
(2015) 05 DEL CK 0083

In the Delhi High Court

Case No : Writ Petition (C) 7762/2011 and CM Appl. No. 17559 of 2011

MTNL and Others

APPELLANT

Vs

Jasbir Singh

RESPONDENT

Date of Decision : 29-05-2015

Acts Referred:

Citation : (2015) 05 DEL CK 0083

Hon'ble Judges : Kailash Gambhir, J; I.S. Mehta, J

Bench : Division Bench

Advocate : Jyoti Singh, Senior Advocate, Vaibhav Kalra and Tinu Bajwa, for the Appellant; Shrigopal Aggarwal, Advocate and Party-in-Person, Advocates for the Respondent

Final Decision : Allowed

Judgement

Kailash Gambhir, J.—Challenge in the present Writ Petition is to the order dated 21.12.2009 passed by the learned Central Administrative Tribunal (hereinafter referred to as the "learned Tribunal") in T.A. No. 922/2009 and order dated 25.07.2011 passed by the learned Tribunal in R.A. No. 117/2010 in T.A. No. 922/2009.

2. Assailing the legality and correctness of the said orders passed by the learned Tribunal, Mrs. Jyoti Singh, the learned Senior Counsel for the petitioners submitted that the respondent herein has been wrongly claiming the pay parity in Pay Scale in Biennial Cadre Review (BCR) Grade in CDA Pay Scale of Rs. 1600-2660/- w.e.f. 29.09.1992 with one Sh. Jitender Kumar who was placed in higher Pay Scale, without appreciating the fact that he was appointed to the post of UDC after declaration of his result on 02.12.1992 and therefore, the respondent could not have equated himself with the case of Sh. Jitender Kumar as the facts similar to his case would be settled with one Mr. Jugal Kishor Wadhwa w.e.f. 01.07.1996. The learned counsel further argued that the learned Tribunal fell in grave error in not appreciating the fact that the respondent was much junior to Sh. Jitender Kumar in the UDC Grade as Sh. Jitender Kumar

joined as LDC in the year 1965 while the respondent has joined as LDC in the year 1981 and reckoning the total length of service of Sh. Jitender Kumar i.e. 26 years, he became eligible for promotion to TOA Grade-III (BCR Scale) in terms of the OM dated 09.09.1992. The learned counsel further argued that the BCR scheme which was announced in the year 1990 by the petitioners was subject matter of challenge before the learned Tribunal, Bangalore Bench in July 1992. The learned Tribunal had also taken a view that BCR scheme appeared to be in violation of the Post and Telegraphs Department, Telecommunication Branch (Selection Grade Posts) Recruitment Rules, 1979 ("hereinafter as Recruitment Rules 1979") but did not strike down the scheme taking into consideration the interest of large number of employees who had already been granted relief on the basis of the scheme over a period of time. The said decision of the learned Tribunal and some of other Benches was ultimately upheld by the Hon'ble Supreme Court in the case of Union of India and Ors. v. Leelamma Jacob and Ors., reported in (2003) 12 SCC 280, and in view of the decision of the Hon'ble Supreme Court, the respondent now cannot challenge the legality or constitutionality of the said BCR scheme.

3. The learned counsel also argued that the respondent had appeared in the competitive departmental examination on 10.08.1992, i.e. before cut off date of 29.09.1992 and his result was declared on 02.12.1992 and therefore, his Pay Scale was rightly fixed in parity with Sh. Jugal Kishore Wadhwa and not in parity with Sh. Jitender Kumar. The learned counsel also argued that the learned Tribunal while passing the impugned order wrongly relied upon the fact that the respondent was senior to Sh. Jitender Kumar whereas Sh. Jitender Kumar was senior to the respondent and therefore, there is basic fallacy in the reasoning given by the learned Tribunal. The learned counsel also argued that the petitioner had filed a Review Petition seeking review of the order dated 21.12.2009 but the said Review Petition was dismissed by the learned Tribunal vide order dated 30.04.2010, being cryptic and bereft of any reasonable ground. Thereafter, a fresh direction was given by this Court vide order dated 20.09.2010 in CWP No. 4870/2010 wherein, the Court remanded this matter back for reviewing, yet the learned Tribunal without appreciating the direction given by this Court and ignoring the entire material placed on record dismissed the Review Petition filed by the petitioners vide order dated 25.07.2011. The learned counsel also argued that the learned Tribunal has failed to appreciate the settled legal position that the seniority in the case of departmental examination is always reckoned from the date of declaration of the result and not from the date of appearance in the examination. Based on these submissions, the learned counsel for the petitioners strongly urged for setting aside of the impugned order passed by the learned Tribunal. In support of her contentions, the learned counsel for the petitioners placed reliance on the following judgments:

