

(2021) 03 DEL CK 0228

In the Delhi High Court

Case No : Civil Writ Petition No. 10482 Of 2019, Civil Miscellaneous No. 43342 Of 2019 & 29274 Of 2020

ONGC Diploma Engineers Technical Association (DETA)
Through: Its President And Ors

APPELLANT

Vs

Oil And Natural Gas Corporation Ltd. And Ors

RESPONDENT

Date of Decision : 23-03-2021

Acts Referred:

Constitution Of India, 1950 — Article 12, 14, 16, 226

Industrial Disputes Act, 1947 — Section 2(k), 12(3), 18, 18(3)(b), 18(3)(d)

Citation : (2021) 03 DEL CK 0228

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Dr. Menaka Guruswamy, Prashant R. Dahat, Aishwarya Murali, Shreyas Gacchi, Tushar Mehta, Abhishek Gupta, Ikshita Singh, Raushal Kumar, Sunil Dutt Mishra, Neeraj Kumar

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

CM No. 29274/2020

1. By this order I shall decide this application filed by the petitioners. The prayers in the application are the following:

"In view of the facts and circumstances stated above, it is most respectfully prayed that this Hon'ble Court may be pleased to:-

A) Allow present Application for Direction;

B) Direct the Respondent No. 1, 2 & 3 to maintain parity and extend modified promotional benefits provided under Memorandum of Settlement (MOS) dated 6.2.2020 to all Petitioners of present Writ Petition during the pendency of Writ Petition and;

C) Direct the Respondent No. 1, 2 & 3 to relax condition mentioned in clause 3(VI) of Memorandum of Settlement MOS dated 6.2.2020 which says "the benefits arising this settlement will be extended to the eligible employees who have not filed disputes and/ or cases before tribunals/Court(s). However, Employees who have filed disputes and/ or cases before tribunal/Court would have to withdraw the same and submit the relevant order of the Authority/Court along with affidavit within a period of 60 days from the date of issue of Order to avail the benefit under this settlement" with regards to the present Petitioners during the pendency of the present Writ Petition.

D) Pass any other or further orders as this Hon'ble Court may deem fit, just and proper in the facts and circumstances of the present case."

2. The writ petition has been filed by the petitioners seeking implementation of Oil and Natural Gas Commission (Recruitment and Promotion) Regulation 1980 ('R&P 1980' for short) and Modified Recruitment & Promotion Regulation 1997 ('Regulation of 1997', for short) and for quashing and setting aside the Memorandum of Understanding of 2004 (MoU) with regard to the recruitment and promotion policy of the Diploma holders who are inducted at A-II level after 2004.

3. Some of facts as noted from the record are that the members of the petitioner No.1/ association are the Diploma holder who have been appointed in terms of the policy under the MoU dated August 19, 2004. Suffice to state that the R&P 1980 were framed on April 25, 1980. Under the said regulations, Diploma holders were promoted to the executive cadre EO / AE after four years. The said regulation has been modified on March 14, 1997. However, the appointment and promotion policy of Diploma holders remained as it was in 1980 Regulation. The impugned MoU was signed between the ONGC and recognized unions of ONGC primarily for modifying R&P 1980. The MoU came into effect on January 01, 2004. In 133rd Board meeting held on October 28, 2004, the proposal for review of R & P policy was accepted.

4. It is the case of the respondents that the petitioner association is not a recognized association and not a part of collective bargaining process.

5. The writ petition was filed on September 17, 2019. During the pendency of the writ petition a Memorandum of Settlement dated February 06, 2020 ('MoS', for short) was signed between the ONGC and recognized Unions of ONGC before the Conciliation Officer under Section 18(3) (b) and (d) of the Industrial Disputes Act, 1947 ('ID Act' for short) . It is noted from the record that out of 12 recognised unions, 11 unions consented to the settlement. Be that as it may, the submission of Dr.Menaka Guruswamy, learned Senior Counsel appearing for the petitioner is that, in terms of the MoU recruitment is made at A-II level instead of Junior Engineer level and the further grades are A-III and A-IV level. From A-IV level, Diploma Engineer is promoted to EO level. The total years of service required to be promoted to EO level was increased from 4 to 18 years (A-II + six

years, A-III + six years, A-IV + six years EO). The position remained the same till 2020 when with the execution of the MoU, the period has been reduced from 18 years to 12 years i.e. (4+4+4 years).

