

(2019) 05 DEL CK 0270

In the Delhi High Court

Case No : Civil Writ Petition No. 4877 Of 2018, Civil Miscellaneous Application
No. 18817, 28890 Of 2018

Chandan Singh

APPELLANT

Vs

Manager L N Girdhari K U Senior Secondary School And Ors

RESPONDENT

Date of Decision : 21-05-2019

Acts Referred:

Citation : (2019) 05 DEL CK 0270

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : S. Sunil, Shikhar Sarin, Sunil Singh Parihar, Vibha Mahajan, Shweta Bhardwaj, Abinash K. Mishra, R.K. Sharma

Final Decision : Allowed

Judgement

1. Vide the present petition, the petitioner seeks direction thereby quashing and setting aside the decision taken by the DPC on 15.03.2018 and to issue appropriate direction for promoting the petitioner as Lab Assistant from the date, the vacancy arose with all consequential benefits.

2. The case of the petitioner is that he was appointed as a Peon in the school of respondent no. 1 on 22.03.1996. His qualification at the time of appointment was Class XIIth pass. On 01.01.2000, the post of Lab Assistant fell vacant after the retirement of Shri Rampal Singh, the then Lab Assistant. Recruitment to the post of Lab Assistant is governed by Recruitment Rules issued vide Notification dated 21.03.1990. As per said rules, the post of Lab Assistant is a non-selection post. The method of recruitment is promotion failing which, by direct recruitment. As per the Recruitment Rules, promotion to the post of Lab Assistant can be made from Group D employee who has rendered three years service in the said grade after appointment on regular basis who is a matriculate or equivalent/Higher Secondary with Science or without Science (provided has done three months orientation course in science conducted by Directorate of Education). As per the Recruitment Rules, the petitioner became eligible for promotion to the post of

Lab Assistant on 22.03.1999. However, on the said date, there was no vacant post available with the respondent. The post of Lab Assistant fell vacant on 01.01.2000 upon retirement of Shri Rampal Singh-Lab Assistant. Immediately, on the retirement of Shri Rampal Singh, respondent ought to have constituted the DPC and filled up the post of Lab Assistant subject to ascertainment and eligibility as per Recruitment Rules. However, no DPC was convened either immediately or at a later point of time. On 07.03.2001, the post of Lab Assistant was abolished in the post fixation for the year 2000-01. Almost for a period of 14 months, the post of Lab Assistant remained vacant. As the work of Lab Assistant was required the post was once again created on 13.07.2004 in the post fixation of 2003-04. On the date when the post was recreated, the petitioner was the only eligible senior most person for the post of Lab Assistant. However, DPC was convened for the first time after four years from the date of recreation of the post.

3. Further case of the petitioner is that by the lapse of time respondent nos.3 & 4 who were senior to the petitioner acquired qualification of class Xth on 15.01.2005 and 15.06.2005 respectively. It may, therefore, be seen that three years of regular service after acquiring the essential qualification has been attained by respondent no.3 on 15.01.2008 and by respondent no.4 on 15.06.2008.

4. No DPC was convened since 01.01.2000, therefore, the petitioner addressed a representation to the respondent on 02.11.2006 stating that it has come to his notice that the post of Lab Assistant is lying vacant and since he has requisite qualifications, he may be promoted to the post of Lab Assistant. Finally on 15.07.2008, the DPC met for consideration of promotion for the post of Lab Assistant. After considering the representation made by the petitioner, the DPC unanimously decided to postpone the proceedings till all facts about the vacancy/post fixation for the period 1999-2008 are gathered and the matter of eligibility of all candidates coming under the zone of consideration is reassessed. It was also decided that head of the school will seek clarification from the Act Branch of respondent no. 2 on the claim raised by the petitioner. A copy of the minutes of the DPC is annexed as Annexure P-4.

5. The further case of the petitioner is that on 26.08.2008, respondent no.1 wrote to the Additional Director of Education (Act), of Act Branch giving the details of the representation given by the petitioner. However, the meeting of DPC for promotion to the post of Lab Assistant was held on 15.07.2008 where a representation given by the petitioner was considered. In the light of above facts, clarification was sought by the respondent School as to whether respondent nos.3 and 4 have a right of promotion to the post of Lab Assistant. As per the directions of the Act Branch, the school authority was asked to send the following details.

(a) Why the DPC was not held in the year 2001 and

(b) Seniority list of Class IV employees along with qualification.

