

(2011) 08 DEL CK 0100

In the Delhi High Court

Case No : Writ Petition (C) 12269 of 2009

Mukesh Kumar Sharma and Another

APPELLANT

Vs

The University of Delhi and Others

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 08 DEL CK 0100

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Neela Gokhale, for the Appellant; Mohinder J.S. Rupal, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The two Petitioners impugn the office order dated 17th August, 2009 reverting them from the "irregularly upgraded posts of Laboratory Assistants" to "the sanctioned posts of Laboratory Attendants" w.e.f. 2nd May, 2008 and the consequent order fixing their salary w.e.f. 1st April, 2002 when they were "irregularly upgraded/promoted".

2. Notice of the petition was issued and vide order dated 9th October, 2009 the Respondents restrained from reverting the Petitioners from the post of Laboratory Assistant to the post of Laboratory Attendant. The said order was made absolute on 22nd July, 2010. Rule was issued on 29th November, 2010. The Petitioners filed CM No. 9379/2011 claiming interim direction for payment to them of wages as of a Laboratory Attendant in pursuance to the 6th Pay Commission Report. The said application came up before this Court on 7th July, 2011 when the counsel for the Respondents was asked to take instructions as to whether there was any difference in the emoluments as of a Laboratory Assistant and Laboratory Attendant. The counsels were also directed to come prepared for addressing on the merits of the petition. The counsel for the Respondents has today informed that the Petitioners have already received from the Respondents

amounts in excess of their entitlement as per the 6th Pay Commission Report also. The counsels have also been heard on the writ petition.

3. The Petitioners, vide letter dated 31st March, 1999 of the Respondent No. 2 Dr. Baba Saheb Ambedkar Center for Biomedical Research (herein after called Respondent No. 2 Center) of the Respondent No. 1 University of Delhi and in accordance with Ordinance XX (6) Clause 2 of the Calendar of the University of Delhi were appointed as Laboratory Attendants. The appointment letters stated that the appointment was temporary but likely to continue. The appointment of the Petitioners as Laboratory Attendants was confirmed vide office order dated 9th November, 2001 of the Respondent No. 2 Center. The Respondent No. 2 Center thereafter, in accordance with the decision taken in the meeting of its Governing Body held on 8th January, 2002, vide office order dated 10th January, 2002 promoted the Petitioners, temporarily, as Laboratory Assistants; the said office order required the Petitioners to attend the Training Programmes of the required duration before 8th January, 2003.

4. It is the case of the Petitioners, that they have since January, 2002 been discharging their duties as a Laboratory Assistants; they were however not given their revised salary as per the recommendation of the 6th Pay Commission and continued to be paid at the old scale; that they made representations for fixation of their salary in terms of the 6th Pay Commission Report; that the Respondents instead of so fixing their salary vide orders aforesaid reverted them from the post of Laboratory Assistant to Laboratory Attendant. Upon representation of the Petitioners to the Respondents not meeting with any success, the present petition was filed. The Petitioners besides impugning the orders dated 17th August, 2009 and 15th September, 2009 (supra) have also sought a direction to the Respondents to fix their salary to the post of Laboratory Assistant in accordance with the Report of the 6th Pay Commission.

5. The Respondents in their counter affidavit have stated, that the letters of appointment of the Petitioners were issued under the signatures of the then Director of the Respondent No. 2 Center Prof. Ramesh Chandra against whom, since then inquiry into various misconducts committed by him had been initiated; that the Respondent No. 2 Center, as per Ordinance XX is wholly maintained and is under the control of the University; that as per Clause 2 of the said Ordinance, the Governing Body of the Respondent No. 2 Center is allowed to manage the affairs of the Respondent No. 2 Center subject to the general control and supervision of the Executive Council of the University; that though the Governing Body of the Respondent No. 2 Center in terms of Clause 2 (h) is empowered to appoint, suspend and terminate the services of administrative and other non-teaching staff of the Respondent No. 2 Center in respect to which such powers may have been delegated by the Executive Council and to determine the emoluments and conditions of service but the qualifications for appointment, emoluments and conditions of services of such persons have to be in accordance with those laid down by the Executive Council of the University for similar posts

in the University.