6. She submitted that the ONGC being a 'State' under Article 12 of the Constitution of India is bound to act reasonably and fairly and in consonance with the Constitution. The impugned MoU and the MoS are in violation of Article 14 rights of the Diploma holders, inasmuch as the MoU increased the promotion span of the petitioners to the post of EO / AE from four years to 18 years. It has been reduced to 12 years in 2020.

7. According to her, an artificial discrimination is made between the Diploma holders having identical qualification, joined before and after 2004. According to her, there is no intelligible differentia between Diploma holders appointed post 2004 and prior to 2004 as they have similar educational qualifications. Those who joined post 2004, were downgraded to A-II level where the requirement of minimum qualification is of matriculation with Board certificate and fitting and mechanic trade under R & P 1980 as opposed to the level of Junior Engineer with eligibility of Diploma holders in engineering or equivalent. This downgradation is unfair, illegal and arbitrary. There is also downgradation in the pay scale from Rs.16,000/- to Rs.12,000/-, as per the revised rates of 2000. She submitted, the petitioners' right to be considered for promotion has been deprived by the impugned MoU and MoS as they have been downgraded into different categories, from which they would be promoted only after a span of 12 years which was previously four years. Therefore, this difference of eight long years deprives the petitioners, their right to be considered for promotion. She states that securing a promotion is an essential element of Article 16 of the Constitution of India. Therefore, respondents increased the span of promotion from 4 years to 18 years and then 12 years have denied the petitioners the avenues for promotion.

8. On the plea of waiver of the respondents, she stated that even though the petitioners were appointed under the impugned MoU, the principle of estoppel or waiver would not apply as the respondents have a constitution obligation to create promotional avenues. She also submitted that this Court in exercise of its powers under Article 226 can create promotional avenues. In support of her submissions she has relied upon the judgment in the case of ONGC v. Petroleum Coal Labour Union and Ors. (2015) 6 SCC 494 that ONGC being instrumentality of State is covered under Article 12 of the Constitution of India and M.P. Junior Engineers' Assn. & Sangarsh Samiti v. State of M.P. 1990 Supp. SCC 229, wherein the Supreme Court while examining the subsequent amended rules which reduced the chances of the petitioners getting promoted, held that order was discriminatory to the people who were being promoted after the amendment came into being.

9. She has also relied upon the judgment of the Supreme Court in Ajit Singh (II) v. State of Punjab (1999) 7 SCC 209 in support of her submission that right to be considered for promotion is recognised as a fundamental right. Similarly, she has

relied upon the judgment of the Supreme Court in *State of Tripura v. K.K. Roy* (2004) 9 SCC 65, to contend while dealing with promotions, being a condition of service, the State has a duty to provide avenues for promotion.

10. Similarly, she has also relied upon the judgment in *Food Corporation of India v. Parashotam Das Bansal*, (2008) 5 SCC 100 in support of her submission that the employees who have been denied promotion for long years can seek a direction from the Court in that regard.

