
(1999) 09 DEL CK 0151
In the Delhi High Court
Case No : C.W. No. 3283 of 1999

K.B. Rajoria

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-09-1999

Acts Referred:

Citation : (1999) 6 AD 591 : (1999) 82 DLT 666 : (1999) 51 DRJ 748

Hon'ble Judges : Usha Mehra, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Mr. U. Hazarika, Central Govt., Mr. Mukul Rohtagi, Mr. Saurabh Kirpal and Mr. G.K. Aggarwal, for the Appellant;

Judgement

Usha Mehra, J.—The question which is posed to be answered in this writ petition is; What does "regular service in a cadre" stands for? Does it amount to qualifying service or amounts to experience in the service? Can fixing of notional pay or for that matter notional promotion count as "regular service"?

2. Briefly stated the case of the petitioner as set up by him is that he joined the Central Public Works Department (in short (CPWD) in September, 1963 as Assistant Executive Engineer in December, 1966 and then promoted as Executive Engineer in December, 1966 and then to the post of Superintending Engineer in April, 1976. He was promoted to the post of Chief Engineer (Civil) and his seniority was fixed w.e.f. August, 1989. On the other hand respondent No.4 joined CPWD as Assistant Engineer in Electrical and Mechanical stream of engineering in September, 1963. He was promoted to the post of Executive Engineer. Thereafter he was promoted to the post of Superintending Engineer in April, 1976. Respondent No.4 was further promoted to the post of Chief Engineer (Electrical) and his seniority was fixed w.e.f. 6th January, 1987. There had been a see-saw change in the inter-se seniority of the petitioner and the respondent No.4. This was due to various judicial pronouncements of the Apex Court namely in the cases of A.K. Subraman and Others Vs. Union of India (UOI) and Others, , P.S. Mahal and Others Vs. Union of India (UOI) and Others, and R.L. Bansal and

others Vs. Union of India and others, . The issue before the Supreme Court in all the above cases was the inter-se seniority amongst Assistant Engineers for whom next promotional post was Executive Engineer. Because of these pronouncements the inter-se seniority of the officials of the CPWD in the Engineering stream including that of the petitioner and respondent No. 4 had been changing. Because of the judgment of the Apex Court, petitioner got seniority over respondent No. 4 and so did Mr. S.R. Goyal who subsequently became junior to respondent No. 4. Subsequent thereto on account of the judgment of Apex Court in the case of S.R. Bansal (supra) respondent No. 4 got seniority over the petitioner as well as the said Mr. S.R. Goyal. Respondent No. 4 thus became Chief Engineer w.e.f. 6th January, 1987 whereas petitioner's seniority in the post of Chief Engineer was fixed w.e.f. August, 1989.

3. According to the petitioner he became eligible for the post of Additional Director General (Works) (hereinafter called the ADG(W) on 21st August, 1992 when he actually completed the qualifying service of three years in the grade of Chief Engineer. The post of ADG fell vacant on 1st April, 1995. He was eligible to be considered for the same on the basis of the seniority then assigned to him. That no DPC was held for the vacant post of ADG for the years 1995-96 and 1996-97 in spite of the fact that the petitioner was eligible for being considered for the post of ADG as on 1st April, 1995. As a result petitioner could not be promoted to the post of ADG as on 1st April, 1995. Five of his seniors were considered and promoted to the post of ADG due to the DPC held between June, 1993 to February, 1995. But thereafter no DPC was held hence he was deprived of the promotion. The reason given by the respondent for not holding the DPC for the year 1995-96 and 1996-97 was that there had been dispute regarding fixation of inter-se seniority. The Apex Court decision was delivered in 1992. As per that decision, seniority was fixed by the respondent. Per that seniority the last person to be promoted was Mr. S.R. Goyal who was in fact promoted in February, 1995 to the post of ADG. Had the DPC met thereafter the petitioner who was then the seniormost would have been promoted to the post of ADG in April, 1995 itself as he was the only person eligible at that time.

