

(2008) 02 DEL CK 0172
In the Delhi High Court
Case No : LPA No. 1037 of 2004

Satya Dev Tomar and Another

APPELLANT

Vs

MCD and Others

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 151

Citation : (2008) 02 DEL CK 0172

Hon'ble Judges : Dr. M.K. Sharma, C.J.; Aruna Suresh, J

Bench : Division Bench

Advocate : S. Janani and Deepak Goel, for the Appellant; Amita Gupta, for MCD, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, C.J.—The present appeal is filed as against the judgment and order dated 7th May, 2004 passed by the learned Single judge in WP(C) No. 1548/1999. The said writ petition was filed by some Assistant Engineers (Civil) working with the respondent-Municipal Corporation of Delhi (for short MCD) seeking issuance of mandamus to the MCD to treat the writ petitioners as Assistant Engineer (Civil) with effect from the date they were entrusted current duty charge to the said post and with consequential benefits. The learned Single Judge disposed of the writ petition by passing the following order:

It is not disputed that petitioners in W.P.3091/1997 were identically placed to the petitioners herein. In said view of the matter, directions are issued to the MCD that service rendered by the petitioners on current duty charge will be counted towards their service for determining their eligibility for promotion to the next higher post. Needful be done in six weeks. Writ petition stands disposed of. No costs.

2. Being aggrieved by the aforesaid order the present appeal is filed by the appellants on the ground that the impugned order passed by the learned Single

Judge adversely affects their interest for promotion to the next higher post of Executive Engineer. However, at this stage, we may mention that the appellants herein are direct recruits to the post of Assistant Engineer in MCD and were not party to the above writ petition.

3. Counsel appearing for the respondents raised an objection with regard to maintainability of the appeal contending, inter alia, that the appellants were not parties in the writ petition and, Therefore, if they were in any manner aggrieved they should have filed a review application before the learned Single Judge instead of coming in appeal. However, since we heard the Learned Counsel appearing for the parties on merit, we proceed to dispose of the appeal without going into the aforesaid issue. Even otherwise, in our considered opinion, such an appeal could be filed by the appellants although they were not parties in the writ petition. A "person aggrieved" is a person who has been deprived of a benefit which he would have received if the order had been contrary to what it actually is, or an order which causes him a legal grievance by wrongfully depriving him of something. In this regard we may also refer to the decision of the Supreme Court in Bar Council of Maharashtra Vs. M.V. Dabholkar and Others, , wherein it is stated that:

28. Where a right of appeal to courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words a person aggrieved may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one a person aggrieved....

4. The respondent Nos. 5-13 herein, who were petitioners in the writ petition were working as Junior Engineers (Civil) with the MCD. They were entrusted current duty charge to the post of Assistant Engineer (Civil) on various dates in the year 1985. By Office Order dated 30th July, 1990 MCD created inter alias 60 supernumerary posts of Assistant Engineer (Civil) for the purpose of accommodating those Junior Engineers who were working on current duty charge to the post of Assistant Engineer (Civil) and they were appointed to such supernumerary posts with effect from 17th July, 1990. As per the said Office Order, these supernumerary posts of Assistant Engineer were personal to the concerned persons and were to be abolished on their regular promotion to the post of Assistant Engineer. Thereafter, vide Office Order dated 30th December, 1997, the writ petitioners were promoted to the post of Assistant Engineer (Civil) on regular basis.