11. On the other hand, Mr. Tushar Mehta, learned Solicitor General of India would contend that this writ petition under Article 226 is not maintainable in view of other efficacious remedy available to the writ petitioners under the Industrial Disputes Act, 1947. According to him, the service conditions of the employees are governed by the Industrial Disputes Act, 1947 ('ID Act', for short) and have to be adjudicated only by the forums created under the said Statute and not otherwise. According to him, the writ petitioners are admittedly workmen within the meaning of the ID Act and their service conditions including recruitment and promotions are governed under the R&P Regulations as amended from time to time including any settlements signed between the respondents and various unions under the provisions of the ID Act. In other words, any alleged change of condition in respect of workmen vide a settlement or agreement, can only be challenged before the Industrial Tribunal and not before this Court in a writ jurisdiction. Therefore, the petitioners are liable to first exhaust the remedy provided under the ID Act. In this regard, he has relied upon various judgments of this Court and the Supreme Court wherein it has been held that only remedy in respect of an industrial dispute for enforcement of a right or obligation under the ID Act, is to get adjudication under the Act. He has referred to the judgments in the case of *Premier Automobiles Ltd. V. Kamlekar Shantaram Wadke of Bombay*, (1976) 1 SCC 496, *State of Uttar Pradesh v. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti*, (2008) 12 SCC 675.

12. He also stated that the petition is not maintainable for non-joinder of parties, inasmuch as the recognised unions who signed the impugned MoU, 2004 which is a statutorily enforceable settlement, have not been made a party in the present writ petition. He stated that the petitioners / Association were not party to the aforesaid MoU, as it is not a recognized Union and was admittedly formed only in the year 2013. However, all the workmen were represented through recognized Unions who executed the MoU, 2004. In view of this, the prayer with regard to setting aside the MoU 2004, cannot be granted unless the recognized Unions who are signatory to the aforesaid MoU, 2004 have been made party in the present writ petition.

13. In this regard, he has relied upon the judgment of the Supreme Court in *State of Orissa v. Madan Gopal Rungta*, reported in 1952 SCR 28. Even on merit he contested the plea of Dr. Menaka Guruswamy by stating that right of promotion is in terms policy alone. If the policy contemplates a particular procedure for promotion, the promotion can be effected only in such a manner

and in no other manner. The matters relating to recruitment and promotion policy falls within the exclusive domain of the executive and this Court ought not to sit over the executive wisdom. The service conditions of the petitioners / association are governed under R&P, 1980 along with subsequent modification vide modified R&P, 1980 in the year 1997, MoU dated August 19, 2004 and now the MoS dated February 06, 2020. The petitioners who were appointed subsequent to the execution of the MoU, 2004, were well aware of the same at the time of induction. They have participated in the appointment process under the impugned MoU, 2004, and have also been promoted under the same. After 15 years of the impugned MoU being in force, the petitioners are estopped from challenging the policy under which they were inducted and promoted.

14. Mr. Mehta also submitted that the right to be considered for promotion is a condition of service but not a promotion itself. The rules which merely affects the chances of promotion cannot be regarded as varying a condition of service and thus, the impugned MoU, 2004 does not suffer from any arbitrariness. In this regard, he has relied upon the judgment in the case of *State of Mysore & Anr. v. G.B. Purohit & Ors.*, 1967 SLR 753.

15. He also stated that all the petitioners herein were appointed under the 2004 MoU, out of them 106 petitioners have already been promoted to A-III level under the said MoU. The petitioners having been appointed under the impugned MoU and having taken the benefit under the same, are governed by the terms and conditions of the MoU and as such they are estopped from challenging the same. In this regard, he has referred to the judgment in the case of *Union of India v. N. Chandrasekharan*, 1998 (3) SCC 694. He also relied upon the judgment of the Supreme Court in the case of *Ashok Kumar v. State of Bihar*, (2017) 4 SCC 357. On merit, it is his submission that the petitioners cannot seek parity with the Diploma holders recruited prior to MoU, 2004, who were recruited in a different post i.e. JE under a different Recruitment and promotion policy. The aforesaid post of JE was neither advertised, nor did the petitioners applied, competed or selected against the said post. The employees possessing similar or same qualification but inducted in different posts at different point of time under different Recruitment and Promotion policies cannot be compared.

