

(2011) 02 DEL CK 0471

In the Delhi High Court

Case No : Writ Petition (C) No. 4936 of 2010

Mahanagar Telephone Nigam Ltd.

APPELLANT

Vs

Shri S.M. Lal and Others

RESPONDENT

Date of Decision : 25-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16
ITS Rules, 1965 — Rule 27

Citation : (2011) 02 DEL CK 0471

Hon'ble Judges : Mool Chand Garg, J;Anil Kumar, J

Bench : Division Bench

Advocate : V.K. Rao and Neha Bhatnagar, for the Appellant; S.P. Pandey, Respondent No. 2, Ram Bilas Gupta, for Respondent Nos. 4, 6 and 7 and R.B. Gupta, Respondent No. 5, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.

CM No. 9759/2010

Respondent No. 5 who appears in person seeks to discharge his counsel. Consequently, Mr. Narendra Kumar Sharma is discharged as counsel for Respondent No. 5.

Learned Counsel for Respondent Nos. 4, 6 & 7, on instructions and Respondent No. 5 state that no reply to the application is to be filed on behalf of the Respondents. This is an application by the Petitioner to file annexure P-2, P-4 to P-9 along with the writ petition. The documents sought to be produced by the Petitioner are relevant for the determination of controversies between the parties and the Respondents have also not opposed the production of said documents. Though these documents ought to have been filed by the Petitioner before the Tribunal, however, for the reasons detailed in the application the Petitioner is allowed to file these documents and the application is disposed of.

1. The Petitioner, MTNL has challenged the order dated 20th January, 2010 passed by Central Administrative Tribunal, Principal Bench, New Delhi in T.A No. 220/2009 titled Sh.S.M. Lal and Ors. v. Mahanagar Telephone Nigam Ltd T.A No. 220/2009 allowing the original application of the Respondents and holding that the Respondent be considered to be promoted to ITS Group "A" service in senior time scale at the time of their absorption on 1st October, 2000 in MTNL and granting them all the consequential benefits.
2. The Respondents were aggrieved by their absorption in the services of the Petitioner in the cadre of Telecom Engineer Service (TES) Grade "B" by order dated 24th January, 2004 with effect from 1st October, 2000 though they had been working in senior time scale (STS) of the Indian Telecommunication service (ITS) as group "A" officers since 1966 though on adhoc basis on account of regular DPC not conducted by the Petitioner. Though their selection on adhoc basis was against the post and a detailed process of selection through DPC was followed and they had even been drawing the increment applicable to the post.
3. The Respondents were initially appointed as Engineering Supervisor in the erstwhile Indian Post and Telegraph Department, Government of India, New Delhi which post was re-designated as Junior Engineer and again as Junior Telecom Officers. The Respondents were specifically promoted to the post of Assistant Engineer (TES) Group "B" and were re-designated as sub Divisional Engineer.
4. On creation of MTNL, the staff of Indian Post and Telegraph Department was transferred to the Petitioner on deemed deputation without any deputation allowance. The Respondents were also promoted to the post of Assistant Engineer (TES) Group "B" and were appointed Divisional Engineer in STS (Group "A") by the orders issued by Telecommunication Headquarters (TCHQ).
5. Appointment of the Respondents to the post of Divisional Engineer in STS (Group "A") was on the basis of consideration and recommendation by a Departmental Promotion Committee which considered the common seniority and assessed their performance. Though UPSC was not consulted, however, the promotion was with the approval of the concerned Minister.
6. The terms and conditions on the basis of which the employees were to be absorbed with the Petitioner or for reversion to the services of the DOT, were circulated and on the basis of the option exercised by the Respondents pursuant to the order dated 24th January, 2004 issued by Department of Telecommunication, they were permanently absorbed from 1st October, 2000 as TES (Group "B") officers although they were working as Divisional Engineers in STS of ITS, Group "A".
7. On Respondents' absorption on 1st October, 2000, the Petitioner on the same day promoted them as Divisional Engineers but on adhoc basis and the Respondents are continuing as such since then. Aggrieved with this the