4. That the petitioner and respondent No. 4 were appointed Additional Director General on ad hoc basis w.e.f. 24th October, 1997. They subsequently by the Presidential order dated 15th June, 1998 were promoted on regular basis as ADG effective from 10th June, 1998. In the order of 15th June, 1998 in para 3 it has been stipulated that respondent No. 4 would get benefit of notional fixation of pay from the date his junior Mr. S.R. Goyal was promoted i.e. 22nd February, 1995. His notional pay has been fixed because of the review DPC which empanelled him for the post of ADG for the vacancy of the year 1995-96.

5. The principal contention of behalf of the petitioner is; that promotion from amongst ADG to the post of Director General has to be made solely on the basis of competitive merit. By fixing notional pay or by granting notional or deemed promotion to respondent No. 4 w.e.f. 22nd February, 1995, the Authority cannot

create imbalance thereby depriving the meritorious persons to compete. Respondent No. 4 has not actually worked for two years in service in the grade. The rules require two years actual experience in the service. The notional promotion cannot be a substitute of actual service or experience in service. Since on the day vacancy of Director General fell vacant i.e. March, 1997, respondent No. 4 had not actually worked for two years in the grade of ADG. Therefore, he could not have been declared eligible nor could fall in the zone of consideration for that post of DG.

6. On the other hand Mr. G.K. Aggarwal, counsel for respondent No.4 stressed number of points in order to establish that notional fixation of pay and deemed promotion would count towards regular service in the grade for the purpose of computing the period of eligibility for promotion to the post of Director General, namely: (i) the final seniority list was prepared by the authorities after judgment of Supreme Court in R.L.Bansal's case. As per the final seniority list respondent No. 4 became senior to Mr. S.R. Goyal. Mr. S.R. Goyal was promoted as ADG on the basis of the then existing seniority list. But once the respondent No. 4 was declared senior to Mr.Goyal on account of re-fixation of inter-se seniority, the authority had to have review DPC to consider the case of respondent No. 4. Accordingly, after review DPC respondent No. 4's pay was notionally fixed in the higher grade from the date his junior was granted that grade in post of ADG i.e. w.e.f. 22nd February, 1995; (ii) Review DPC declared respondent No.4 senior to Mr.S.R.Goyal. He was accordingly declared promoted as ADG w.e.f. 22.2.95 i.e. the date Mr. S.R. Goyal was promoted as ADG; (iii) in the Presidential order dated 15th June, 1998 this fact was made clear in para 3; (iv) dictate of the Government of India conveyed in para 3 of the order dated 15th June, 1998 is in tune with the instructions and guideline issued by the Government of India contained in para 18.4.3 of the O.M. dated 10th April, 1998 and as amended from time to time. (v) That para 18.4.3 of that instruction stipulates that seniority of the officer would be determined in the order in which his name after review DPC is placed in the select list. Further period of qualifying service will be reckoned from the date the notional promotion is given to the officer to the next higher grade. Since the pay of respondent No. 4 was fixed from 22nd February, 1995 it tantamounts to appointing him as ADG w.e.f. 22nd February, 1995. Thus on the cut off date i.e. 1st July, 1997, he was the only eligible ADG for promotion to the post of DG because by then he had completed two years qualifying service in the grade of ADG. (vi) Reading of Note (1) of RRs of 1986 and 1990 two years regular service is nothing but qualifying service and not two years experience in service. If regular service is construed as experience then Note No.1 will lose its significance and would become redundant. And as per para 18.4.3 notional promotion has to be counted towards qualifying service. Thus as on 1st July, 1997 i.e. the year when vacancy of DG became available only respondent No. 4 was eligible for the post of Director General.

7. That the post of Director General became available in March, 1997. The cut off date for eligibility as per rule is 1st July, 1997. The Government of India while

taking into consideration the notional promotion of respondent No. 4 as ADG (Works) effective from 22nd February, 1995 considered respondent No. 4 alone to be eligible for the post of Director General. When the DPC met in January, 1999 for selecting an officer for the post of Director General only the name of respondent No. 4 was considered. Feeling aggrieved by this action of the Authorities the petitioner filed an Original Application (called the OA) before the Central Administrative Tribunal (hereinafter called the Tribunal). The Tribunal by the impugned order dismissed his O.A. Aggrieved by the same, the petitioner has preferred this petition.