16. He stated that Article 14 has no applicability in the instant case, inasmuch as the Diploma holders recruited prior to and post MoU, 2004 form distinct categories in a class of service on account of the variance in their nature, mode and manner of recruitment, nature and character of the posts and promotional avenues and terms and conditions of service. He has relied upon the judgment in the case of *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 and *Dilip Kumar Garg v. State of U.P.*, (2009) 4 SCC 753.

17. That apart, he stated that mere possession of any qualification does not give entitlement for induction at a particular level. The promotion policy is for those inducted in a particular post and not merely on possessing a qualification.

18. On the extending modified promotional benefit provided under the MoS dated February 06, 2020 to the writ petitioners is concerned, the clause 3(VI) categorically provides that the benefits under the aforesaid MoS can only be extended to such eligible employees who fulfill terms and conditions as agreed upon in the aforesaid MoS, including the withdrawal of disputes / court case(s) by the employees filed before different forums and the same having been entered upon before the Conciliation officer under Section 12(3) & 18 of the ID Act, between the recognized unions representing the workmen of ONGC and the ONGC management and the same is a legally binding document qua all the workmen including the writ petitioners herein, represented via various recognized Unions.

19. That apart, the petitioners have not challenged the entire settlement but have challenged only one clause in isolation which is impermissible. He seeks the dismissal of the application filed by the petitioners in the writ petition.

20. Having heard the learned counsel for the parties and perused the record, the prayers made in the application by the petitioners are for seeking a direction to respondent Nos.1 to 3 to maintain parity and extend modified promotional benefits provided under the MoS to all the petitioners.

21. I may state here that on November 27, 2020 while issuing notice on this application under consideration an oral observation was made by this Court not to take coercive steps against the petitioners.

22. Suffice to state that on February 23, 2021, Mr.Mehta on instructions has submitted before the Court that the order dated November 27, 2020 by which the respondents were proceeding to make promotions, shall be kept in abeyance till the next date of hearing. The said statement continued thereafter.

23. Having said that the first submission of Mr. Mehta on the application is that in the present petition the petitioners impugn the MoU dated August 19, 2004 which has been executed by the ONGC with the recognised unions and even the subsequent MoS dated February 06, 2020 was entered between the management of the ONGC and 11 recognised unions before the Conciliation Officer under the provisions of the ID Act and the remedy for the petitioners is to challenge the MoU / MoS under the provisions of ID Act by raising an industrial dispute. This submission of Mr. Mehta is appealing.

24. A perusal of prayer clause reveal that the petitioners are seeking quashing and setting aside of the MoU dated August 19, 2004 and also the minutes of the Board meeting held on October 28, 2004 with regard to recruitment and promotion policy of the Diploma holders.

25. That apart, I find from the submissions filed on behalf of the petitioners, they are also challenging the MoS dated February 06, 2020 to contend that the same has deprived the petitioners promotion after four years by increasing the span to 12 years. It is the stand of the respondents that even the MoS dated February

06, 2020 was entered between the ONGC and 11 recognised unions before the Conciliation Officer under the provisions of Section 12(3) & 18 of the ID Act. Surely, there is a dispute between the ONGC and the petitioners (employer and workmen) or between unions on one hand and the petitioners (workmen and workmen) on the other hand, which falls within the definition of industrial dispute as defined under Section 2(k) of the ID Act, and such a dispute need to be decided by an Industrial Tribunal under the provisions of ID Act, on the petitioners raising an industrial dispute. It is also conceded position that the petitioners are workmen within the meaning of ID Act.

26. The Supreme Court in the case of State of Uttaranchal v. Jagpal Singh Tyagi, (2005) 8 SCC 49, has in paragraphs 4 and 5 held as under:

"4. We find that the approach of both the Labour Court and the High Court is clearly on wrong premises. If there was dispute on the question as to whether the settlement was bona fide or was obtained by fraud, misrepresentation or concealment of facts, the same can only be the subject-matter of another industrial dispute. To substantiate the averments that such settlement could not have been arrived at, nothing was brought on record by the respondent employee to show that there was any pressure exercised or that he was subjected to undue influence. There is also no material to show that the settlement was intended to frustrate the order passed by the High Court. At no point of time, the respondent employee raised any dispute as regards the fairness of the settlement. Having obtained the benefit, it was not open to him to turn down without justifiable reasons to contend that the settlement was not fair.