5. For promotion to the next higher post i.e. Executive Engineers, the Assistant Engineers are required to have the eligibility of ten years service in the lower grade for Diploma holders and five years for Degree holders. The writ petitioners being Diploma holders, for promotion to the post of Executive Engineer, they

were required to have ten years service in the lower cadre i.e. Assistant Engineer. In the writ petition the writ petitioners challenged the order dated 30th December, 1997 praying for issuance of a writ of mandamus directing MCD for considering the writ petitioners as Assistant Engineers from 17th July, 1990, the date when they were appointed to the supernumerary post of Assistant Engineer, for all purposes including seniority, pay, promotion etc. However, on 7th May, 2004 when the writ petition was listed before the learned Single Judge a statement was made by the counsel appearing for the petitioners that the writ petitioners were giving up the claim for payment of wages with retrospective effect and were restricting their prayer to the claim that they be brought at par with the petitioners in WP(C) 3091/1997 titled Prem Singh Dahiya and Ors. v. MCD decided on 22.5.2002. In the said case the Engineers, who were similarly situated as the petitioners, made a statement to the following effect:

Learned Counsel for the petitioners had made a statement on 15.2.2002 that the petitioners will be satisfied in case the period which they spent on current duty charge after they became eligible for being considered by the DPC is counted towards their service for determining the eligibility for promotion to the next higher post and they would not claim the other reliefs in case the respondents agree to the said proposition. Learned Counsel for the respondents states that the aforesaid position is acceptable to their respondents, subject to the condition that there should be a vacancy in existence for the relevant post at the relevant date.

In view of the aforesaid, a direction is issued that service rendered by the petitioners on current duty charge will be counted towards their service for determining the eligibility for promotion to the next higher post if the petitioners were eligible, a vacancy existed and the DPC was not held within a period of one year from the vacancy arising.

The respondents shall do the needful and intimate it to the petitioners within a period of 6 weeks from today. Writ petition is disposed of in the aforesaid terms.

6. On consideration of the aforesaid position, the learned Single Judge passed the impugned order dated 7th May, 2004. Hence, this appeal.

7. Ms.Janani, Learned Counsel appearing for the appellants submitted before us that 50% post of Assistant Engineers are earmarked for promotee officers whereas 50% posts are earmarked for the direct recruit officers and that the impugned order passed by the learned Single Judge would go against the aforesaid ratio as the said writ petitioners, who have been given the benefit, would be given promotion as against posts which are meant for direct recruits.

8. In order to appreciate the aforesaid contentions, we have considered the background facts leading to the filing of the aforesaid writ petition. Respondent Nos. 5-13, who were petitioners in the writ petition, were appointed as Junior Engineers (Civil) with Municipal Corporation of Delhi between the year 1961 to 1971. They became eligible to be promoted as Assistant Engineers after five

years of regular service as Junior Engineer (Civil) but since Departmental Promotion Committee (DPC) was not convened, they could not be considered for giving such promotion to the post of Assistant Engineer. However, from the year 1985 onwards, they have been assigned current duty charge of Assistant Engineer (Civil). Therefore they were holding and discharging the duties of the post of Assistant Engineer (Civil), although on current duty charge. Accordingly, a decision was taken by the MCD on 30th July, 1990 to create a separate cadre just to accommodate the Junior Engineers (Civil) and Junior Engineers (Electrical) who were holding the posts of Assistant Engineer on current duty charge. In view of the fact that the said Junior Engineers were working in that grade for about 19-29 years and were holding the post of Assistant Engineer on current duty charge basis, a decision was taken to create 60 supernumerary posts of Assistant Engineer (Civil) and 7 supernumerary posts of Assistant Engineer (Electrical). The said posts, Therefore, cannot be said to be belonging to the cadre of direct recruits and they are posts which are absolutely created for the first time by upgrading 60 posts of Junior Engineer (Civil) and 7 posts of Junior Engineer (Electrical).

9. It was contended by the counsel appearing for the appellant that the concession that the period spent on current duty charge by the petitioners would be counted towards their service for determining the eligibility for promotion to the next higher post, could not have been given by the respondent/MCD, for such concession would, at this stage, affect the service and promotion of the appellants.

10. The Learned Counsel also drew our attention to the circular issued by the Government of India whereby restriction on ad hoc appointment was imposed by the Government itself. It was submitted that the aforesaid concession was also in violation of the restriction put by the Government and as such the impugned order is required to be set aside and quashed.