- a) Union Of India and Others v. Leelamma Jacob and Others, (2003) 12 SCC 280
- b) Government of Andhra Pradesh and Others Vs. N. Subbarayudu and Others,

(2008) 117 FLR 369 : (2008) 4 JT 282 : (2008) 4 SCALE 117 : (2009) 2 SCC(L&S) 172

c) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, AIR 1979 SC 1628 : (1979) 2 LLJ 217 : (1979) 3 SCC 489 : (1979) 3 SCR 1014

d) Rupinder Singh and others v. The Punjab State Board of Technical Education and Industrial Training, Chandigarh and others, CWP No. 14903 and 15373 of 1996, decided on 05.03.1997

4. Opposing the present Writ Petition, Mr. Shrigopal Aggarwal, the learned counsel for the respondent strongly contended that the learned Tribunal has correctly granted the pay parity to the respondent at par with Sh. Jitender Kumar as the respondent was senior to Sh. Jitender Kumar on account of his passing the departmental examination for promotion to the post of UDC for which the examination was held on 10.08.1992 and the petitioners had introduced One Time Bound Promotion (hereinafter referred to as the "OTBP") in 1983 and an OTS Scheme through an administrative order later in time, i.e. on 09.09.1992. The learned counsel also argued that the petitioners have failed to explain the sanctity of the cut off date i.e., 29.09.1992 and why the LDCs were granted pay parity as per this date. The petitioners have also ignored that there is no reasonable nexus with the object that they sought to achieve by laying down the said cut off date. The learned counsel thus contended that after having appeared in the departmental examination held under Recruitment Rules, 1979, the respondent could not have been deprived of the said right by any subsequent administrative order and therefore, the learned Tribunal has rightly upheld the claim of the respondent in granting him pay parity at par with the case of Sh. Jitender Kumar. Based on these submissions, the learned counsel for the respondent prayed for dismissal of the present Writ Petition after upholding the order passed by the learned Tribunal. In support of his argument, the learned counsel for the respondent placed reliance on the following judgments:

a) Tej Prakash Pathak and Others Vs. Rajasthan High Court and Others, (2013) 8 JT 498 : (2013) 5 SCALE 1 : (2013) 4 SCC 540 : (2013) 2 SCC(L&S) 353 : (2013) 2 SCT 699 : (2013) 2 SLJ 139

b) Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, AIR 2003 SC 511 : (2002) 10 JT 55 : (2003) 2 SCC 111 : (2003) 1 UJ 80

5. We have heard the learned counsel for the parties at considerable length and have given our conscious consideration to the arguments advanced by them.

6. The legality, constitutionality and validity of the BCR scheme which was announced by the petitioners in the year 1992 cannot be questioned by the respondent after the same was upheld by the decision of the Apex Court in Union of India and Ors. v. Leelamma Jacob (Supra) case. This plea of BCR scheme being an administrative order and being in contravention of the existing

Recruitment Rules, 1979 was also considered by the Apex Court in the above judgment and the Apex Court took a view that since the scheme has been in operation since 1992 and also the fact that contesting respondents were quite content with having their alternative prayer as granted by the learned Tribunal, and therefore, the Court refrained from taking any such view to strike down the scheme altogether. The relevant paras of the aforementioned judgment are reproduced as under:

"14. Having heard the submissions of the parties, we are of a view that the appeals must be dismissed and the decision of the Tribunal be upheld. The reasoning of the Tribunal particularly its finding that the BCR Scheme in fact amounted to an amendment of the existing Rules by an administrative order is unexceptionable. Logically speaking this should lead us to strike down the Scheme altogether. However, given the fact that the Scheme has been in operation since 1990 and also that the contesting respondents are quite content with having their alternative prayer as granted by the Tribunal we do not do so.