Respondents had made a representation on 8th March, 2004 for treating them as officers in STS (Group "A") as Divisional Engineers. Though the representation of the Respondents was not replied, however, by order dated 12th April, 2006 they were appointed to the post of Deputy General Manager on current duty charge without any extra remuneration. The Respondents also alleged discrimination vis-?-vis other officials one of them being Sh. Manoj Kumar who had been working in junior time scale (Assistant Divisional Engineer) till 25th May, 1999 but who was promoted to STS of ITS Group "A" (Divisional Engineer) and he had also been promoted to Junior Administrative Grade (JAG) as Deputy General Manager on adhoc basis with effect from 2nd May, 2003. The Respondents, therefore, contended that even a junior officer had been promoted in the Department of Telecommunication, however, they have been made to languish as adhoc Divisional Engineers for more than a decade.

8. As the grievances of the Respondents were not rectified, they filed a writ petition in the High Court being WP (C) 16701-07 of 2006 titled S.M. Lal and Ors seeking a direction to Petitioner to treat them as regular Divisional Engineers with effect from the date of their adhoc promotion and to direct the Petitioner to promote the Respondent to next higher post on time bound basis. The Respondents relied on a circular dated 8th May, 2000 of DOT which contemplated that the officers opting for MTNL will strictly be on the basis of their seniority in their respective cadre. It further stipulated that all the officers promoted by Telecommunication Headquarters will be treated in promoted cadre provided they had assumed the charge of higher cadre post though due to various reasons DPC in some of the services could not be conducted for quite long time. In paragraph 3 of the said circular, it has been observed as under:

...3. Selection of officers opting for MTNL will be strictly on the basis of their seniority in their respective cadre. Since due to litigation, DPC in some of the services could not be conducted for quite long time, hence all the officers promoted on TCHQ orders will be treated in promoted cadre provided they have assumed the charge of higher cadre....

9. The plea of the Respondents was that their selection was against the vacant posts and by a detailed process of selection through a DPC, though a regular DPC could not be constituted because of administrative problems. The Respondents asserted that since they have been working on regular basis on the post of Divisional Engineers and have also been drawing increments in that post although on adhoc basis, they be treated as regular Divisional Engineers. Reliance was also placed on behalf of Respondents on N.S.K. Nayar and others Vs. Union of India and others, where the Supreme Court had held that the number of posts in junior time scale (JTS) are limited, whereas number of posts in the grade of STS (Senior Time Scale) is substantial and considering the facts and circumstances the grade structure of group "A" service is that of an inverted pyramid and it would not be possible to fill up all the posts of STS from the JTS officers and, therefore, there is an administrative compulsion to fill up STS post

with a frog leap by appointing TES Group "B" officer bypassing the JTS. In the circumstances, on behalf of Respondents it was pleaded that denial of right of regularization of their services was wholly arbitrary and in violation of Articles 14 & 16 of the Constitution. It was also asserted that since the Respondents have worked in STS for almost a decade, therefore, they be deemed to be regular members of Group "A" service in STS. Reliance was also placed on the decision of Bombay High Court dated 27th April, 2005 where the Court had held that there was no reason to keep the Divisional Engineers on adhoc basis for long period of time. Reference was also made on behalf of the Respondents to the fact that those officials who continued with DOT and who were working as Assistant Engineers till 1999, when the Respondents were working as Divisional Engineers, officers working in DOT have been promoted whereas the Respondents have been denied this opportunity.

10. The writ petition filed by the Respondent was transferred to the Central Administrative Tribunal, Principal Bench and was registered as T.A No. 220/2009 titled The writ petition was contested by the Petitioner contending inter-alia that the Respondents have no grounds to seek regularization as Divisional Engineers because they had been promoted only on adhoc basis and adhoc promotion does not give them any right of seniority for future promotion. Reliance was also placed on the terms and conditions of absorption, stipulating that the absorption of officers would be in their substantive grades/posts and not on the post on which they were working on officiating/adhoc post. According to the Petitioner the Respondents were promoted on adhoc post to STS of ITS Group "A" in the interest of service as sufficient number of JTS officers were not available, however, the substantive grade of the Respondent remained TES group "B". The relaxation was also denied on the ground that as per the recruitment rule of ITS Group "A", only the officers of JTS of ITS group "A" with four years regular service are eligible for regular promotion to STS of ITS group "A". As the Respondents substantive grade continued to be TES Group "B" they could not be considered for promotion to the post of STS of ITS group "A". The Petitioner also asserted that Group "A" officers have not been absorbed yet in MTNL in view of various cases pending before various Courts and Tribunals and this matter for absorption in Group "A" of the Respondents could be resolved only after the decision in other cases. In any case it was contended that the Respondents have been promoted as Deputy General Manager but only given current duty charge to look after the work of such post without extra remuneration.

