

(2011) 01 DEL CK 0322

In the Delhi High Court

Case No : Writ Petition (C) No. 8024 of 2010

Ashwani Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Citation : (2011) 2 AD 497 : (2011) 179 DLT 753 : (2012) 2 SLJ 501

Hon'ble Judges : Veena Birbal, J;Anil Kumar, J

Bench : Division Bench

Advocate : Tarun Sharma, for the Appellant; A.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Veena Birbal, J.

CM No. 21595/2010 in W.P. (C) No. 8024/2010

This is an application by the applicant for placing on record the amended memo of parties incorporating the correct address of Respondent No. 1 and 2.

For the reasons stated in the application, the correct memo of parties dated 14.12.2010 is taken on record.

W.P. (C) No. 8024/2010

1. Petitioner was appointed on compassionate grounds as LDC on probation in the President's Secretariat on an initial pay of Rs. 3050 in pay scale of Rs. 3050-75-3950-80-4590 w.e.f 1st March, 1999. The services of the Petitioner were regularized in the year 2001. On 7th June, 2005, a Limited Departmental Competitive Examination (in short referred to as "LDCE") in accordance with the President's Secretariat Upper Division Clerks Limited Departmental Competitive Examination Regulations, 1997 (hereinafter referred to as "the Regulations-1997") was held to fill up 25% vacancies arising in the Upper Division Clerk (UDC in short) cadre of President's Secretariat. The aforesaid

Regulations came into force w.e.f. 13.12.1997 after being published in the Official Gazette. The Regulation 9(4) provides a procedure for fixation of the seniority of successful candidates in the LDCE to the promoted post of UDC which is in accordance with the inter-se-seniority of Lower Division Clerk cadre. The seniority of the Petitioner was at sr. No. 5 in the Lower Division Clerk Cadre at the time of appearing in the LDCE. Petitioner appeared in the LDCE after satisfying the pre-requisite condition of five years of regular service in the Lower Division Clerk Cadre. The Petitioner came second in the merit of LDCE. The seniority of the Petitioner in the Upper Division Clerk Cadre in respect of 25% vacancies which was to be filled up by the LDCE was fixed at sr. No. 5 instead of sr. No. 2 without following the merit in the LDCE. It is stated that in the years 1997, 2000 and 2002, the Respondents had determined the seniority of the candidates who had qualified LDCE for being promoted as Upper Division Clerk in accordance with the merits obtained in the LDCE. However, the seniority of the Petitioner in the cadre of UDC was fixed on the basis of seniority in the feeder cadre and not on the basis of merit in LDCE. Aggrieved with the same, Petitioner made representations on 3rd August, 2005, 12th December, 2005, 8th August, 2006, 21st May, 2007 and 19th November, 2008 respectively to stake the claim of seniority at sr. No. 2 instead of sr. No. 5. The representations of the Petitioner were rejected vide letter dated 17th June, 2008. Aggrieved with the same, Petitioner had filed OA No. 768/2009 before the Central Administrative Bench, Principal Bench (hereinafter referred to as 'the Tribunal?') contending therein that he stood second in the merit in the LDCE held on 7th June, 2005. However, his seniority was fixed at sr. No. 5 as per inter-se-seniority existing in the Lower Division Clerk Feeder Cadre instead of fixing the same in accordance with the merit obtained in the LDCE. The said OA was dismissed as withdrawn and liberty was granted to Petitioner to challenge the vires of the Regulations, 1997. Thereafter, Petitioner filed OA No. 3178/2009 contending that as the Respondents deviated from the Regulations-1997 for the LDCE of 1997, 2000 and 2002 respectively, there was no reason why the Respondents did not deviate from the Regulations-1997 in 2005 also, the year in which the Petitioner appeared in LDCE. Petitioner also contended before the Tribunal that as the "merit" basis in the LDCE has been introduced in the year 2007, the inter-se-seniority in the LDC cadre existing in the Regulations-1997 should be declared ultra vires and bad in law. The said OA was dismissed vide impugned order dated 18th August, 2010.

Aggrieved with the same, the present writ petition is filed.

2. Learned Counsel for the Petitioner has contended that the Respondent ought to have adopted the principle of merit in the LDCE as was done in the previous years i.e in 1997, 2000 & 2002 and applying the same analogy, the Petitioner ought to have been granted seniority in the UDC cadre as per merit in LDCE.

The relevant regulation which deals with fixation of seniority is Regulation 9(4) which reads as under:

9. Select List:

xxx

xxx

xxx

(4) The inter se ranking of those persons who qualify in the examination shall be in the order of their inter-se-seniority and those qualifying in any earlier examination shall be ranking en-bloc senior to those who qualify in a later examination. The vacancies which could not be filled by promotion for want of Lower Division Clerks eligible for such promotion in a year shall be filled up by candidates selected on the basis of the examination.

3. The stand of the Respondents in the counter affidavit filed before the Tribunal was that in 1997, 2000 and 2002, seniority in the UDC Cadre of the successful candidates in LDCE was fixed on the basis of merit in the said examination due to a mistake committed not knowingly i.e. due to misinterpretation of Regulations framed for the purpose of deciding seniority and when the mistakes were detected in the year 2003, the persons who had qualified in the LDCE held in the year 2003 were given seniority on the basis of their inter-se-seniority in the cadre of LDC and the same was followed in the subsequent years i.e. 2003, 2005 & 2006 respectively. Thereafter, an amendment to the Regulations-1997 was made in the year 2007 and the principle of inter-se-seniority in the LDC is changed to merit secured on the basis of LDCE.