15. In addition to the fact that the Scheme is in contravention of the existing Rules, by virtue of the BCR Scheme the contesting respondents' seniority in Grade II was taken away. Those who had not been able to pass the examinations for promotion from Grade I to Grade II and who had continued to serve in Grade I were allowed to leapfrog over the contesting respondents by the BCR Scheme by being granted scales of pay in respect of posts in Grade III. As a result not only were the contesting respondents superseded without being considered for promotion to Grade III at all when their juniors were considered, but their chances of being further promoted to Grade IV were effectively forestalled as promotion from Grade III to Grade IV would be strictly on the basis of seniority presumably in the grade below. Since the contesting respondents having not at all being promoted to Grade III they would not be in a position to be considered for promotions to Grade IV whereas the beneficiaries of the BCR Scheme would, by virtue of the Scheme be in a position to be considered for further promotion to Grade IV. Indeed according to the contesting respondents the BCR Scheme has resulted in some of its beneficiaries getting Grade IV of pay already. There is also substance in the submission of learned counsel for the respondents that the Recruitment Rules as well as the BCR Scheme provide for consideration of suitability and fitness as criteria for advancement. Necessarily the consideration for promotion to the next grade should be from the grade immediately below. As a result of the BCR Scheme however the beneficiaries have been promoted from Grade I to Grade III and possibly Grade IV without any consideration of their suitability in terms of the Rules or Scheme. Nevertheless the contesting respondents do not seek the withdrawal of any benefits which may have already been granted under the BCR Scheme to these employees. What they only want is that they should be granted at least a parity with those who in Grade II were junior to them. It has to be recorded that the system of promotion by examination from Grade I to Grade II has since been abolished in 1983 therefore, the contesting respondents represent a class of employees who had

been promoted on the basis of departmental examinations successfully taken by them prior to that date."

7. The respondent admitted the fact that he was himself a party in *Union of India v. Leelamma Jacob* (Supra), the case that was decided by the Apex Court and therefore, now he cannot turn around to agitate the said issue again with regard to the constitutionality of the said administrative order on the ground that the same is in contravention of the existing Recruitment Rules, 1979. This plea is thus, no more available to the respondent.

8. With regard to the question as to whether Sh. Jitender Kumar was junior to the respondent or the respondent was junior to him, the basic facts on this aspect are not in dispute. Undoubtedly, in the order dated 21.12.2009 passed by the learned Tribunal, the learned Tribunal has wrongly assumed that Sh. Jitender Kumar was junior to the respondent and thus based on this basic canard the learned Tribunal had a view that the parity of pay is to be restored vis-a-vis juniors and admittedly with Sh. Jitender Kumar, his junior, from 29.09.1992, cannot be countenanced in law. By a Review Petition filed by the petitioners, the petitioners wanted to draw the attention of the Court to the said glaring error on this important aspect in the order dated 21.12.2009 treating Sh. Jitender Kumar as junior to the respondent was junior to Sh. Jitender Kumar. The learned Tribunal despite the direction given by the High Court vide order dated 20.09.2010, did not accord any weight-age to this important and vital fact that Sh. Jitender Kumar had joined as a LDC in the year 1965 while the respondent had joined as a LDC in the year 1981. Prior to 1992, the criteria for promotion under the existing Recruitment Rules, 1979 from the post of LDC to the post of UDC was by two modes- first, by passing departmental competitive examination and the second was on the basis of seniority-cum-fitness. The new scheme known to as OTBP scheme was introduced by the petitioners vide OM dated 09.09.1992. Vide this OM, the post of LDC was re-designated as TOA (G) Grade-I, thus all those who were in the scale of OTBP were placed in TOA (G) Grade-II and those in BCR scheme were placed in TOA (G) Grade-III under BCR scheme. The persons who were working as LDC/UDC and had rendered 26 years of service became eligible for the promotion to TOA (G) Grade-III (BCR Scale) by virtue of their total length of service and thus who had rendered 16 years of service as LDC/ UDC were entitled for being promoted to TOA (G) Grade-II (OTBP Scale). The respondent herein had appeared in the departmental examination on 10.08.1992, i.e. much prior to the announcement of the scheme, i.e. on 09.09.1992 and the result of the said exam was declared on 02.12.1992. Sh. Jitender Kumar had rendered 26 years of qualifying service in the LDC Grade and based on his length of service, he was promoted as TOA (G) Grade-III (BCR Scale) in accordance with the said scheme and as on this date the respondent was ineligible to be promoted as TOA (G) Grade- III (BCR Scale) since he had not completed requisite 26 years of length of service as per the BCR scheme. The result of the respondent was declared on 02.12.1992 and he was promoted as UDC on 08.12.1992 and therefore, the respondent cannot claim parity to draw