8. Central Public Works Department has Civil Engineering stream and Electrical and Mechanical streams. These streams form the feeder cadre of the next higher post. The next higher post of both the streams is that of Additional Director General (Works). The post of Director General is the highest post in the CPWD. The Director General's post is to be filled up by selection. The feeder cadre for the post of ADG is the Chief Engineer of these two streams and of the Architect stream. For the post of Director General the feeder cadre is the ADGs (Engineering) and ADG (Architect). For recruitment to these posts the officials are governed by the Central Public Works Department Recruitment Rules, 1986 (hereinafter called the RRs of 1986). The said rules were amended vide Recruitment (Amendment) Rules, 1990. As per recruitment rules the post of ADG is required to be filled by promotion from amongst Chief Engineers of either stream with three years regular service in the grade and for the post of DG the promotion is from amongst ADG with two years regular service. The RRs of 1986 and as amended by RRs of 1990 pertaining to the promotion from amongst ADGs to the post of Director General in Group-A prescribes the following conditions of eligibility:-

1(a) Additional Director General (Works) with two years" regular service in the grade;

(b) Additional Director General (Architecture) with two years" regular service in the grade;

Provided that a person holding the post by direct recruitment on contract shall not be eligible.

Failing (1) above:

2(a) Additional Director General (Works) with five years" combined regular service as Additional Director General (Works) and Chief Engineer (Civil/Electrical)

(b) Additional Director General (Architecture) with five years combined regular service as Additional Director General (Architecture) and Chief Architect.

Note (1) the "eligibility list" for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grades/ posts.

9. But before we embark on the interpretation of the above rule and in particular the meaning of "Regular Service", it would be beneficial and advantageous to have a glance at para 18.4.3 of the guidelines and instructions issued by the Government of India. Para 18.4.3 reads as under :-

18.4.3. If the officers placed junior to the officer concerned have been promoted, he should be promoted immediately and if there is no vacancy the junior most person officiating in the higher grade should be reverted to accommodate him. On promotion, his pay should be fixed under F.R. 27 at the stage it would have reached, had he been promoted from the date the officer immediately below him was promoted but no arrears would be admissible. The seniority of the officer would be determined in the order in which his name, on review, has been placed in the select list by the DPC. If in any such case a minimum period of qualifying service is prescribed for promotion to higher grade, the period from which an officer placed below the officer concerned in the select list was promoted to the higher grade, should be reckoned towards the qualifying period of service for the purpose of determining his eligibility for promotion to the next higher grade.

10. The para 18.4.3 assumes relevance because it has been mentioned in the Presidential order dated 15th June, 1998. This para is part of instruction contained in DPT's Office Memorandum dated 10th April, 1989 mentioned in the order. The Presidential order dated 15th June, 1998 says thus:-

New Delhi, Dated 15th June, 1998

ORDER

The President is pleased to regularise the ad hoc promotion of the under mentioned Chief Engineers (Civil) and (Elect.) to the grade of Addl. Director General of Works in the C.P.W.D. in the pay scale of Rs.7300-7600 (pre-revised) w.e.f. 10.6.98 and until further order :-

1. Shri N. Krishnamoorti ADG (TD), New Delhi.
2. Shri K.B. Rajoria, E.-in-C., Govt. of NCT of Delhi.
3. Shri Chander Pal, ADG (S&P), New Delhi.
4. Shri P. Ravindranathan, ADG., Western Region, Bombay.
5. Shri D.V.S. Sharma, on deputation to the B.P. Koirala Institute of Health Sciences, Dharan, Nepal.
6. Sh. P.K. Ratho, ADG (Eastern Region) Calcutta
7. Shri S.M. Aggarwal, ADG (Border), New Delhi.
8. Shri Ravinder Lal, ADG (Northern Region), New Delhi.