6. In response to the said query, the respondent/school has stated that the post of Lab Assistant fell vacant only on 01.01.2000 on the retirement of Shri Rampal Singh, the then Lab Assistant. New post fixation was awaited and the school was informed that the post of Lab Assistant is likely to be abolished since the Science stream was not available in the Senior Secondary School and the same was subsequently abolished in the post fixation for the year 2000-01. As per promotion rules, the petitioner was eligible for being considered for promotion to the post of Lab Assistant as on 01.01.2000 after completing three years of regular service, but he was not considered for the same. Respondent no.2 in its noting has clearly noted that "there was intentional delay in not constituting the DPC".

The relevant file noting reads as under:-

"It seems to be a case of intentional delay. The school did not fill the post of Lab Assistant since 2001 even when there was an eligible candidate. Does it mean that no Lab Assistant was needed to help out the students till the seniors of Mr Chandan acquired the necessary qualification. Let the school put up its proposal whom do they want to promote instead of rolling the ball in our court."

7. The petitioner through his advocate on 28.04.2010 addressed a representation to respondent nos.1 and 2 requesting them to take suitable steps for promoting the petitioner to the post of Lab Assistant. Since the said representation was not considered, therefore, the petitioner filed W.P.(C) 5709/2010 and on 21.10.2010, this Court issued notice in the Writ Petition and on 09.02.2011 granted interim protection to the petitioner directing "not to hold DPC for promotion to the post of Lab Assistant till further orders". The said writ petition was allowed vide judgment dated 21.02.2017 with a direction for constituting the DPC to examine the case of the petitioner for promotion to the post of Lab Assistant in accordance with law.

8. Learned counsel appearing on behalf of the petitioner submits that despite the positive direction issued in favour of the petitioner after a span of more than one year, the DPC was constituted on 15.03.2018 for considering the eligible candidates for promotion to the two vacant posts of Lab Assistant. It is clear from the DPC proceedings that it was constituted in compliance to the direction issued by this Court in judgment dated 21.02.2017 which is evident that paras 6 and 7 of the judgment have been reproduced in the minutes of the DPC. However, after referring to para 6 of the judgment dated 21.02.2017, it has been observed by the DPC that the petitioner was not the senior most person either on 13.07.2004 or on the day when the DPC was held. The Chairman of the DPC has, however, opined that the petitioner should be considered first for promotion, in view of the judgement dated 21.02.2017. The DPC, however, has once again chosen to ignore the case of the petitioner stating that on the date of constitution of DPC, as per post fixation for the year 2016-17, there are only two

posts vacant/available in the school and there cannot be any supersession in the matter of promotion and the names of respondent nos.3 & 4 have been recommended for promotion as per seniority and other eligible conditions.

9. Learned counsel for the petitioner submits that the decision taken by the DPC on 15.03.2018 is totally misreading of the judgment dated 21.02.2017. This Court in its judgment clearly observed in para 2 that it has been argued and rightly said on behalf of the petitioner that only the persons who were eligible as on 13.07.2004 should be considered for promotion. Learned counsel further submits that there is no dispute with regard to the fact that as on 13.07.2004, the petitioner was the only person who was eligible for promotion to the post of Lab Assistant. Respondent nos.3 and 4 did not even have the requisite qualification on the date when the post was recreated whereas observed by the DPC that the petitioner at the time of appointment as peon was class XIIth pass and the requisite qualification for the post of Lab Assistant is matriculation or equivalent. Even though respondent nos.3 & 4 were group D employees but they have acquired the qualification of class Xth pass only on 15.01.2005 and 15.06.2005. Thus, it is clear that even though respondent nos.3 & 4 were senior to the petitioner, however, they became eligible much after on 13.07.2004.

10. On the other hand, counsel for the respondents submits that the DPC found that there were three eligible candidates falling under zone of consideration and the DPC observed that the petitioner was not the senior most person for promotion as on 13.07.2004 i.e. the date when the post of Lab Assistant was created/restored in the school. The DPC further observed that the eligibility has to be determined on the date of DPC only. The respondent no.1, however, at the outset, pointed out that the petitioner may be considered first for promotion in view of the order passed by this Court in view of the fact that the petitioner was the only candidate who possessed the requisite qualifications as on 13.07.2004. However, the DPC carefully perused the O.M. No. 35034/7/97 dated 08.02.2002 which under para 3.1 provides that there will be no supersession in the matter of promotion and the promotion has to be made as per seniority subject to fitness/eligibility criteria. The DPC found five persons on seniority of Class IV employees/feeder cadre. However, out of five candidates in feeder cadre, only three fulfilled the eligibility criteria and their position in order of seniority were as follow:-

"a) Sh. Jagdish Prasad, Waterman

b) Sh. Veer Bahadur Singh, Waterman

c) Sh.Chandan Singh Bisht, Peon"

11. It is further submitted that as per post fixation for the year 2016-17, there are only two posts vacant/available in the school and thus the DPC recommended only two candidates for promotion.

