

Central Administrative Tribunal Principal Bench, New Delhi

O.A.No.1881/2013

Wednesday, this the 6th day of March 2019

Hon'ble Mr. Justice L. Narasimha Reddy, Chairman
Hon'ble Mr. Mohd. Jamshed, Member (A)

1. Sh. Desh Raj Singh Tomer
s/o late Sh. Budhi Mal
r/o 1/9867, Ground Floor
Gali No.1D, West Gorakhpark
Shahdra, Delhi – 32
2. Sh. Shahidhasan s/o late Sh. Tahir Hassan
r/o 13/128, J Extn. Laxmi Nagar
Delhi – 92

..Applicants

(Mr. Ajesh Luthra, Advocate)

Versus

1. Govt. of NCT of Delhi
Through the Chief Secretary
5th Floor, Delhi Sachivalaya, New Delhi
2. The Principal Secretary
(Home), GNCT of Delhi
5th Floor C Wing, Delhi Secretariat
I P Estate, New Delhi
3. Delhi Fire Service
Through its Director
Govt. of NCT of Delhi
Connaught Lane, New Delhi – 1

..Respondents

(Mr. Amit Yadav, Advocate)

O R D E R (ORAL)

Justice L. Narasimha Reddy:

The applicants joined the service of Delhi Fire Service in the year 1975 and 1972 respectively as Cleaners and were

promoted as Mechanics in the year 1990. The Delhi Fire Service was brought under the purview of the Delhi Government in the year 1994. The applicants were promoted as Head Mechanics in the year 2008 on *ad hoc* basis. The Departmental Promotion Committee (DPC) for regular promotion was held in the year 2011 and both of them were promoted on regular basis as Head Mechanics on 04.07.2011.

2. The applicants submitted representations in the year 2011 claiming that they were entitled to be promoted to the post of Head Mechanics in the year 2008 itself when they were promoted as Head Mechanics on *ad hoc* basis. It was also pleaded that they are entitled to count the service rendered in the post as Head Mechanic from the year 2008 and to be considered for promotion to the next higher post of Foreman; but they were wrongfully denied of the benefit. The respondents have considered the representations and passed the order dated 04.05.2012, rejecting the claim of the applicants. Hence, this O.A.

3. The applicants contend that the vacancies in the post of Head Mechanic were existing since long time and without any justification, the respondents failed to conduct the DPC for promotion to that post. It is stated that whatever may have been the justification for not holding the DPC, the applicants are entitled to be considered as Head Mechanic on regular basis

from the year 2008, when they were promoted to that post on *ad hoc* basis. Reliance is placed on certain precedents.

4. The respondents filed counter affidavit opposing the O.A. It is stated that mere existence of vacancies in a post does not entitle the employees in the feeder category, to claim promotion as of right. It is also stated that the question of an employee being promoted to the post earlier to the consideration by the DPC, does not arise. Various pleas raised by the applicants are denied.

5. We heard Mr. Ajesh Luthra, learned counsel for applicants and Mr. Amit Yadav, learned counsel for respondents.

6. The applicants were promoted on *ad hoc* basis, to the post of Head Mechanic in the year 2008 and were promoted on regular basis to that post on 04.07.2011. They insist that the services rendered by them on *ad hoc* basis between 2008 and 2011 be treated as the one on regular basis and their cases be considered for further promotion.

7. The promotions to the posts, which carry a semblance of administrative or professional responsibility, are to be effected on the basis of selection. It is not in dispute that the promotion to the post of Head Mechanic is through a process of selection. It is only when a DPC considers the case of an eligible employee

and recommends him as fit, that he can be promoted by the appointing authority.

8. The question as to whether an employee can be promoted to a higher post before the DPC finds him fit, was considered by the Hon'ble Supreme Court in **Union of India & others v. K. K. Vadera & others**, AIR 1990 SC 442. Their Lordships discussed the various aspects and observed as under:-

“4..... We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal.”