2. The approval of the President is also accorded to the extension of deputation of these officers in the grade of ADG (Works) w.e.f. 24.4.98 till the date of their

regularisation.

3. Since Shri N. Krishnamoorti has been empanelled by the Review DPC for the vacancies of the year 1995-96 against which Shri S.R. Goyal, an officer junior to him was promoted w.e.f. 22.2.95, it is hereby ordered that the pay of Shri N. Krishnamoorti in the grade of ADG (Works) shall be fixed notionally w.e.f. 22.2.95 in terms of instructions contained in the DPT's O.M. No. 22011/5/86-Estt. D. dated 10th April, 1989 as amended from time to time.

(S.K. Bhatnagar)

Under Secretary to the Govt. of India"

11. The answer to the moot question raised i.e. counting of notional promotion for eligibility depends upon the interpretation to the use of the word "two years regular service" in the Recruitment Rules of 1986 and as amended by RR 1990.

12. Admittedly RRs of 1986 were framed under Article 309 of the Constitution. Hence, the RRs of 1986 as well as amended RRs of 1990 are statutory rules. These rules prescribe that no one can be considered for promotion to the post of DG unless he has completed two years regular service in the grade of ADG. The condition precedent for eligibility to be considered for promotion to the post of DG is that the said ADG has put in at least two years service in that grade. The rule imposes an obligation on the authority not to consider that ADG for the post of DG who has not completed at least two years in service as ADG. The requirement of two years regular service shows that the incumbent ADG has actually put in two years service and has acquired two years experience. Similar question came up for consideration before the Supreme Court in the case of Union of India (UOI) and Others Vs. Majji Jangamayya and Others, . Apex Court while considering the expression "years in service" interpreted it to be experience in service, in other words number of years put in service. In the case of Majji Jangammayya (supra) the Rule 18 prescribed requirement of 10 years in service which was later reduced to 8 years in service for eligibility to be considered for promotion to the post of Assistant Commissioner from the post of Income Tax Officer. The requirement was at least 10 years" service as Income Tax Officer. The Government by office memorandum reduced the requirement from 10 years service to 8 years service as Income Tax Officer. Supreme Court while answering the question considered 10 years or 8 years service as synonymous to experience in service. Even regular service rendered in an equivalent grade has not been considered by the Apex Court to be service of a particular year in the grade. It has been so held in the case of Union of India and Another Vs. G.R.K. Sharma, . The Apex Court while dealing with eligibility condition of regular service of 8 years in the grade held that service in equivalent grade is not acceptable nor will amount to fulfilling the condition of eligibility. Therefore, Mr. Aggarwal cannot take any aid from Para 18.4.3 as quoted above. It only lays down that when a notional promotion is given on account of the review DPC in that eventuality if there is any minimum period of qualifying service prescribed

for promotion to higher grade then the notional promotion will count towards the qualifying period of service. Stress has been laid on counting the notional promotion for qualifying service. But that is not the requirement of the RRs of 1986 or of 1990. Mr. Aggarwal, however, tried to impress that as per Note No.1 of RRs of 1986 the requirement of two years has to be read as qualifying service, hence the notional promotion should be counted. We are unable to subscribe to this contention of Mr. Aggarwal for the obvious reasons that if qualifying service has been the pre-condition for promotion to the post of DG then nothing prevented the drafter of the RRs to use the expression "two years qualifying service" instead of demanding "regular service". In fact from the reading of the Note No.1 with the substantive condition it gets clear that at the time of drawing eligibility list the Authority will keep in mind that the officer has completed the required number of years in the service. It is in this context that qualifying service has to be seen. Requirement of the rule is number of years in service i.e. put in those years in service i.e. actual service.