the same Pay Scale at par with Sh. Jitender Kumar who had completed 26 years of length of service when he was promoted as TOA (G) Grade-III (BCR Scale) as on 29.09.1992.

9. Reliance was placed by the learned counsel of the respondent on the judgment of Tej Prakash Pathak and Ors. case (Supra) wherein the Hon''ble Supreme Court was faced with the issue that whether criteria of selection can be altered by the authorities concerned in the middle or after the process of selection commences i.e. whether the "rules of the game" can be changed after the game is played. The Hon''ble Supreme Court observed that under the scheme of our Constitution an absolute and non- negotiable prohibition against retrospective law making is made only with reference to the creation of crimes. Any other legal right or obligation could be altered, created, extinguished retrospectively by the sovereign law making bodies. Though no final decision was taken by the Hon''ble Bench in the matter and the matter was left open for further consideration of the Hon''ble Chief Justice of India. Thus, reliance cannot be placed on the above-mentioned case.

10. We find considerable merit in the contention raised by the learned counsel for the petitioners that it is the date of the declaration of the result which would be the determining factor to grant Pay Scale on the promotional post and not the date when the candidate had appeared in a particular examination. Reliance in this regard can be safely placed on the judgment of the Hon''ble High Court of Punjab and Haryana in Rupinder Singh's case (Supra) wherein, it was held that a person is said to have passed the examination only on knowing the result of his examination. The relevant para of the same is produced hereunder:

"18. In the light of the above discussion, we are of the considered opinion that a candidate be declared to have passed an examination only with effect from the date on which the result of the examination is declared. The declaration of the result cannot relate back to the date of the examination unless otherwise specifically provided by any Act or Rules as in service jurisprudence. Nor can it legally be taken that by passing supplementary examination the result will relate back to the date of passing of the annual examination. We are firmly of a view that publication of the result of the examination cannot have any retrospective operation by projecting it backward to the date of the examination or to the date of the main examination. If such a course is adopted, we are clear in our mind that it will become impossible to decide the qualification of a particular candidate with reference to any date like last date of filing the application for any post or for admission to any course. While disposing of the review petition No. 182/96, the Bench went a step further and said that the benefit of the judgment will accrue to petitioners and to all those who had appeared in supplementary examination either in re-appear or in compartment and who have been given admission by the College-Management and whose results were declared after the cut off date. These observations made by the Bench are not correct statements in law. We do not approve the same."

11. In light of the aforesaid judgments, coming to the facts of the present case, it would be pertinent to note that the respondent was promoted by virtue of him passing a departmental examination and Shri Jitender Kumar was promoted by virtue of his length of service and placing both on equal pedestal would not be fair and just. We find considerable merit in the submissions made by the learned counsel for the Petitioner in this regard. The respondent herein was promoted to the post of UDC from 08.12.1992 after the declaration of result on 02.12.1992 and not from the date of examination i.e. 10.08.1992 however, in our view he should be granted Pay Parity of the same scale as Sh. Jugal Kishore Wadhwa, w.e.f. 01.07.1996.

12. In the light of the above discussion, we do not find ourselves in agreement with the decision given by the learned Tribunal that the respondent be granted pay parity in the BCR grade in the CDA pay scale at par with Sh. Jitender Kumar. Hence, the orders dated 21.12.2009 and 25.07.2011 in T.A. No. 922/2009 and R.A. No. 117/2010 respectively passed by the learned Tribunal are hereby quashed. Accordingly, the present Writ Petition stands allowed.