

(2004) 05 DEL CK 0007
In the Delhi High Court
Case No : WP (C) 6127 of 2004

S.K. Tanwar

APPELLANT

Vs

National Open School Society (Regd.)

RESPONDENT

Date of Decision : 31-05-2004

Acts Referred:

Citation : (2004) 112 DLT 774 : (2005) 3 SLJ 49

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : G.D. Gupta and Bimla K. Kaul, Adv Sangeeta Verma, for the Appellant;

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—The petitioner who was promoted to the post of Deputy Director (Admn.) by the National Institute of Open Schooling and has since been reverted on the ground that his promotion was contrary to the notified recruitment rules challenges his reversion.

2. National Open School Society (NOS) was established as an autonomous organization in November, 1989, being a society registered under the Societies Registration Act, 1860. The society has established the National Institute of Open Schooling (NOIS). It

3. Petitioner joined service as an Accountant under the Government of India, on permanent basis w.e.f. 13.12.1983. He was placed in pay scale of Rs. 1200-2040. He earned promotions to posts of Senior Accountant, Jr. Accounts Officer and thereafter the post of Assistant Accounts Officer. When he was a Junior Accounts Officer he proceeded to join service under CBSE. W.e.f. 2.7.1996 he joined NOIS on deputation where he was permanently absorbed w.e.f. 31.3.2000. On 29.3.2001 he was promoted as Chief Accounts Officer. Since dispute between the parties revolved inter alia, on the eligibility of the petitioner for being promoted as Deputy Director (Admn.) as on 1.1.2002, which issue in

turn predicates itself to the scale of pay held by the petitioner, I would be advised to have a pen picture of the career graph of the petitioner. Same is as under:-

HELD	PAY	SCALE	S.No.	DATE	POST
13.12.1983	Accountant	RS. 1200-2040	1.	01.04.87	Sr. Accountant
1640-2900	3.	21.9.1990	Jr. Accountant	Officer	RS. 1640-2900
Asst.	Accounts	Officer	Rs.	08.04.94.	2000-3200

Note:

- w.e.f.1.1996 scale of Rs. 2000-3200 was replaced by scale of Rs. 6500-10500.
- vide order dated 28.2.2003 the scale was retrospectively revised w.e.f. 1.1.1996 to Rs. 7450-11500, on notional basis with actual payment being made from 19.2.2003.

HELD	PAY	SCALE	S.No.	DATE	POST
2.7.1996.	Accounts	Officer (On deputation under NOIS)	5.		Rs. 7450-11500.

Note:

- Vide order dated 30.12.2002 scale was revised to Rs. 10,000-15200 w.e.f.1.1.1996 .

HELD	PAY	SCALE	S.No.	DATE	POST
29.3.2000	Accounts	Officer (Under NOIS on permanent absorption)	6.		Rs. 7450-11500 when absorbed but w.e.f.2.7.1996 granted scale of Rs. 10000-15200.
1.3.2001	Chief Accounts	Officer	7.		Rs. 10000-15200 revised to Rs. 12000-16500.

4. In September 2002, respondent framed General Rules of Recruitment and Promotion of Academic and Non-Academic Staff of NIOS 2002. For the post of Deputy Director, the rules stipulated as under:-

- S.No. 2.
- Name of Post Dy. Director(Admn.) .
- No. of Posts 7(2+5)
- Classification Group A.
- Scale of Pay Rs. 10000-325-15200 .
- Whether by Open selection for Direct selection or non- Recruitment and selection selection through DPC for promotion.

7. Age limit for direct Below 32 years. recruitment

8. Educational and Essential other qualifications

1. At least second class for direct Bachelor's Degree. Recruitment

2. At least 5 years of regular service in the scale of Rs. 6500-200-10500 or equivalent in any of the two following fields.

(i) Experience of Administration including HRD, Finance and Accounting.