9. From this, it becomes clear that under no circumstances, can the promotion of an employee take place anterior to the date on which the DPC met. An exception can be when a senior is overlooked in the context of promotion, without there being any valid basis, and in the meanwhile, his junior was promoted. In such case, a Review DPC is required to be convened and once the employee has cleared, he becomes entitled to be promoted with effect from the date, on which his junior was promoted.

10. The Supreme Court in **K. Madhavan & another v. Union of India & others** (1987) 4 SCC 566 observed that if the meeting of DPC scheduled to be held but was cancelled arbitrarily and without any reasonable justification, resulting in prejudice to an employee, the employer can, in a suitable case, do justice by promoting him to the higher post, for which the DPC was to be held, with retrospective effect, so that he is not subjected to a lower position in the seniority list. However, a note of caution was added to the effect that if the postponement or cancellation of the meeting of the DPC is not arbitrary and is supported by adequate reasons, the employee concerned can have no grievance and the employer will not be justified in promoting him to the higher post with retrospective effect. Relevant portion of judgment reads as under:-

“15. There can be no doubt that if the meeting of the DPC scheduled to be held is arbitrarily or mala fide cancelled without any reasonable justification therefor to the prejudice of an employee and he is not considered for promotion to a higher post, the Government in a suitable case can do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held, with retrospective effect so that he is not subjected to a lower position in the seniority list. But, if the cancellation or postponement of the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have no grievance and the Government will not be justified in appointing the employee to the higher post with retrospective effect. An employee may become eligible for a certain post, but surely he cannot claim appointment to such post as a matter of right.”

11. Before undertaking further discussion, it needs to be mentioned that except making representations that the service rendered by them from 2008 onwards on *ad hoc* basis may be treated as the one on regular basis, the applicants did not plead that any DPC was scheduled to meet in the year 2008 and it was arbitrarily postponed, to defeat their rights. Therefore, the question of applying the ratio of the judgment in the case of **K Madhavwn** (supra) to the facts of the present case does not arise.

12. Learned counsel for applicants relied upon the judgments of Hon'ble High Court in **H.B. Sharma v. Union of India**, 63 (1996) DLT 427, **Union of India & another v. S K Thakral** (W.P. (C) Nos.423-424/2006) decided on 05.10.2009, **Dr. Sahadeva Singh v. Union of India & others** (W.P. (C) No.5549/2007) decided on 28.02.2012; and **Sunil Kumar Mehra v. MCD & another** (W.P. (C) No.2059/2012) decided on 08.05.2013.

13. In the last of the judgments referred to above, a detailed discussion was undertaken and reference was made to the judgments of Supreme Court in **K. Madhavan** and **K.K. Vadera** (supra), and it was held that if there exists malice in the context of failure to consider the case of an employee for promotion when it became due, the retrospective promotion can be ordered. However, the question as to how the ratio of the

judgment in **K.K. Vadera's** case can be overcome was not examined, nor any specific paragraph, in any judgment of the Supreme Court, was relied upon. On the other hand, the sole basis was the observation made in **Union of India & another v. K.L. Taneja & another** (W.P. (C) No.8102/2012) decided on 12.04.2012. We find that the observations made by the Delhi High Court in the said judgment cannot be construed as a proposition of law, and it becomes difficult to take view, contrary to the law laid down by the Supreme Court.

14. In **Manjit Singh v. Govt. of NCT of Delhi & others** (O.A. No.1837/2013) decided on 09.09.2016, this Tribunal dealt with this issue in detail and took into account the ratio of the judgment of Supreme Court in **K.K. Vadera** (supra) and other judgments on the subject, and held as under:-

“5.... It has been ruled that retrospective promotion is impermissible unless the rules so provide. However, retrospective promotion may be granted where a junior has been promoted or a person was holding clearly available promotional post on ad hoc basis on being selected by some process of selection. The case of the applicant does not fall in any of the exceptional categories.”

The same situation obtains in the present case also.

15. We do not find any merit in this O.A. It is accordingly dismissed. There shall be no order as to costs.

(Mohd. Jamshed)
Member (A)

(Justice L. Narasimha Reddy)
Chairman

March 6, 2019

/sunil/