6. It is further the case of the Respondents that a Departmental Promotion Committee of the Respondent No. 2 Center in its meeting held on 7th January, 2002 had recommended promotion of the Petitioners though they had not undergone any Training Programme; that the Governing Body of the Respondent No. 2 Center in its meeting on 8th January, 2002 considered the said recommendation and observed that the Petitioners had not undergone any Training Programme though they had rendered service for more than the minimum experience required for promotion and approved the promotion of the Petitioners with immediate effect subject to the condition that the Petitioners attend the Training Programme of required duration by 8th January, 2003.

7. It is further the case of the Respondents that the post of Laboratory Attendant on which the Petitioners were serving was treated as Laboratory Assistant by treating the same "as personal" to the Petitioners; that the post of Laboratory Assistant was so created although there was no sanctioned post of Laboratory Assistant; that this anomaly as well as several other issues concerning the Respondent No. 2 Center came to the knowledge of the Respondent No. 1 University of Delhi and accordingly the Executive Council vide Resolution No. 142 dated 13th December, 2006 appointed a Committee to look into the issues of the non-teaching staff of the Respondent No. 2 Center and to make recommendation in this regard; that the said Committee arrived at a conclusion that the Governing Body of the Respondent No. 2 Center had in the meeting held on 8th January, 2002 promoted the Petitioners despite the fact that in the roster of Respondent No. 2 Center the post of Laboratory Assistant did not exist; accordingly the Committee recommended that the Governing Body of Respondent No. 2 Center had no authority to upgrade any post on "personal basis" in as much as up gradation required the approval of Executive Council and the Funding Authority namely UGC; accordingly the Petitioners were recommended to be reverted; that the Executive Council in its meeting held on 2nd May, 2008 approved the said reversion of the Petitioners. 8. The Petitioners in their rejoinder have stated that they have undergone the required Training Programme; that they could not have been reverted after eight years; that it was in the knowledge of the Respondent No. 1 University of Delhi that they were drawing the salary as of a Laboratory Assistant and even loans were sanctioned to them on the basis of their drawing the salary of Laboratory Assistant; that they have been reverted in retaliation to their demand for implementation of the 6th Pay Commission Report.

9. The counsel for the Petitioners has argued, that the Petitioners could not have been reverted without giving them an opportunity of being heard; that they were paid the salary as of a Laboratory Assistant even after 17th August, 2009; that it is not in dispute that the Governing Body of the Respondent No. 2 Center did pass a Resolution promoting the Petitioners; that the said Resolution could not be undone after long lapse of time; that the Committee aforesaid constituted by the

Executive Council of the Respondent No. 1 University of Delhi, while had, applying the principles of natural justice, fair play and good faith, recommended regularization of other illegally appointed non-teaching staff of the Respondent No. 2 Center, had discriminated against the Petitioners by recommending reversion of the Petitioners instead of their being regularized on the post of Laboratory Assistant; that the Governing Body of the Respondent No. 2 Center was year after year sending its proposed budget showing the salaries of the Petitioners as of Laboratory Assistants and from which the Respondent No. 1 University of Delhi ought to have known of the promotion of the Petitioners as Laboratory Assistants and the Respondent No. 1 University is now estopped from contending to the contrary.

10. The counsel for the Respondents has argued that the services of the then Director of the Respondent No. 2 Center who had appointed the Petitioners have since been terminated by the Respondent No. 1 University of Delhi; though as per the recommendation of the Departmental Promotion Committee of the Respondent No. 2 Center, the Petitioners, to be eligible for promotion to the post of Laboratory Assistant, were required to have minimum six years experience as Laboratory Attendant and to have undergone at least one Training Programme for a minimum six weeks duration in the field and were ineligible for promotion till the year 2005 but were promoted with immediate effect in the year 2002 itself; that there was no sanctioned post of Laboratory Assistant in the Respondent No. 2 Center; that in the circumstances the decision of the Executive Council of the Respondent No. 1 University of Delhi of reverting the Petitioners cannot be found fault with. It is further stated that on compassionate grounds however a decision has been taken not to make any recovery from the Petitioners of the excess amount received by them for the post which did not exist.

