 24/03 is allowed.

So far as merit of the case is concerned, whether services rendered by the applicant in the grade of Rs.

2200-4000 in the capacity of Assistant Director/Assistant Executive Engineer alongwith service rendered as ASW in the MES should be counted for the purpose of eligibility for promotion to the post of SW, for that purpose, the learned counsel for the applicant has placed reliance on SRO 37 dated 25th January, 85 whereby recruitment and promotion rules for MES (Surveyor of Works Cadre) Recruitment Rules, 1985 was notified. At this stage, it will be useful to quota clause 12 of the said rules, which thus reads:-

".....12

Promotion: Assistant Surveyor of Works with 4 years regular service in the grade and having passed the final examination of the Institute of Surveyors (India) or equivalent.

Note: For the purpose of counting of the above period of eligibility for promotion, the regular service rendered by the Assistant Surveyor of Works in the equivalent post of Assistant Executive (Engineering Cadre) in Military Engineering Service prior to 4th January, 1981 shall also be taken into account....."

The learned counsel for the applicant while drawing our attention to the provisions contained in the aforesaid rules, argued that 'regular service in the grade' as appearing in the recruitment rules implies that the service rendered by him in the same grade viz. Rs. 2200-4000 while working as Assistant Director/Assistant Executive Engineer in CWC and the service in the MES as ASW which is feeder grade for promotion to the post of SW, has to be counted for the

purpose of experience and promotion for the post of SW. The learned counsel for the applicant also relied upon Government of India, Department of Personnel and Training OM No. AB-14017/10/86-Estt.(RR) dated 1.9.98. At this stage, it will be useful to quote the said OM which has been placed on record by the applicant alongwith the rejoinder and thus reads:-

"Counting of past Group service at the time of lateral entry on direct recruitment basis for promotion to higher grades.

The undersigned is directed to say that the question of counting of previous Group 'A' service to meet the condition of minimum eligibility service prescribed in the Recruitment/Service Rules at the time of lateral entry on direct recruitment as qualifying service for promotion to the higher grades has been considered by the Government and it has been decided that since all appointments by the method of direct recruitment are in the public interest, the benefit of counting of previous Group 'A' service to meet the condition of minimum eligibility on direct recruitment as qualifying service for promotion to the higher grades will be admissible to an employee, provided he/she has completed the prescribed eligibility service in the immediate feeder grade. However, the past service will not count for seniority in the new organization as upheld in the Supreme Court's judgment dated 19.11.1993 in the case of Renu Mullick vs. Union of India [JT 1993 (b) SC 527]

2. Ministries/Departments etc. are requested to process the cases of direct recruit employees in the light of the foregoing instructions."

On the contrary, the stand taken by the respondents is that in terms of provisions contained in the recruitment rules, relevant portion of which has been reproduced above, only those ASW who have put in 4 years of service in MES shall be eligible for

promotion to the post of SW, besides those persons who have put in requisite services in the equivalent post of Assistant Executive (Engineering Cadre) in MES prior to 4th January, 1981 and it is in this context that 'regular service in the grade' has to be interpreted and it is not permissible to take into account the services rendered by a person in equivalent grade in a cadre to which MES (Surveyor of works) recruitment rule is not applicable.

We have given due consideration to the submissions made by the learned counsel for the parties. As already stated above, we are of the view that the applicant is not entitled to any relief. At the outset, it may be stated that as per provisions contained in recruitment and promotion rules as reproduced above, only those Assistant Surveyor of Works are eligible for promotion who have put in 4 years of regular service in that grade and have also passed the final examination of Institution of Surveyors (India) or has put in equivalent years of service in the grade which according to us, is relatable to the equivalent post of Assistant Executive (Engineer Cadre) in MES prior to 4th January, 1981, as is clear from the Note appended below the aforesaid rule. Thus on the face of this statutory provision, the validity of which has not been challenged by the applicant, we are of the view that the services rendered by the applicant in an entirety

different department which is governed by separate set of rules, cannot be taken into account for the purpose of promotion for the post of SW. The applicant cannot also take any assistance from OM dated 1.9.98, relevant portion of which has been reproduced above, which speaks of counting of past service at the time of lateral entry on direct recruitment basis for promotion to higher grade. This OM was issued on 1.9.98 and it is prospective in nature. The applicant in this case is claiming promotion on the basis of panel prepared in the year 1996-97 and 1997-98. The said instruction was not in vogue at that time. Thus, the applicant cannot be given any benefit on the basis of the said OM.