5. In National Engg. Industries Ltd. v. State of Rajasthan it was observed as follows: (SCC p. 24, para 393)

"Settlement is arrived at by the free will of the parties and is a pointer to there being goodwill between them. When there is a dispute that the settlement is not bona fide in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements it could be the subject-matter of yet another industrial dispute which an appropriate Government may refer for adjudication after examining the allegations as there is an underlying assumption that the settlement reached with the help of the Conciliation Officer must be fair and reasonable."

(Emphasis supplied)

27. Even a Coordinate Bench of this Court in the case of PTI Employees Union v. Press Trust of India Ltd., 2020 SCC OnLine Del 1216 has in para 39 to 45 held as under:

"39. The petitioners have challenged the retrenchment of 297 employees by the respondent on 29th September, 2018. However, 78 out of 297 retrenched employees have accepted their retrenchment and have applied for withdrawal of their statutory benefits including gratuity etc. during the pendency of these writ

petitions.

40. The retrenched employees have a statutory remedy to raise an industrial dispute under the Industrial Disputes Act. The petitioners have based their claims on the alleged violation of the provisions of the Industrial Disputes Act. There are no exceptional circumstances for exercise of the writ jurisdiction under Article 226 of the Constitution in these writ petitions.

41. This case is squarely covered by the principles laid down by the Supreme Court in *U.P. State Bridge Corporation Ltd. v. U.P. Rajya Setu Nigam Karamchari Sangh* (supra) in which the High Court allowed a writ petition of the Trade Union to challenge the termination of a workman. The Supreme Court held that the High Court erred in entertaining the writ petition since the disputes related to the enforcement of a right/obligation under the Industrial Disputes Act and the specific remedy was provided under the Industrial Disputes Act. Relevant portion of the judgment is reproduced hereunder:

"11. We are of the firm opinion that the High Court erred in entertaining the writ petition of the respondent Union at all. The dispute was an industrial dispute both within the meaning of the Industrial Disputes Act, 1947 as well as U.P. IDA, 1947. The rights and obligations sought to be enforced by the respondent Union in the writ petition are those created by the Industrial Disputes Act.

42. This case is also covered by *A.P. Foods v. S. Samuel* (supra) in which the High Court allowed the writ petition against stoppage of ex-gratia/bonus by the management. The Supreme Court reiterated the principles laid down in *U.P. State Bridge Corporation Ltd.* (supra) and catena of other judgments and held that the writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act unless exceptional circumstances are made out. Para 6 of the judgment is reproduced hereunder:

"6. In a catena of decisions it has been held that a writ petition under Article 226 of the Constitution of India should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

43. This case is also covered by *State of Uttar Pradesh v. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti* (supra) in which the writ petition to challenge retrenchment of 460 employees was allowed by the Allahabad High Court and various interim orders were passed in favour of the employees. The Supreme Court held that the High Court should not have entertained the writ petition in view of statutory remedy to the employees under the Industrial Disputes Act. The Supreme Court dismissed the writ petition with liberty to the employees to approach the Tribunal in accordance with law. Relevant portion of the said judgment is reproduced as under:

"50. In our considered view, however, all such actions could be examined by an appropriate court/tribunal under the industrial law and not by a writ court exercising power of judicial review under Article 226 of the Constitution. If the

impugned action of the Corporation of retrenchment of several employees is not in consonance with law, the employees are certainly entitled to relief from an appropriate authority."