Or

(ii) Experience in conducting examination/internal assessment at the Board/ University level

Or

(iii) Planning, Printing and Publication of text books

Or

(iv) Computer application programme and hardware.

3. Organization of Seminars, conference and liaison with various Government/ Non-Government agencies.

4. Working knowledge of Hindi/English

5. Working knowledge of computer operation. Desirable

i) Post Graduate Degree or Diploma in Management.

9. Whether age and N.A. qualifications prescribed for direct recruits will apply in case of promotion

10. Period of probation, Two years. if any.

11. Method of 33.3% by direct recruitment either recruitment and by promotion/ 66.6% by deputation transfer promotion failing and percentage which by deputation. of promotion to be filled by various methods.

12. In case of promotion/ By promotion from deputation transfer amongst the officers grade from which having regular promotion/ transfer continuous service, to be made. For at least, 5 years in the scale of Rs. 8000-275-13500. 7 years in the scale of Rs. 7450-11500. 10 years in the scale of Rs. 6500-200- 10500 in any of the following fields:-

Administration (including finance and HRD), conducting of examination, printing and publication, computer applications, organizations of seminars, conferences etc. for teachers and key personal. For deputationists qualification and experience as prescribed in Col. 8.

13. Composition of DPC As given in General Rules of Recruitment and Promotion

(Part I).

5. Respondent had a number of vacant posts of Deputy Director (Admn.) in the year 2002. It fixed 1.1.2002 as the cut off date for determining eligibility.

6. D.P.C met on 8.11.2002. As per the petitioner, he has 7 years of service as on 1.1.2002 in the grade of Rs. 7450-11500 since w.e.f. 1.1.1996 pay scale of the post of Assistant Accounts Officer which the petitioner held since 8.4.1994 got revised from Rs. 2000-3200 firstly to Rs. 6500-10500 w.e.f. 1.1.1996 and further to Rs. 7450-11500 w.e.f. 1.1.1996 on notional basis with actual payment being made from 19.2.2003. Further, revision of pay scale of Rs. 7450-11500 got enhanced to Rs. 10,000-15200 w.e.f. 1.1.1996, though notionally with actual payment being w.e.f. 19.2.2003). Considering said fact, petitioner would be having 5 years service in the grade of Rs. 10000-15200 as on 1.1.2002. Petitioner states that Rule 5.4.1 of the Recruitment and Promotion Rules 2002 empower the D.P.C to give relaxation. Rule 5.4.1. of the Recruitment and Promotion Rules 2002 empower the D.P.C to give relaxation. Rule 5.4.1. reads as under:

7. As per the petitioner, Departmental Promotion Committee (DPC) met on 8.11.2002 to consider the cases of candidates for promotion to the post of Deputy Director (Admn.) and in view of number of available posts for promotion and non-availability of sufficient number of eligible and meritorious candidates, the DPC, in anticipation of the revision of the pay scale of Accounts Officer in NIOS from the pay scale of Rs. 7500-11500 to Rs. 10000-15200, to give them parity with CBSE which eventually was announced by Government of India in December 2002 retrospectively w.e.f. 1.1.1986, by way of abundant caution granted relaxation in the case of the petitioner in the matter of experience so that the interest of the petitioner were not unjustly prejudiced due to lay on the part of the NIOS in announcing the revised pay sale of Accounts Officer. Thus the parity was brought between NIOS and CBSE Accounts Officer in the matter of pay scale. Otherwise the pay scales of Assistant Accounts Officers in the government departments and the Accounts Officers in NIOS were in the pay scale of Rs. 7450-11500 on the basis of the acceptance of recommendations of the 5th Central Pay Commission.

8. The petitioner was promoted to the post of Deputy Director (Admn.) on 15.11.2002 in the pay scale of Rs. 10000-15200 initially on ad-hoc basis on the recommendations of the DPC and his promotion on regular basis was made subject to the revision of the pay scale in the post of Accounts Officer in NIOS as revision of the pay scale of Accounts Officer in NOS was in active consideration of the authorities. The ad-hoc promotion as Deputy Director (Admn.) was regularized w.e.f. 15.11.2002 (vide Office Order dated 10.3.2003) after the pay scale of the Accounts Officer was revised to Rs. 10000-15200 retrospectively w.e.f.1.1.1996. The petitioner assumed the charge of the said post on 15.11.2002.