11. The Tribunal after considering the respective pleas and contentions of the parties relied on the decision of the Supreme Court in N.S.K. Nayar (Supra). The Tribunal noticed that in N.S.K. Nayar the claimants were the promotee members of ITS Group "A" who had been officiating as Divisional Engineers in STS grade. It was also noticed that the rules contemplated appointment to JTS in ITS Group "A" by selection on merit from amongst the officers of TES Group "B" with not less than 8 years regular service in group "B" on the recommendation of duly constituted DPC and approval of the recommendation by UPSC. The Tribunal also

noted that though a directly recruited Assistant Divisional Engineer would not ordinarily be promoted as Divisional Engineer unless he had put in five years of service, however, under the rules the post in STS could be filled up on temporary measure in an officiating capacity to hold charge by promotion of permanent members of TES Group "B". In these circumstances, the Tribunal considered the question whether the services rendered by the Respondents in senior time scale for over a decade entitled them to claim that they were regular holders of the post in STS of ITS grade. The Tribunal categorically relied on the judgment of N.S.K. Nayar where in paras 5 & 6 it was held as under:

5. We have heard learned Counsel for the parties at length. It is no doubt correct that the regular channel of promotion to Group A Service provided to the officers of the Telegraph Engineering Service Class II under the Rules is to the JTS and their promotions under Rule 27(b) are only to meet the administrative exigency of short-tenure. We are of the view that Rule 27(b) of the Rules has been made to enable the Government to meet an ad hoc shortage of officers to man the posts in STS. The Class II officers have long experience to their credit and the nature of their work is almost identical to that of the posts in JTS. The direct recruits to JTS are deputed to work in Class-II posts to acquire experience. It is also not disputed that a class-II officer who is on the approved list for promotion is competent and eligible to work in JTS and STS. It is in this background that Rule 27(b) has been enacted to enable the Government to fill the large number of vacancies in STS by appointing Class-II officers with a frog-leap from class-II to STS by-passing the JTS. The object of having Rule 27(b) of the Rules is to provide a source of appointment to meet an administrative exigency of short tenure. It could never be the intention of the framers of the Rule to permit the appointments under the said Rule to go on for 10 to 15 years. The appointments for such a long period cannot be considered to be purely temporary/ officiating or to hold charge. Taking work out of the Petitioners in the STS posts for 10/ 15 years and denying them the right of regularization and the consequent benefits in the said grade, is wholly arbitrary and is violative of Article 16 of the Constitution of India.

6. We have given our thoughtful consideration to the question as to what relief under the circumstances can be given to the Petitioners and other officers similarly situated. While doing justice to the Petitioners we do not wish to cause any prejudice to the direct recruits. Rule 27(a) of the Rules provide that a direct recruit to JTS shall not ordinarily be promoted to STS unless he has put in five years" service in JTS. Taking clue from the said Rule we hold that the promotee officers who have worked in STS for a continuous period of five years and are holding the posts to-date shall be deemed to be regular members of Group A Service in STS. They shall be entitled to count their seniority in the STS from the date of completing the said period of five years and shall be entitled to be considered for further promotion to JAG and SAG on the basis of the said seniority.

12. Comparing the cases of the Respondents it was observed that they had also been working in the STS of Group "A" for over a decade and even after absorption in MTNL they had been appointed as Divisional Engineers although on adhoc basis and, therefore, the ratio laid down by the Supreme Court in N.S.K. Nayar (supra) is categorically applicable in the case of the Respondents. Reliance was also placed on the circular dated 8th May, 2000 contemplating that when DPC could not be conducted for quite long, the officers promoted by the Telecommunication Headquarter (TCHQ) will be treated in promoted cadre provided they had assumed the charge of higher cadre. Since this was not disputed that the Respondents had been promoted by Telecommunication Headquarter (TCHQ) and they had assumed the charge of the higher cadre in which they had worked for long time, in the circumstances, the relief as claimed by the Respondents was granted by order dated 20th January, 2010.

