

(2000) 09 DEL CK 0113

In the Delhi High Court

Case No : CWP No's. 1658 of 1993 and 438 of 1999

S.C. Kohli and Others

APPELLANT

Vs

M.C.D. and Others

RESPONDENT

Date of Decision : 29-09-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 09 DEL CK 0113

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Shyamala Pappu, R. Krishnamoorti and Ajit Kumar Sinha, S.K. Kaul, E.C. Vidyasagar and B.K. Choudhary, in C.W.P. No. 438 of 199, for the Appellant; Amita Gupta and Raman Duggal, for Respondent in C.W.P. No. 438, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J.—Petitioners in this case are all employees of Municipal Corporation of Delhi who were appointed as Labour Welfare Superintendents (hereinafter referred to as "LWS"). Petitioners No. 1 & 2 were appointed to the aforesaid post in the year 1983 and petitioner No. 3 was appointed to the same post in the year 1986. The next promotion is to the post of Assistant Labour Welfare Officer (hereinafter referred to as "ALWO"). The Regulations which govern promotion to the aforesaid at relevant time were promulgated vide Gazette Notification dated 6th August, 1976. As per these Regulations post of ALWO is a selection post. Method of recruitment to this post was by promotion failing which by direct recruitment. Although age limit, educational and other qualifications required for direct recruits were prescribed, it was mentioned that the same were not to be applicable in respect of promotees. The only requirement for promotees was three years' service in the grade of LWS after appointment on regular basis. The petitioners Nos. 1 & 2 became eligible for due consideration for promotion in the year 1988 and petitioner No. 3 became eligible for promotion to the said post in the year 1991. Petitioners were in fact promoted to the post of ALWO also after

their due consideration in terms of aforesaid Regulations. However, they were given adhoc promotions. The petitioners submit that they were not considered for promotion on regular basis as ALWO although they were eligible and vacancies on "regular basis existed. The petitioner attributed this to the fact that the administrative wing of the respondent dealing with promotions, appointments etc. is manned by Superintendents and Administrative Officers. Since these posts compete with ALWO's for further promotion, it has always been the effort of the personal department to delay promotions in the Labour Welfare Wing so that they get late regular appointments as ALWO. This adversely affect their further promotion to the post of Deputy Assessor & Collector/Assistant Commissioner. Petitioners have tried to demonstrate the malafides of the personnel department manned by Administrative Officer that Sh. S.P. Sharma & Laxmi Chand Gupta were promoted from the post of Head Clerk to post of Superintendent in 1984. They were promoted, as Administrative Officers in the year 1988 and in the year 1992 they were promoted as Deputy Assessor & Collector/Assistant Commissioner. It was also submitted that the petitioners who were appointed as LWS in 1983 and 1986 respectively are still languishing as ALWO many of them as adhoc even till date. In 1981 the post of LWS was a group B post and that of Superintendent was a group C. In these circumstances, petitioners filed CWP No. 1658/93 wherein they prayed:

a) a writ of mandamus or any other suitable writ, order or direction in the like nature directing the respondent to fix the seniority of petitioners 1 to 11 in the combined seniority list of Assistant Labour Welfare Officers and Administrative Officers/Assistant Assessor & Collectors giving to the petitioners benefit of deemed regular appointment as Assistant Labour Welfare Officer w.e.f.19.5.1988, and 19.8.1991 the date from which the petitioners 1 to 7 and 8 to 11 respectively were given adhoc appointment after holding D.P.C. to the post of Assistant Labour Welfare Officer;

b) a writ of mandamus or any other suitable writ, order or direction in the like nature directing the respondents to consider the petitioners for further promotion to the post of Deputy Assessor & Collector/Assistant Commissioner as per the Recruitment Regulations to the said post.

2. Rule in the petition was issued and interim orders passed to the effect that any promotions made shall be subject to outcome of the writ petition.

3. While this writ petition was pending, MCD introduced and published new Recruitment Regulations vide Gazette Notification dated 24th December, 1996 amending the 1976 Recruitment Regulations. As per the new Regulations, vacancies in the post of ALWO have been divided into two categories namely 33.33 per cent of the vacancies are earmarked for promotion failing which by transfer and deputation and 66.67 per cent of vacancies are earmarked for direct recruitment. This led the 3 petitioners to file CWP No. 438/99 (who are also the petitioners in the earlier CW No. 1658/93) with the following prayers :

a) issue writ of certiorari or any other appropriate writ and order quashing the gazette notification dated 24.12.1996 issued by Department of Urban Development, Government of National Capital Territory of Delhi.

b) issue a writ of mandamus or any other appropriate writ or orders directing the respondents to consider the petitioner for promotion to the post of Assistant Labour Welfare Officer in accordance with 1976 Regulations with effect from the date of their selection and posting on adhoc basis to the post of Assistant Welfare Officer from 1988 and 1992 respectively.