13. The word "Regular" as per the Concise Oxford Dictionary, Ninth Edition, means (1) Conforming to a rule or principle, systematic; (2) harmonious, symmetrical; (3) acting or done or recurring uniformly or calculably in time or manner, habitual, constant, orderly; (4) conforming to a standard of etiquette or procedure, correct, according to convention; (5) properly constituted or qualified, not defective or amateur, pursuing an occupation as one's main pursuit. In the Words and phrases Vol.36-A, page 241 the word "regular" has been defined as "steady or uniform in course, practice, or occurrence, etc. and implies conformity to rule, standard, or pattern". Webster's New World Dictionary defines 'regular' as 'consistent or habitual in action; not changing; uniform; conforming to standard or to a generally accepted rule or mode of conduct. The word 'regular' connotes a consistent course of conduct without any break or breach. Illustration (e) appended to Sec. 114, Indian Evidence Act, provides that the Court may presume that judicial and official acts have been regularly performed. In the illustration the words, 'regularly performed' mean done with due regard to form and procedure. Meaning of word "regular" as given in various dictionaries show that it stand for acting consistently, properly constituted, systematic or done uniformly. Meaning thereby a regular service can only be done systematically if one has actually performed the service in that grade or in other words had put in these number of years in service. Therefore, the word with two years regular service has to connote two years experience in service and not deemed or notional promotion in the grade.

14. Therefore, to our mind the reliance by Mr. Aggarwal on Note (1) to interpret that the requirement of the recruitment rules is qualifying service is misplaced. Note (1) is not a substitute to the eligibility condition laid down in the rule which clearly requires two years in the service. Note (1) at best says that the authority shall keep in mind date of completion of each of the year spent in service. In this case two years regular service is a condition precedent. Therefore, when an eligibility list is to be prepared date of completion of each year put in service has

to be reckoned and that would be experience in service for the purpose of qualifying or making the incumbent eligible for consideration for the post of DG. The date of completion of each year service has to be seen in that context. This can only be possible if a person has actually put in service and not by fiction. The reason why two years regular service, a condition precedent, is not far to search. The post of Director General, which is a selection post, is the highest post in the CPWD. Since the post is to be filled by selection, this selection has to be of the best. To find out who is the best the authority has to see his experience of at least two years in the service of ADG. It is only his experience of two years as ADG which will make him eligible to compete for the post of DG. For a selection post it is invariably the merit which is to be seen. If a person has not gained experience of that post his merits cannot be judged. In order to judge the merit his experience in the feeder cadre post is the requirement of the rules. The experience has to be actual physical experience as held by Supreme Court in the case of Union of India & Ors. Vs. M. Bhaskar & Ors., reported in JT 1996 (5) SC 501.

15. In the case of M. Bhaskar (supra) the challenge was made by one P.C. Ohja who was denied promotion to Grade-I Commercial Inspector in 1990. The Rule required two years period of experience for promotion to Grade-I. Mr. Ohja was given promotion as Commercial Inspector Grade-II by order dated 21st September, 1989. It was made effective from 11th October, 1988. He, Therefore, sought promotion and wanted himself to be declared eligible for the same. He wanted his deed med promotion period i.e. 11th October, 1988 to be counted. Patna High Court rejected his plea and dismissed his petition. Mr. Ohja appealed to the Supreme Court. The Apex Court while upholding the decision of the Patna High Court in SLP (C) No.15438 of 1994, observed thus:

"The aforesaid decision has been challenged in this appeal by the Union of India by contending that 2 years" period of experience has to be reckoned not from 11.10.1988 but from 21.9.1989. There is no dispute that the eligibility condition is 2 years experience in Grade-II. Now this respondent having really started working in Grade-II pursuant to the order of 21.9.1989, he could not have gained experience prior to the date he had joined pursuant to this order. The mere fact that his promotion in Grade-II was notionally made effective from 11.10.1988 cannot be taken to mean that he started gaining experience from that day, because to gain experience one has to work. Notional promotions are given to take care of some injustice, inter alia, because some junior has come to be promoted earlier. But we entertain no doubt that the person promoted to higher grade cannot gain experience from the date of the notional promotion, it has to be from the date of the actual promotion."