12. To strengthen the arguments, counsel for the respondents has taken the shelter of the judgment in the case of Union of India vs. N. C. Murali: AIR 2017

Supreme Court 1496 whereby it is held that unless there is specific rule entitling the applicants to receive promotion from date of occurrence of vacancy, right of promotion does not crystallize on date of occurrence of vacancy and promotion is to be extended on the date when it is actually effected.

13. I have heard learned counsel for the parties and perused the material available on record.

14. Undisputed facts are that the petitioner was appointed as a Peon in School of respondent no.1 on 22.03.1996 and at that time he was class XIIth pass. On 01.01.2000, the post of Lab Assistant fell vacant. The recruitment to the post of Lab Assistant is governed by Recruitment Rules issued vide notification dated 21.03.1990. As per the said rules, the post of Lab Assistant is a non-selection post and the method of recruitment is promotion failing which, by direct recruitment. As per the Recruitment Rules, promotion can be made from Group D employee who has rendered three years service in the said grade after appointment on regular basis who is a matriculate or equivalent. As per the Recruitment Rules, the petitioner became eligible for promotion to the post of Lab Assistant on 22.03.1999, however, on the said date, there was no vacant post available with the respondents. The said post fell vacant on 01.01.2000 upon the retirement of Shri Rampal Singh, the then Lab Assistant.

15. In view of the admitted facts mentioned above, the respondents ought to have constituted the DPC and filled up the post of Lab Assistant subject to ascertainment and eligibility as per Recruitment Rules, however, no DPC was convened either in January or at a later point of time. However, on 07.03.2001, the post of Lab Assistant was abolished and again created on 13.07.2004 in the post fixation of 2003-04. On the date when the post was recreated, the petitioner was the only eligible senior most person for the post of Lab Assistant. However, DPC was convened for the first time after four years from the date of recreation of the post. Meanwhile respondent nos.3 & 4 who were senior to the petitioner as Peon acquired qualification of class Xth on 15.01.2005 and 15.06.2005 respectively. The said respondents acquired essential qualification on 15.01.2008 and 15.06.2008 respectively. Finally on 15.07.2008, the DPC met for consideration of promotion for the post of Lab Assistant. After considering the representation given by the petitioner, the DPC unanimously decided to postpone the proceedings till all facts about the vacancy/post fixation for the period 1999-2008 are gathered and the matter of eligibility of all candidates coming under the zone of consideration is reassessed. It was also decided that the Head of School will seek calcification from the Act Branch of respondent no.2 on the claim made by the petitioner.

16. It is pertinent to mention here that the respondent no.2 stated in his reply that as per promotion rules, the petitioner was eligible for being considered for promotion to the post of Lab Assistant as on 01.01.2000 after completing three years of regular service, but he was not considered for the same. The said respondent in its noting has clearly stated that "there was intentional delay in

not constituting the DPC". Despite that, DPC was not constituted. Accordingly, the petitioner through his advocate on 28.04.2010 addressed a representation to respondent nos.1 & 2 requesting them to take suitable steps for promoting the petitioner to the post of Lab Assistant. Since the said representation was not considered, therefore, the petitioner filed W.P.(C) No.5709/2010 and same was allowed vide judgment dated 21.02.2017 with a direction for constituting the DPC to examine the case of the petitioner for promotion to the post of Lab Assistant in accordance with law.

17. In para 6 of the aforesaid judgment, this Court held that in view of the fact that the petitioner was the senior most person as on 13.07.2004 and has accordingly to be considered first for promotion to the post of Lab Assistant.

18. Despite the positive direction issued in favour of the petitioner, after a span of more than one year, the DPC was constituted on 15.03.2018. It is clear from the DPC proceedings that it was constituted in compliance to the direction issued by this Court in judgment dated 21.02.2017.