4. It may thus be seen that the second petition CW No. 438/99 is the sequel to the first petition i.e. CW No. 1658/93. CW No. 438/99 was being heard by me and CW 1658/93 was pending before Division Bench. However on 6th July, 2000 petitioners in CW No. 1658/93. submitted before the Division Bench that since question raised in CW No. 438/99 was identical as raised in CW No. 1658/93 that petition be also listed along with CW No. 438/99 before me. Division Bench referred the matter to the Hon'ble Chief Justice for appropriate orders and the CW No. 1658/93 was also came to be listed before me along with CW No. 438/99. That is how both the writ petitions were heard together and are being disposed of by one common judgment.

5. In CW 438/99 Mr. S.K. Kaul, learned senior counsel appearing for the petitioners did not press prayer (a) but made neat submission to the effect that the new Recruitment Regulations which were notified on 24th December, 1996 were prospective in nature, and Therefore, the vacancies of ALWO which existed prior to the promulgation of Recruitment Regulations dated 24th December, 1996 were to be filled as per the earlier Regulations namely Regulations 6th August, 1976 which held the filed at the relevant time. In the counter affidavit filed by respondent/MCD to this petition, it has been stated that prior to 1983, there were fourteen posts of LWS and seven posts of ALWO. In February, 1983, seven posts of LWS were upgraded to that to ALWO vide decision dated 16th February, 1983. Respondents have also mentioned the vacancy position in the counter affidavit by stating that in the year 1990, there was one vacancy of ALWO and in the year 1992 there were eleven vacancies of ACWO. Thus as on 1992, there were in total twelve vacancies of ALWO. It is further submitted in the counter affidavit that these vacancies were sought to be filled as per amended Recruitment Regulations which were notified vide Notification dated 24th December, 1996 and petitioners were not found eligible for consideration as per these amended Recruitment Regulations as they did not come within the zone of consideration.

6. Ms. Shyamala Pappu, learned senior counsel appearing for petitioners in CWP No. 1658/93 additionally submitted that although the petitioners were promoted as ALWO, the said promotion given to them was on adhoc basis only and they were wrongly denied appointment to the post of ALWO on regular basis. Her submission was that petitioners were entitled to benefit of seniority from the date of their initial appointment as ALWO w.e.f. 19th May, 1988 (in respect of

petitioners Nos. 1 to 7) and w.e.f. 19th August, 1991 (with respect to the petitioners Nos. 8 to 11). She also submitted that all the personnel matters relating to the concerned post and the promotional posts are controlled by the Central Establishment Department. This Department is primarily manned by persons who belong to the cadre of those posts, Administrative Officer, which are feeder post for Assistant Commissioners/Dy.Assessor & Collectors. Thus these persons manning the Central Establishment Department have a conflict of interest with ALWO's for the common promotion to the post of Assistant Commissioners/Dy. Assessor & Collectors on the basis of inter-se-seniority. In order to cause prejudice to the ALWO, they intentionally delayed the holding of DPC for filling up the post of ALWO on regular basis, and kept ALWO on adhoc basis for years together. She further submitted that in other feeder cadre i.e. of Administrative Officer/Assistant Assessor & Collector, those who have been appointed on adhoc basis after petitioners, have acquired two promotions, to Assistant Commissioner/Additional Deputy Commissioners. Sh. B.R. Arya who was appointed as Administrative Officer on adhoc basis on 27th February, 1989, was regularised on 23rd January, 1990, promoted as Assistant Commissioner on 23rd February, 1995 and further promoted to post of Additional Deputy Commissioner on 29th January, 1999. Similarly, Sh. Shyam Lal Sharma, Sh. Shiv Lal, Sh. Purshottam Lal were appointed as Administrative Officers on adhoc basis on 15th July, 1994, 15th July, 1994 & 18th July, 1995 respectively, regularised on 17th July, 1997, promoted as Assistant Commissioner on 9th November, 1999, counting their adhoc services whereas the petitioners are still languishing as adhoc ALWO since 19th May, 1988 and 19th August, 1991. Her further submission was that MCD implemented the order of this Court and Sh. H.B. Sharma & others, who were earlier regularised by UPSC w.e.f. 30th September, 1992 were regularised from the date of initial appointment i.e. 13th May, 1986 and 21st April, 1988 as Assistant Commissioner/Deputy Assessor & Collector vide office order No. F. 12(280)CED/II/94/6/1503-74 dated 15th January, 1999. Therefore, it is clear that regular vacancies of ALWO were available w.e.f. 13th May, 1986 and 21st April, 1988. It was also submitted that petitioners 3, 9 & 11 who are working as ALWO on adhoc basis w.e.f. 19th May, 1988 and 19th August, 1991 respectively may be regularised from the initial date of their appointment i.e. 19th May, 1988 and 19th August, 1991 on the basis of old notified Recruitment Regulations prevailing at the time of vacancies, and be promoted as Assistant Commissioner/Deputy Assessor & Collector accordingly. She relied upon the judgment of this Court in the case of H.B. Sharma v. UOI and Ors., in CWP No. 4071/94 which was upheld by Division Bench judgment in LPA No. 179/96. Her submission was that in the aforesaid cases, it was held that they were initially appointed on adhoc basis and had continued uninterrupted service till their regularisation by DPC or UPSC were entitled to get the benefit of continuous or 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 and adhoc promotion. It was also submitted that MCD bad-implemented the orders of this Court in the aforesaid cases by giving the