16. The notional promotion given to the respondent No.4 as stipulated in para 3 of the order dated 15th June, 1998 read with para 18.4.3 makes it clear that since injustice was done to respondent No.4 because of wrong fixation of seniority earlier, Therefore, authorities compensated him by notionally fixing his

pay in higher grade from the date his junior Mr. S.R. Goyal got and also granted him notional promotion. Taking advantage of the Government instructions and guide-lines as provided in para 18.4.3 he got seniority with back date in the grade of ADG. But seniority in the grade itself is not a substitute to experience in service nor can be considered having put in two years in service as on 1st July, 1997. He had only been given notional promotion w.e.f. 22nd February, 1995 which, to our mind, will not amount to two years experience in service or two years regular service. Action is possible if one has actually performed the duty of additional Director General but not deemed to have performed. The statutory rule requires actual service of two years.

17. We also find no merit in the contention of Mr. Aggarwal that petitioner cannot take any help of M. Bhaskar's case (*supra*). Because according to Mr. Aggarwal unlike in the present case, M. Bhaskar's case rule envisaged two years experience, whereas in the case in hand rules require two years regular service. The distinction which Mr. Aggarwal has drawn seems to be only theoretical. Factually and legally the rule in question by requiring regular service requires experience in service. In M. Bhaskar's case the word "experience" was expressly used whereas in this case by implication when rule requires two years regular service it cannot be but requirement of experience or actually putting two years in service.

18. Regular service cannot be equated with qualifying service. If contention of Mr. Aggarwal is accepted it would result in inequity of treatment. It would amount to discrimination and offence to rules. Both Mr. G.K. Aggarwal as well as Mr. Mukul Rohtagi had during the course of arguments, fairly conceded that ad hoc service rendered by any of the parties would not count towards eligibility. If ad hoc service cannot be counted, then there is no reason why deemed promotion should count. Because in a deemed promotion the officer has not performed any functions in the service during that period. It is by fiction he is placed there. Whereas in ad hoc he actually performed still it has not to count towards regular service. In similar situation the observation of Supreme Court in *S. Ramaswamy Vs. Union of India (UOI) and Others*, aptly apply. Therein the Apex Court held that five years regular service in the grade does not include ad hoc service. In other words "regular service" must mean "regular service" and not ad hoc, let alone notional service. If that be so then there cannot be any valid reason to contend that the notional promotion or deemed promotion be counted towards putting up of service or experience in the grade. That will tantamount to creating two classes of officers amongst the same group. For example if a person has spent three years as ADG on ad hoc basis and applies for being considered for the post of DG, he will not be considered eligible whereas a person who has not rendered any service but by fiction placed there will be considered. By fiction or by deeming provision, the requirement of the statutory rules to put in two years service or experience cannot be scuttled. If "regular" has no meaning or relevance and the note appendixes to the rule has to be only considered as the guiding factor of eligibility then the substantive rule

will become redundant. That could not have been the intention of the rule making authority. The word "regular service" has a significance. It stands for experience in service. Since the promotion to a selection post of Director General has primarily to be on merit then filling up of such a post has to be when a person actually fulfills the requirement of the rules and not notionally.

19. So far as the grievance of the petitioner that he should be given seniority with retrospective effect from 1st April, 1995, we find no merits in the same. It was all in the realm of speculation that had the DPC met in 1995 he would have been selected as ADG. The fact remains that the seniority on the basis of which he claimed retrospective seniority stood changed in view of the subsequent judgment of Supreme Court. As per the final seniority list prepared he was declared junior to respondent No. 4. His appointment as the Chief Engineer is w.e.f. August, 1989. Whereas that of respondent No. 4 w.e.f. January, 1987. Therefore, at this juncture petitioner cannot be allowed to say that on the basis of his seniority as in 1992 he be declared ADG. We see no reason to interfere with the order of the Tribunal on this count.

20. In view of our above discussion, the impugned order is modified to the extent that respondent No. 4 was not eligible as on 1st July, 1997 for consideration for the post of DG. We further hold that for the post of Director General which fell vacant in 1997 neither the petitioner nor respondent No. 4 were eligible on the cut off date i.e. 1st July, 1997. Since the DPC is now to be held, we deem it proper that the Department should consider all the eligible ADGs for promotion to the post of Director General.

21. With these observations, the petition stands disposed. No costs.