44. This case is also covered by *Transport and Dock Workers Union v. Mumbai Port Trust* (supra) in which the Bombay High Court allowed the writ petition in respect of an industrial dispute. The Supreme Court held that the High Court should have dismissed the writ petition on the ground of existence of alternative remedy under the Industrial Disputes Act. The Supreme Court further observed that an over liberal approach was unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. Relevant portion of the judgment is reproduced hereunder:

"14. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."

45. According to the learned senior counsel for the petitioner, the writ jurisdiction should be exercised because two years have passed after the filing of this writ petition. There is no merit in this contention as the respondent raised the preliminary objections to the maintainability of the writ petition at the very threshold of the commencement of arguments and these cases were pending due to lengthy arguments of learned counsels for both the parties. The petitioners themselves have filed CM. Appl. 41299/2018 in W.P.(C) 10596/2018 and CM. Appl. 41305/2018 in W.P.(C) 10605/2018 seeking adjudication on the maintainability of writ petitions. That apart, delay by itself has been held by the Supreme Court not to be a sufficient ground to exercise the writ jurisdiction. In *U.P. State Bridge Corporation Ltd. v. UP. Rajya Setu Nigam Karamchari Sangh* (supra), the issue of delay on the part of the High Court in disposing of the dispute was raised before the Supreme Court. The Supreme Court rejected this plea and held that even when there is a delay, High Court should not have short-circuited the process. The Supreme Court dismissed the writ petition with liberty to the workman to raise an industrial dispute. Relevant portion of the said judgment is reproduced hereunder:

"17. The only reason given by the High Court to finally dispose of the issues in its writ jurisdiction which appears to be sustainable, is the factor of delay, on the part of the High Court in disposing of the dispute. Doubtless the issue of alternative remedy should be raised and decided at the earliest opportunity so

that a litigant is not prejudiced by the action of the Court since the objection is one in the nature of a demurrer. Nevertheless even when there has been such a delay where the issue raised requires the resolution of factual controversies, the High Court should not, even when there is a delay, short-circuit the process for effectively determining the facts."

28. The plea of maintainability of the petition has been taken by the respondents in their counter affidavit (at page 9). No rejoinder to the counter affidavit has been filed. Even the submissions made by Mr. Mehta during hearing have not been controverted or dealt with by the petitioners in their written submissions.

29. The submissions made by Dr. Menaka Guruswamy were by referring to the judgments in the case of ONGC (*supra*) to contend that ONGC is a State within the meaning of Article 12 of the Constitution of India; M.P. Junior Engineers' Assn. & Sangarsh Samiti (*supra*) that the subsequent amended rules which reduced the chances of promotion held to be discriminatory; Ajit Singh (II) (*supra*) that right to be considered for promotion is a fundamental right; State of Tripura (*supra*) that a State has a duty to provide avenues for promotion; Food Corporation of India (*supra*) when employee is denied promotion, the Court is within its jurisdiction to issue necessary direction.

30. The judgments are on the merit of the dispute whether the MoU / MoS can deprive the promotion to the petitioners by increasing the span from four years to 18/12 years. Since, I have accepted the submission made by Mr. Mehta that the remedy for the petitioners is to approach the Industrial Tribunal by raising industrial dispute, I refrain from answering those submissions, as the same need to be urged and considered by the Industrial Tribunal and any conclusion / finding will have a bearing on the final outcome of the industrial dispute to be raised by the petitioners.

31. Accordingly, it is seen that, the MoU / MoS has been entered by ONGC with the recognised unions, one of which is before the Conciliation Officer under Section 12(3) & 18 of the ID Act and statutory remedy is available for the petitioners to raise dispute under the ID Act. Hence, it must be held that the appropriate remedy for the petitioners is to raise an industrial dispute and proceed thereof in accordance with law.

32. I am conscious that this order has been passed on the application filed by the petitioners for certain reliefs but the issue raised by Mr. Mehta goes to the root on the maintainability of the petition in view of the statutory remedy available to the petitioners.

33. Accordingly, the petition and the application(s) are dismissed.