11. We have very carefully considered the said submissions and have also given our anxious consideration to the same. However, before dealing with the said submissions, we may mention a very relevant factor, going to the root of the matter. In this case, the impugned order was passed in respect of the petitioners, who were initially arrayed as respondent Nos. 5-13 in the present appeal. During the pendency of the appeal, an application being CM No. 1727/2006 was filed by the counsel appearing for the appellants on 9th January, 2007 under Order 1 Rule 10 read with Section 151 of the CPC for deletion of the names of Sh.R.K.Gupta, and Sh.D.K.Singal, Assistant Engineers, being respondent Nos. 7 & 13 respectively, on the ground that they have already superannuated from service. The said application was allowed and the names of the above two persons were deleted from the array of parties. In this connection, we may mention here that the impugned order passed by the learned Single Judge gets implemented and becomes final and binding in respect of those two writ petitioners, whose names stand deleted from array of parties. The other persons

who are similarly situated are, Therefore, entitled to the same benefit, as they form one batch and identically positioned. Therefore, same principle and standard has to be applied to the other petitioners as well and the present appeal is, Therefore, liable to be dismissed on that ground.

12. However, we would like to answer the issue raised by the Learned Counsel appearing for the appellants, as part of the grievance of the appellants would remain unanswered if we do not deal with the contentions raised before us. On going through the records, we find that the decision to treat the writ petitioners in the aforesaid manner was taken in the peculiar facts and circumstances of the case, by upgrading the post of Junior Engineer to the rank of Assistant Engineer so as to accommodate the persons who were holding current duty charge for a very long time, as to down grade them after serving for such a long time would have prejudicially affected the interests of the Corporation as also of the persons who are so situated. In order to save the said situation and also to remove the anomaly, MCD created 60 supernumerary posts of Assistant Engineer (Civil) and 7 supernumerary posts of Assistant Engineer (Electrical) w.e.f. 1st May, 1990 and they were appointed to the said supernumerary posts with effect from 17th July, 1990 under promotion quota. Subsequent thereto DPC was convened and the aforesaid respondents were promoted w.e.f 30th December, 1997 as regular Assistant Engineers.

13. In the case of H.B. Sharma v. Union of India reported in 1996 III AD (Del) 637, this Court after referring to a catena of judgments held that the persons who have continued uninterruptedly till the regularisation of service by the DPC or the UPSC would be entitled to get all the benefits of the continuous uninterrupted service for determination of their seniority and consequently they would be entitled to promotion from the date when they were given current duty charge. Also in the case of D.K.Jain and Anr. v. Delhi Jal Board and Ors. reported in 2005 VI AD (Delhi) 928 this Court, after referring to the decision of the Supreme Court in the case of K. Madhavan and Another Vs. Union of India (UOI) and Others, held that with a view to ensure that miscarriage of justice does not occur, promotion should be deemed to have taken effect retrospectively from the commencement of the so called ad hoc, stop gap and current duty charge, provided the incumbent concerned fulfilled the essential criteria for consideration for promotion on the initial date.

14. So far as the argument that the respondents have themselves accepted the condition that under the current duty charge they will not claim any benefit accruing from the said post is concerned, we would like to refer to the observation made by the Supreme Court in case of Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, wherein considering a contention that the respondent was promoted in stop gap arrangement as Junior Engineer-I and he had given undertaking to the appellant that on the basis of stop gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post, it was held by the Supreme Court that

apart from the fact that the Government in its capacity as the model employer cannot be permitted to raise such an argument, the undertaking which is set to constitute an agreement between the parties cannot be enforced at law and will be contrary to law and also against public policy.

15. The writ petitioners who have been arrayed as private respondents in this appeal formed one separate class and were given promotion under the aforesaid circumstances without disturbing in any manner the quota of 50% meant for the direct recruits as against which the appellants could be considered for promotion. There is, Therefore, no discrimination nor any interference with the right of the appellants for being considered for their promotion.

16. In view of the above discussion, we find no infirmity in the impugned judgment and order. There is no merit in this appeal and the same is dismissed.