4. The Tribunal considering the stand of Respondent and relying on the various judgments of Apex Court has rejected the contention of the Petitioner by holding that if any such deviation in fixing of seniority in the UDC cadre has been done from the aforesaid Regulations of 1997, the same does not create a right in favour of the Petitioner to deviate in his case also especially when the relevant Regulation does not permit any such deviation. The relevant finding of the Tribunal on the aforesaid contention is given in Para 20 of the impugned judgment which is as under:

20.

....

....

Such deviation does not make the same legal. We cannot allow the official Respondents to perpetuate the illegal deviations from the provisions in the Regulations of 1997. What the applicant is asking for being deviation from the Regulations, 1997 would not be admissible in the eyes of law. Such a direction, which is de hors the Regulation 1997, is not permissible. What seniority the applicant has been assigned by the official Respondents in the UDC cadre being as per the inter-se-seniority in the LDC cadre, the Respondents Nos. 1 & 2 have followed the Regulations-1997 fully in letter and spirit. In view of the above, we

conclude that applicant has already received the seniority that he is entitled to and our interference is not necessary.

5. It is an admitted position that Regulation 9(4) as it was then existing was followed in the Petitioner's case by Respondents. The Regulations-1997 do not confer any enforceable right on the Petitioner to get his seniority fixed by any deviation from the same. It is a settled principle of law that an administrative error would not confer a valid right, as ruled out by the Apex Court in *State of Haryana and Ors v. Ram Kumar Mann*; 1997(2) SLJ SC 257. Recently the Supreme Court in *Bihar Public Service Commission and Others Vs. Kamini and Others*, ruled that an illegality cannot be perpetuated under the so-called "equality doctrine". The relevant finding of the Supreme Court given in Para 10 of the judgment is as under:

10. In our opinion, the submission of the learned Counsel for the Commission is well founded and must be accepted. Therefore, even if in 1993, some ineligible candidates were wrongly treated as eligible, the first Respondent cannot insist that she also must be treated eligible though she is ineligible. In our considered opinion, such an action cannot give rise to equality clause enshrined by Article 14 of the Constitution. It is well settled and needs no authority that misconstruction of a provision of law in one case does not give rise to a similar misconstruction in other cases on the basis of doctrine of equality. An illegality cannot be allowed to be perpetuated under the so-called "equality doctrine". That is not the sweep of Article 14. Even that contention, therefore, has not impressed us.

In view of the above settled position of law, simply because due to a bonafide mistake, seniority of some of the UD Cs in the past had been fixed on the basis of merits in LDCE, the same cannot be taken as a precedent for misconstruction of provision in other cases also as is contended. The direction as prayed cannot be given to the Respondents to commit the same mistake which has been done inadvertently when the relevant Regulation i.e. Regulation 9(4) does not permit the same.

The Tribunal has also noted in the impugned order that Respondents 1 & 2 had permitted Respondent No. 3 to appear in LDCE de hors the Regulation 9(4) though she was over age. The Respondents 1 & 2 admitted the same to be a mistake. The Tribunal has also observed that Respondent No. 3 received notice but she preferred to remain silent by not filing her counter and accordingly Tribunal has issued directions to Respondents 1 & 2 to correct the wrong which they had done in her case. About other UD Cs who according to the Petitioner were given seniority contrary to the Regulation 9(4), the Tribunal has observed that they were not necessary parties before it, as such, no directions could be given against them. However, the Tribunal has given liberty to the Petitioner to correct the wrong as per law.

6. Petitioner had also challenged the constitutional vires of the Regulation 9(4) before the Tribunal. Relying on the judgment in *P.V. Joshi and ors v. The*

Accountant General of Ahmedabad ATJ 2003 (2) 6224, the Tribunal has held that the Regulations-1997 are tenable and sustainable and more specifically Regulation 9(4) is valid in law. The relevant finding of the Tribunal is as under:

12. It is trite in law that the executive has the authority to frame Rules and Regulations and amend the same in a transparent and fair manner. We find force in the argument of Shri A.K. Bhardwaj who relied on the judgment of Hon''ble Apex Court in P.V. Joshi Case (supra) and the said judgment clearly sets the law on (a) Rules and Regulations come within the delegated legislative power of the executive; (b) the courts and Tribunal should not direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion; and (c) the State has the power to change the Rules relating to a service and amend various provisions.

We find no illegality or irrationality in the finding of the Tribunal in this regard also.

It is also informed that the Regulation 9(4) of the Regulations-1997 has been amended in the year 2007 and thereafter the seniority in the UDC cadre amongst the 25% vacancies is being fixed on the basis of merit achieved in LDCE.

The contention of Petitioner that aforesaid amendment be given retrospective effect is also not tenable in law. Learned Counsel for Petitioner has failed to substantiate this contention also.

There is no indication in the Regulations that amended Regulation 9(4) is to apply retrospectively. Normal rule of interpretation is that every statute is prospective unless by express language or necessary implication the same is made retrospective by law making authority.

The Regulations-1997 are statutory Regulations. The language of the Regulations is very clear. There is nothing from which it can be inferred that application of amended Regulation 9(4) has to be made retrospective. Even assuming that it is to be given retrospective effect as is contended, the persons who are likely to be affected by any such interpretation are not impleaded, as such, no direction to that effect can be given. The Tribunal has rightly rejected the said contention also.

7. Considering the totality of facts and circumstances, we find no illegality or irrationality in the order of the Tribunal. Present is not a fit case in which we should interfere and grant relief to the Petitioner in exercise of our power under Article 226 of the Constitution of India.

Writ petition is dismissed with no order as to costs.