19. It is pertinent to mention here that it has been observed by the DPC that the petitioner was not the senior most person either on 13.07.2004 or on the day when the DPC was held. This fact is correct to the extent that the petitioner was not the senior most in the seniority of the Peon but he was the senior most person eligible to the post of Lab Assistant for the reason that only the petitioner had eligibility to be promoted for the said post much before 13.07.2004. Thus, the opinion of the DPC is wrong and contrary to the record. Moreover, the decision taken by the DPC on 15.03.2018 is totally misreading of the judgment dated 21.02.2017. This Court in its judgment clearly observed in para 2 that it has been argued and rightly said on behalf of the petitioner that only the persons who are eligible as on 13.07.2004 should be considered for promotion.

20. There is no dispute with regard to the fact that as on 13.07.2004, the petitioner was the only person who was eligible for promotion to the post of Lab Assistant, whereas respondent nos.3 & 4 did not even have the requisite qualification on the date when the post was recreated, whereas it is wrongly observed by DPC that the petitioner was not the senior most person as on 13.07.2004.

21. It is also pertinent to mention here that Chairman of DPC has, however, opined that the petitioner should be considered first for promotion in view of the judgment dated 21.02.2017, the said fact has been ignored by the DPC.

22. The petitioner at the time of appointment as Peon was class XIIth pass and requisite qualification to the post of Lab Assistant is matriculation or equivalent. Though respondent nos.3 & 4 were Group D employees but they have acquired the qualification class Xth only on 15.01.2005 and 15.06.2005. Thus, it is clear that even though the respondent nos.3 & 4 were senior most to petitioner as Peon, however, they become eligible much after on 13.07.2004.

23. It is pertinent to mention that in para 6 of the judgment dated 21.02.2017, it has held that the petitioner was the senior most person as on 13.07.2004 and has, therefore, "to be considered first for promotion to the post of Lab Assistant before consideration of respondent nos.3 & 4". The direction of this Court to consider the senior most person on 13.07.2004 has necessarily mean as the eligible senior most person who was eligible on 13.07.2004.

24. The respondent no.2 has admitted before this Court that respondent nos.3 & 4 were not eligible for the post of Lab Assistant as on 13.07.2004. Therefore, in the DPC which was met on 15.03.2018 ought to have considered the senior most eligible person as on 13.07.2004. Instead of doing so, the DPC has once again committed the same error which had been committed earlier on 15.07.2008.

25. The above facts disclose that there has been a deliberate attempt to delay the DPC proceedings to accommodate the candidates who were not eligible on the date of arising of the post of Lab Assistant. The aforesaid post was abolished and then recreated. The post was recreated only because the services of the Lab Assistant was immediately required. However, even after recreation, the post was deliberately kept vacant for a long span of almost seven years. By the passage of time, respondent nos.3 & 4 acquired the requisite qualification of Xth pass. In these circumstances, the principle that the eligibility condition has to be seen from the date of constitution of DPC cannot apply to the facts of the present case.

26. In para 6 of the aforesaid judgment, this Court has held that the petitioner was the senior most person as on 13.07.2004 and has accordingly to be considered first for promotion to the post of Lab Assistant before considering the respondent nos.3 & 4. Para 6 is reproduced as under:-

"In view of the fact that petitioner was the senior most person as on 13.07.2004 and has accordingly to be considered for promotion to the post of Lab Assistant before consideration of Sh. Jagdish Singh Prasad and Sh. Bahadur Singh, according, this writ petition is disposed of with the direction that the respondent No 1/school must now constitute a DPC/Selection Committee in accordance with the applicable rules and guidelines and in case the petitioner before this DPC succeeds in showing that he was a senior most person as on 13.07.2004 for being appointed to the post of Lab Assistant and the petitioner otherwise has the necessary eligibility criteria as required for the post of Lab Assistant, the DPC in accordance with the rules and guidelines of the respondent No 1/school will consider the case of the petitioner for promotion to the post of Lab Assistant."

27. In view of above facts and circumstances of this case, I hereby direct the respondents to promote the petitioner from the date of 13.07.2004 when the post was created in the post fixation year 2003-2004 with all consequential benefits within four weeks from the receipt of this order. Since respondent nos.3 & 4 have already been promoted, liberty is granted to the respondents either to create one post of Lab Assistant or demote either respondent no.3 or respondent

no.4 whosoever is junior most.

28. The writ petition is allowed, accordingly.

CM APPL. Nos. 18817/2018 & 28890/2018

In view of the order passed in the present writ petition, these applications have been rendered infructuous and are accordingly, disposed of.