benefits to the incumbents. She also referred to the judgments of Supreme Court in the case of Narender Chadha and Others Vs. Union of India and Others, as well as The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, .

7. The narration of the facts of two writ petitions mentioned above would show that the petitioners were originally taken into the employment as LWS and joined the department as LWS on various dates. Thereafter petitioners Nos. 1 to 7 were promoted as ALWO on adhoc basis on 19th May, 1988 and petitioners Nos. 8 to 11 were promoted as ALWO on adhoc basis on 19th August, 1991 although twelve vacancies of ALWO on regular basis existed in the year 1992.

1) Under which Regulations twelve vacancies of ALWO which existed in the year 1992 are to be filled i.e. whether under 1976 Regulations or 1996 Regulations?

2) If the petitioners are entitled to be considered under 1976 Regulations, what benefit of seniority they are entitled to and what other consequential directions are required?

1. WHICH RULES ARE APPLICABLE:

As already noted above, submission of Mr. S.K. Kaul, learned senior counsel appearing for petitioners in CWP No. 438/99 that when twelve vacancies of ALWO existed in the year 1992 the same were to be filled in accordance with Regulations which were prevalent at that time namely 1976 Regulations and it could not be filled up on the basis of subsequent Regulations namely 1996 Regulations.

8. From the averments made in the counter affidavit, the following aspects are amply clear:

1) Twelve vacancies of ALWO existed in the year 1992.

2) No DPC was held after 24th April, 1989 for promotion to the post of ALWO as the Recruitment Regulations notified in the year 1976 were required to be amended in terms of OM dated 18th March, 1988.

3) After the 1996 Regulations, the steps were taken to fill up the vacancies as per the amended Regulations.

9. However, as noted in detail at the appropriate place, although the vacancies in the promote quota were filled from amongst the petitioners only, the process of filling up of these posts as per 1996 Regulations by way of direct recruitment was not initiated.

10. Law on this aspect is amply clear. The vacancies existed in a particular year are to be filled up as per the Regulations prevalent at that time and if there is a subsequent amendment in the Regulations such Regulations can be made applicable to the vacancies which arise after the amendment/promulgation of new Regulations (as the case may be) and these Regulations cannot be applied

retrospectively taking away the right of an employee which has already accrued to him. It is now well settled position that Regulations framed under proviso to Article 309 of the Constitution can be altered with retrospective effect but even then benefits which have acquired under existing Regulations cannot be taken away retrospectively. In *T.R. Kapur and Others Vs. State of Haryana and Others*, , the Supreme Court held that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. An authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotions are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted cannot be reverted and their promotion cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Articles 14 and 16(1). In the instant case, the Regulations are not even made retrospectively. Admittedly in the year 1992, twelve vacancies of ALWO existed. Petitioners have become eligible to be considered for promotion to the post of ALWO. Right to be considered for promotion is the fundamental right of the petitioners though not right to get promotion automatically. Once this right vested in the petitioners and the governing Regulations were 1976 Regulations, the respondents were under obligation to follow the 1976 Regulations. As per 1976 Regulations, 100 per cent vacancies to be filled by way of promotion. Therefore, the petitioners who were departmental candidates had right to be considered against 100 per cent vacancies as on 1992. By amendment the promotion quota was reduced to 33.33 per cent and 66.67 per cent of the vacancies are to be filled up by direct recruitment. This having been notified by amending the Recruitment Regulations vide notification dated 24th December, 1996 this would be applicable only in respect of vacancies occurring thereafter and not twelve vacancies of ALWO which existed in the year 1992. Therefore, the action of the respondents in applying the amended Recruitment Regulations even for these twelve vacancies is clearly erroneous.