11. It is further argued that it is the UGC which creates the posts and till date there is no post of Laboratory Assistant in the Respondent No. 2 Centre. It is further shown from the documents filed by the Petitioners themselves that the training subject to which they were promoted was also of 18 days only and not of six weeks as required.

12. The counsel for the Petitioners has not been able to show that there was/is any post of Laboratory Assistant in the Respondent No. 2 Center. The case thus being of promotion to a post which did not exist and the entire case of the Petitioners being based on promissory estoppel and on the long delay after which the Petitioners were reverted, it was enquired from the counsels whether the principles of estoppel applied to service jurisprudence.

13. The counsel for the Respondents in this regard has invited attention to S.K. Khanna (Dr) and Others Vs. State of Haryana and Others, laying down that a promotion if impermissible is no promotion and rectification of a wrongful promotion cannot be said to be a case of reversion. Reliance is also placed on Union of India and Others Vs. Rakesh Kumar etc., laying down that if by an

erroneous interpretation of statutory rules, benefits are conferred on someone, it would not mean that the said mistake should be perpetuated by direction of the Court and the Court should not direct something contrary to the statutory rules. It was further held that in such circumstances there is no question of application of Article 14 of the Constitution and no person can claim any right on the basis of a decision which is de hors the statutory rules, nor can there be any estoppel. It was yet further held that there cannot be any consideration in such cases on the ground of hardship.

14. Reference in this regard can also be made to;

A. Ram Shankar Bhattacharjee Vs. Gauhati High Court and Others, holding that promotion can be given only to a post which was given in the classification of rules and since there was no post mentioned in the schedule there could not have been a promotion to that post;

B. S.I. Paras Kumar and Others Vs. S.I. Ram Charan and Others, where it was observed the right to be considered for promotion and procedure to be followed for affecting promotion is a condition of service and promotion can be made only as per the rules and no other procedure can be adopted for affecting promotion; the promotion made contrary to the rules cannot be treated as promotion and is only ornamental in nature;

C. Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, laying down that appointments to posts not available are mere fortuitous and cannot confer the benefit of seniority from the date of appointment; there could be no appointment to a post not available and the promotees cannot be given seniority from the date of appointment;

D. D.R. Yadav and Another Vs. R.K. Singh and Another, also laying down that posts means posts which are available having been legally created or borne on the cadre and promotion to a non existent post does not confer any right and the persons so promoted for all intense and purposes are to be treated as not promoted at all.

15. Faced with the aforesaid, the counsel for the Petitioners has contended that there is a post of Technical Assistant in the roster of the Respondent No. 2 Center and the Petitioners are eligible there for and ought to be promoted thereto.

16. I have also enquired from the counsel for the Respondents as to how the Petitioners appointed to the post of Laboratory Attendant can be permitted to stagnate on the said post and there ought to be scope for the Petitioners to improve their status. Allowing the Petitioners to so stagnate would certainly be contrary to law.

17. The counsel for the Respondents has stated that though at present there does not appear to be any scope for promotion but the Petitioners otherwise would be entitled to an upward increment.

18. In the circumstances, though no error can be found in the orders of the Respondent No. 1 University of Delhi impugned in this petition and the petition is dismissed but nevertheless the Respondent No. 1 University of Delhi is directed to consider the case of the Petitioners if eligible and in accordance with the rules for promotion to the post of Technical Assistant and/or to consider as to how steps against stagnation can be taken. The decision in this regard be taken on or before 31st March, 2012. The petition is disposed of. No order as to costs.