13. We have heard the learned Counsel for the parties and some of the Respondents in person in detail and have perused the record. The emphasis of the learned Counsel for the Petitioner is that the Respondents had been absorbed according to the terms and conditions and the option exercised by them. Once the option had been exercised by the Respondents and they had been absorbed, they would be governed by the rules applicable to MTNL and as such once they accepted their absorption in MTNL as TES Group "B" officer, they were estopped from agitating any grievance regarding their absorption. According to the learned Counsel such a relief as has been granted by the Tribunal would have far reaching implications, as Petitioner will have to create post to accommodate all similar placed officers which is not within the domain of Petitioner's organization and as such not only the functioning of the Petitioner's organization will be impacted but it will also have ramification on the other organizations e.g BSNL. The learned Counsel has also contended that the ratio of the precedent N.S.K. Nayar (Supra) is not applicable in the facts and circumstances of the present case as after the said case there have been other cases of the Supreme Court especially State of Karnataka v. Uma Devi.

14. The Respondents and their counsel have relied on DOT order No. 400-41/98-STG-III dated 8th May, 2000 stipulating that the selection of officer opting for MTNL will be on the basis of their seniority in their respective cadre. Since due to litigation, DPC in some of the services could not be conducted for quite long time thus all the officers promoted on TCHQ order (Telecommunication Headquarter) would be treated in promoted cadre provided they had assumed the charge of higher cadre. According to the Respondents all of them had already worked for 3 to 4 years on promoted cadre of Divisional Engineer after getting promotion on TCHQ orders. Even after absorption in cadre of TES Group "B" on the same day they were promoted as Divisional Engineer on adhoc basis and they have continued to work on the promoted post of Divisional Engineer and they had worked even prior to absorption, on the cadre of Divisional Engineer for considerable period. After absorption they have kept the charge of higher post and have also drawn all the incremental benefits in the pay scale of the said post.

15. Perusal of the options exercised by the Respondents it is apparent that the options were exercised in reference to DOT office memorandum No. 400-41/98-STG-III dated 8th May, 2000. Para 3 of the said order is as under:

Selection of officers opting for MTNL will be strictly on the basis of their seniority in their respective cadre. Since due to litigation, DPC in some of the services could not be conducted for quite long time, hence all the officers promoted to TCHQ orders will be treated in the promoted cadre provided they have assumed the charge of higher cadre.

16. In the facts and circumstances it could not be disputed that all the Respondents have been promoted on TCHQ orders and they had worked for 3-4 years on the promoted cadre of Divisional Engineer on the date of absorption that is 1st October, 2000. This is also not disputed that though regular DPC was not held, however, the adhoc promotion to the post of Divisional Engineer in STS (Group "A") was on the basis of consideration and recommendation by DPC which considered the common seniority and assessed their respective performance. Though UPSC was not consulted but this has not been denied that the concerned Minister's approval was taken. Another significant factor is that the selection of the Respondents was against the vacant posts. After selection on the basis of the recommendation of a properly constituted DPC they have not only been drawing the emoluments of the said post but also the increment in the said post.

17. If that be so then the plea of the Respondents that they should have been absorbed as Divisional Engineer rather than TES Group "B" cannot be faulted and the reasoning and rationale of the Tribunal cannot be held to be illegal. The relief which is available to the Respondents cannot be denied to them on the ground that this may lead to grant of similar relief to many other similarly situated officials who had been absorbed in MTNL or BSNL. If the Respondents are entitled for certain relief in accordance with rules and regulations and under law the grounds envisaged by the Petitioner that it will impact many officials cannot be the basis for declining the relief in accordance with rules and regulations to the Respondents. The Petitioner had also issued an office memorandum dated 11th September, 1997 pertaining to time bound/post based promotion policy for group "B" level executive/officers of MTNL. Rule 3(i) contemplates consideration for upgradation of the IDA scale of individual executive on completion of 4 years of service in the current IDA scale. The said rule also stipulates that no upgradation will be granted to any executive by virtue of any local officiating arrangement. The Respondents have contended that even the Petitioner has accepted the regular and continuous service of the Respondents in the Divisional Engineer (STS of ITS group A-E5 Grade of MTNL) with effect from 1st October, 2000 and have promoted them to E-6 grade with effect from 1st October, 2004. Had the Petitioner accepted absorption on 1st October, 2000 only in TES Group "B", the Petitioner would not have given promotion to the Respondent to E-6 grade with effect from 1st October, 2004. This is further augmented by the fact