11. At this stage, let us take stock of the position that existed from time to time vis-verse the petitioners. As pointed out in the beginning, the petitioners were taken in the employment of MCD as LWS on various dates between 1982 to 1986. In the year 1988, a DPC was convened by Central Establishment Department and seven vacant posts of ALWO were filled up by way of promotion of LWS to the post of ALWO on adhoc basis. Following persons were given adhoc promotion as ALWO w.e.f. 19th May, 1988.

S. No. Names Date of Promotion on as ALWO on adhoc basis.

1. Sh. S.C. Kohli 19.5.1988
2. Sh. O.P. Balwani -do-
3. Sh. Arun Kumar Singh 19.5.1988
4. Sh. Deepak Hastir -do-
5. Smt. Kiran Dabral -do-
6. Sh. D.P. Ture -do-
7. Ms. C.A. Tirkey -do-

12. In the year 1991, a DPC was again convened and the following LWS's were promoted to the post of ALWO on adhoc basis:

S. No. Names Date of Promotion as ALWO on adhoc basis.

1. Smt. Sangeeta Bansal 19.8.1991
2. Smt. Alka R.Sharma -do-
3. Sh. Kuldeep Singh Yadav 19.8.1991
4. Sh. Jagdeep Chiller -do-

13. Thus all eleven petitioners were given adhoc promotion as ALWO w.e.f. 19th May, 1988 and 19th August, 1991. However, they were not regularised. The reason for this is already stated above. The MCD did not convene the meeting of DPC as the Regulations were in contemplation of amendment. When the Regulations were amended, on 17th July, 1997 S/Sh. S.C. Kohli, O.P.Balwani, Dharampai Turey and Smt. C.A. Dhan (petitioners Nos. 1,2, 6&7) were regularized as ALWO. They were promoted as Assistant Commissioner/Deputy Assessor and Collector w.e.f. 4th September, 1997. If respondents had taken the steps to make the regular appointments in accordance with the then existing Regulations i.e. 1976 Regulations other petitioners also would have been regularized long ago as the vacancies on regular basis existed but were not filled. In these circumstances, the question of consequential directions crops up.

2. CONSEQUENTIAL DIRECTIONS WHICH ARE REQUIRED:

Once it is held that twelve vacancies of ALWO which existed in the year 1992 had to be filled up following the 1976 Regulations, the effect of that would be that all these twelve vacancies should have been filled up by way of promoting from amongst departmental candidates and the 1996 Regulations earmarking only 33.33 per cent for promotees and 66.67 per cent by way of direct recruitment was not permissible. The petitioners could not get regular appointment as the vacancies meant for promotion were earmarked to be filled up by direct recruitment. Therefore, the first exercise which is required to be done by the respondents is to apply 1976 Regulations in respect of twelve vacancies which existed in the year 1992 and consider the cases of the petitioners for promotion

on that basis. If the petitioners are given the promotions applying the 1976 Regulations then they would be entitled to seniority from the date of their initial appointment as ALWO on adhoc basis i.e. w.e.f. 19th May, 1988 in so far as petitioners 1 to 7 are concerned and w.e.f. 19th August, 1991 as far as petitioners 8 to 11 are concerned. For taking this view, I find support from the judgment of this Court in the case of H.B. Sharma v. UOI and Ors. in CWP No. 4071/94 decided on 18th July, 1996. In the said case Learned Single Judge of this Court, after relying upon various judgments of Supreme Court came to conclusion that adhoc service which continued and uninterrupted till regularization has to be counted for determining the seniority. The concluding part of the judgment reads as under:

"In view of the clear enunciation of law as set out in the aforesaid cases, particularly in the cases of A.K. Jain and Gangadhar Kar's and Delhi Water Supply and Sewage Disposal Committee (supra) which has been approved later on by the Constitution Bench in the case of Direct Reemit Class II Engineering Officers Association v. State of Maharashtra and Ors. The conclusion seems to be irresistible. In the instant case the claims of all the eligible and qualified candidates were considered at the time of adhoc appointment and such appointment continued uninterruptedly till the regularisation of service by the Departmental Promotion Committee or the Union Public Service Commission, there is no justification in excluding such service for determining the seniority. Of course, in absence of any statutory rules or executive order to the contrary in the instant case, when the current duly charge was given to the petitioner along with other officers in the year 1986. Claims of all the eligible and qualified candidates were considered and after considering their claims, they were given adhoc appointments and the adhoc appointments have continued from 13.5.86 till 30.9.92 when the appointment were regularised.