The learned counsel for the applicant has placed reliance on the decision rendered by the Supreme Court in the case of Scientific Advisor to Raksha Mantri and another vs. V.M. Joseph, AIR 1998 Supreme Court 2318 and Smt. Renu Mullick vs. Union of India and Anr., JT 1993 (6) SC 527 to contend that the services rendered by an employee at earlier place cannot be excluded for determining eligibility for promotion. There is no quarrel about the proposition of law as laid down by the Apex Court in the aforesaid cases. It may be stated that it pursuant to the decision rendered by the Apex Court in the case of Smt. Renu Mullick (supra) that the OM dated 1.9.98 came to be issued which will ^{be a} prospective in nature. That apart, even if

it is to be held that the applicant has made out a case on the basis of the judgment rendered by the Apex Court as noted above, the applicant is not entitled to any relief yet on another ground. The applicant has assailed the panel of the year 1996-97 and 1997-98, but the applicant has not impleaded the persons who have been promoted as SW on the basis of the panel of 1996-97 and 1997-98. In case relief is granted to the applicant, the persons selected vide those panels will be adversely affected.

The Apex Court in the case of Praboth Verma and Others vs. State of Uttar Pradesh and Others, 1984 SCC (L&S) 704, held that the matter cannot be decided in the absence of necessary parties. In the case before the Hon'ble Apex Court only the State of U.P. and concerned officers were impleaded as respondents. Those who were vitally concerned namely the reserved pool teachers, were not made parties - not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents and the matter therefore came to be decided in their absence. Accordingly, it was held by the Hon'ble Supreme Court that the High Court ought not to decide a writ petition without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if

there number is too large, and if the petitioners refused to do so, the High Court ought to have dismissed that petition for non-joinder of necessary parties.

Similar is the view taken by the Hon'ble Apex Court in the case of All India SC & ST Employees' Association and Anr. vs. A. Arthur Jeen and Ors., (2007) 2 SCC (L&S) 362. In that case the Apex Court held that while challenging the panel of selected candidates, atleast some of the successful candidates must be impleaded as respondents. In para 13 of the judgment, it was observed that before the Tribunal the successful candidates whose names were included in the panel of selection were not made parties. The contention raised by the learned counsel that since name and particulars of the successful candidates included in the panel were not given, they could not be made parties was rejected as having no force. It was further observed that the applicants before the Tribunal could have made efforts to get the particulars, atleast they ought to have some of the successful candidates, may be in a representative capacity, if the large number of candidates were there and if there was any difficulty in service of notice on them, they could have taken appropriate steps to serve them by any one of the modes permissible in law with the leave of the Tribunal. For that purpose, the

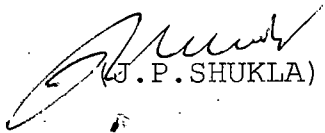
Apex Court has relied upon its earlier judgment in the case of Prabodh Verma (supra).

In the case of Rashmi Mishra vs. M.P. Public Service Commission, ^{(2007) 2 SCC (A.S) 345} the appellant has impleaded two persons as respondents against whom allegation of favouritism and nepotism was levelled as against 17 persons who were selected by the Selection Committee. The High Court did not go into the question as to whether any favouritism or nepotism had been shown in favour of those private persons who were impleaded as respondents. In the aforesaid background, it was held that all the 17 persons were necessary party. The number of selected candidates was not large and there was no difficulty for the appellant to impleaded them as parties in the said proceedings. Thus, according to the Hon'ble Apex Court, they were, thus necessary and/or in any event proper parties. In Para 30 the Apex Court held that 'in the instant case, however, as all the selected candidates were not impleaded as parties in the writ petition, no relief can be granted to the appellant.' Thus, according to us, even if the applicant has got a case on merit, no relief can be granted to the applicant as it will adversely affect one of the person who has been empanelled for promotion in the year 1996-97 and given appointment who will necessarily have to be reverted in case relief is granted to the applicant from the year 1996-97 and it will also affect all the persons who were

promoted from panel for the year 1997-98. All those persons will become junior to the applicant who have also further been promoted from the post of SW to SSW during the year 2004-05, as ^{can be seen from} ~~per~~ the submission made by the learned counsel for the applicant in Para 25 of the written arguments.

As regards the contention of the learned counsel for the applicant that some of the persons whose names find mention in para 16 of the OA were granted relaxation in the year 2001, as such, it is a case of discrimination is without any basis. From the material placed on record it is clear that persons who were promoted in the year 2001 forms a class in itself, inasmuch as, in their case, the appropriate authority has relaxed the provisions of clause 12 of the recruitment and promotion rules, as quoted above, as there were not sufficient officers eligible for promotion in the vacancies of 2001-2002. That was not a case that previous service of those employees promoted were counted for the purpose of promotion. In fact, that was a case where promotee officers belong to MES department and they had not put in 4 years of service as ASW. Since there were not sufficient officers available with 4 years of service in the cadre of ASW, as such, the appropriate authority invoked the provisions of Rule 6 of the 1985 Rules where the Central Government in consultation with the UPSC can relax any of the provisions of the rules.

Thus viewing the matter from any angle, we are of the view that the applicant is not entitled to any relief. Accordingly, the OA is dismissed with no order as to costs.



(J.P. SHUKLA)

Admv. Member



(M.L. CHAUHAN)

Judl. Member

R/