that in reply dated 22nd January, 2007 to a RTI query the Petitioner has denied any provision of adhoc promotion in MTNL. The query raised was:

4. Does ITS rules permit for provision of adhoc promotion or not? If provision does not exist in ITS rules then under what rule of DOT, the adhoc promotion in STS Grade was given.

Comment: There is no provision in ITS Recruitment Rules for adhoc promotion from TES Group "B" to STS of ITS Group "A". However, the adhoc promotions from TES Group "B" to STS of ITS Group "A" were made in public interest in accordance with the guidelines of DOPT on the subject issued vide O.M No. 28036/8/87-Estt.(D) dated 30th March, 1988."

18. This is also apparent from the pleas and contentions of the parties that promotion in STS of ITS Group "A" by DOT was given by considering Respondents' all India seniority in accordance with the eligible rules. Though the Petitioner has termed the DPC as Screening Committee whereas the Respondents contend that it was a DPC consisting of two officers of Telecom Commission and one DDG and all the formalities of DPC were observed. Regarding not getting the opinion of UPSC it has been contended that MTNL being a Public Sector Undertaking the opinion of UPSC was not required for promotional purposes to the Divisional Engineer cadre. The Petitioner has also not been able to show any cogent reason for not holding the regular DPC. The Supreme Court in N.S.K. Nayar (Supra) had also held that in view of the plea of the officer that it was never the intention of the framers of the rule to permit the adhoc appointment to go on for 10 to 15 years which will tantamount to denial of right of regularization of their services and would be arbitrary and in violation of Articles 14 or 16 of the Constitution by holding that the Courts see no reason as to why the officials had to be kept on adhoc basis for such a long period and it directed the department to file an affidavit as to why the officials were not regularized against the post, if the officials were eligible for regularization. In the circumstances the plea of the learned Counsel for the Petitioner that the ratio of the precedent N.S.K. Nayar (Supra) is not applicable in the present facts and circumstance of the case cannot be accepted.

19. Perusal of ITS Rules, 1965 and ITS Rules, 1992 also reveal that they are similar except Rule of 1965 contemplated officiating promotion on hold charge basis whereas ITS Rule, 1992 does not stipulate that officiating promotion shall be on hold charge basis. If that be so the plea of the learned Counsel for the Petitioner about the non applicability of the ratio of N.S.K. Nayar (Supra) cannot be sustained. No other grounds have been raised on behalf of Petitioner impugning the order of the Tribunal dated 20th January, 2010 holding that the ratio of N.S.K. Nayar (Supra) is applicable in the facts and circumstances of the case and, therefore, allowing the Respondents petition and directing the Petitioner to consider them as having been promoted the Respondents to ITS Group "A" service in senior time scale at the time of their absorption in Respondent MTNL and also granting all consequential benefits.

20. The case of the Respondents would be different from those officers from whom the posts have to be created though they have been promoted as Divisional Engineer Group-A from those who had been promoted on ad-hoc basis despite having posts for them and who were not appointed to the regular posts as regular DPC was not held. In the circumstances, the plea of the Petitioner that such relief as has been granted by the Tribunal will impact the functioning of the Petitioner and even other organization cannot be sustained nor on such a ground the relief which the Respondents are entitled for can be denied to them.

21. For the foregoing reasons we do not find any illegality or perversity in the order of the Tribunal impugned before us which will impel us to exercise this Court's writ jurisdiction. In the circumstances, the writ petition is without any merit and it is, therefore, dismissed. Parties are, however, left to bear their own cost.