On the basis of these large number of Judgments of the Supreme Court, the petitioner and all others similarly placed who have continued uninterruptedly till the regularisation of service by DPC or UPSC would be entitled to all get the benefit 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 to the post of Assistant Commissioner, vide order dated 13.5.86 and later on this current duty charge according to the assertions in the counter affidavit was converted into adhoc appointment vide order dated 19.9.86 from the date of their assuming the current duty charge (13.5.86). Therefore, in the instant case, the petitioner and similarly placed officials would be entitled to get the benefit or service from 13.5.86 and all consequent benefits.

The benefit which is being given to the petitioner because of the direction in this petitioner must also be given to the similarly placed officials in consonance with the principles of equity, fairness and good conscience. This approach, of the respondent MCD would certainly curtail avoidable litigation."

14. While upholding the aforesaid judgment and dismissing the appeal filed by MCD the Division Bench of this Court made the following pertinent observations :

"We are of the view that for the purpose of counting the number of years of service for eligibility for further promotion, the nature of the post or the nature of holding that post is not relevant. This has been laid down by the Supreme Court in the case of State of Madhya Pradesh and Another Vs. Laxmishankar Mishra, In that case it was clearly pointed out by their Lordships that what is important is the "experience" of the officers for the purpose of promotion and Therefore the manner in which or the capacity in which the post was held by the concerned employee in the lower category i.e. ad-hoc or temporary or regular was not relevant. In the aforesaid Supreme Court case employees were holding the post of Head Masters/Principals on an in charge basis, but still that service was counted for purposes of eligibility or experience for higher promotion. In view of the aforesaid Judgment of the Supreme Court, the contention raised by he appellants in this appeal cannot be accepted. Therefore, the reliance by the leaned counsel for the appellant on administrative instructions which require only regular service to be counted for purposes of eligible for further promotion which run contrary to the aforesaid ruling of the Supreme Court, cannot be accepted."

15. I may point out at the cost of repetition that on 30th September, 1992 twelve clear-cut vacant posts of ALWO were available with the department, but the petitioners were not regularised as per existing notified Recruitment Regulations for the post, in accordance with G.O.I. O.M. No. 22011/5/86-Estt.(D) dated the 10th April, 1989 (para 4.1) issued by the Ministry of Personnel Public Grievance and Pensions. Even this O.M. No. 22011/5/86-Estt.(D) dated 10th April, 1989 (para 3.1) envisages that "D.P.C. should be convened at regular intervals to draw panels." The DPCs should be convened at regular annual interval to draw panels which could be utilised on making promotions against the vacancies occurring during the course of a year. For this purpose it is essential for the concerned appointing authorities to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel by collecting relevant documents like CRs integrity certificates, seniority list etc., for placing before the DPC. DPCs could be convened every year if necessary on a fixed date e.g, 1st April or May. The Ministries/Departments should lay down a time schedule for holding DPCs under their control and after laying down such a schedule the same should be monitored by making one of their officers responsible for Keeping a watch over the various cadre authorities to ensure that they are held regularly. Holding of DPC meetings need not be delayed or postponed on the ground that Recruitment Rules for a post are being reviewed/ amended. A vacancy shall be filled in accordance with the Recruitment Rules in force on the date of vacancy, unless Rules made subsequently have been expressly given retrospective effect. Since amendments to Recruitment Rules normally have-only prospective applications, the existing vacancies should be filled as per the Recruitment Rules in force. The Division Bench in the aforesaid case took note of the aforesaid O.M. and found that in that case also DPC had

not convened at regular annual intervals. Same is the position here.

16. Similarly in Kailash Chandra Rajawat Vs. Union of India and another, it was held that period spent by the appellant, as temporary duty, prior to his regularisation was required to be taken into consideration for considering his eligibility for promotion. The Court referred to Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, in support of this proposition. To the same effect are the judgments of Supreme Court in the cases of The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others, and V.P. Shrivastava and Others Vs. State of M.P. and Others,

17. The result of the aforesaid discussion is that both the petitions succeed and are hereby allowed. Rule is made absolute. Respondents are directed to fill the twelve vacancies of ALWO on regular basis which existed in the year 1992 as per 1976 Regulations and consider the petitioners against the aforesaid vacancies. If the petitioners are found fit for promotion to the post of ALWO, they be given said promotion from the due date and be assigned seniority as well on that basis. They would be entitled to further promotion to the post of Additional Deputy Commissioner and Assistant Commissioner respectively in accordance with Recruitment Regulations and on the basis of revised seniority. The petitioners shall also be entitled to costs which is quantified at Rs. 5,000/- in each case.