9. Order dated 10.3.2003 reads as under:-

Office Order 85/03

This cancels this Office Order No. 84/03 dated 07 March 2003.

(S.S. Gil)

10. On 31.12.2002 respondent upgraded the pay scale of various posts including the posts of Deputy Director and Accounts Officer. In respect of the Deputy Director (Admn.) the existing pay scale of Rs. 10000-15200 was revised to Rs. 12000-375-16500 and in case of Accounts Officer it was revised from Rs. 7450-11500 to Rs. 10000-15200 and the revision was to take place retrospectively w.e.f. 1.1.1996. Order dated 31.12.2002 reads as under:-

Sub: Upgradation of Pay Scales of certain post in NIOS

Based on the approval conveyed by Govt. of India, MHRD in their letter No. 5-31/99-Sch.3 dt. 20th December, 2002 to the new scales of pay, after parity with the corresponding posts in CBSE, in respect of certain posts in NIOS, the scales of pay of the following posts are revised as under:-

-----	S.No.	Name
of Post Existing Pay New scale of Pay Remarks Scale (Rs.) After parity (Rs.)		
-----	1.	Dy.
Director (Admn.) 12000-375-16500	14300-400-18300	2. Dy. Education Officer
10000-325-15200 12000-375-16500	3. Publication Officer	8000-275-13750
10000-325-15200	4. Accounts Officer	7450-225-11500 10000-325-15200
5. System Analysist-Cum	4500-125-7000	5500-175-9000
Programmer	6. Chief	
Accounts	Officer	7. Dy. Director (Acad)

Includes Desk Officer (since re-designated as Supdt. Personal Asstt., Technical Asstt., Assistant Librarian.

The revised pay scales will be w.e.f.1.1.1996 or the date of assumption of charge by the individual or the relevant posts which ever is later. The pay in the upgraded scales will be fixed under the normal rules.

(S.S. Gill)

11. Since as of 1.1.1996, petitioner was borne on the regular cadre as Assistant Accounts Officer under the Government of India and vide order dated 28.2.2003 pay scale of Assistant Accounts Officer was notionally revised w.e.f.1.1.1996 with monetary benefits w.e.f. 19.2.2003, following order was issued:-

MINISTRY OF HOME AFFAIRS

2/10, Jam Nagar House,

New Delhi-110011.

Dated 01.01.2004

OFFICE ORDER

Consequent upon grant of Higher Pay Scale w.e.f. 01.01.1996 vide M/o Finance and Company Affairs O.M.6/82/E.III(B)/91 dated 28.02.2003 and CGA O.M.No. A-60015/1198/MF-CGA(A)/NGE/FTC/240 dated 04.03.2003 and CGA clarification U.O No.6/82/E.III(B)/91 dated 31.07.2003, the Pay of Shri S.K.Tanwar, AAO, who has permanently observed in National Open School on 28.03.2003, has been fixed notionally in the higher scale of Pay Rs. 7450-225-11500 w.e.f. 01.01.1996. 6500-200-10500 7450-225-11500

Shri S.K. Tanwar, AAO Rs. 6500 Pay fixed Rs. 7450 D.N.I. 01.04.1996 w.e.f. 01.01.1996 with DN.I 01.04.1996 (Notionally) Monetary benefits w.e.f. 19.02.2003.

This issues with the approval of CA (H).

Sd/-

12. On 21.2.2004, respondent issued office order No. 29/4 reverting the petitioner to the post of Accounts Officer. No reasons were indicated. Petitioner was not heard before the order of reversion was passed. Petitioner filed a writ petition being WP(C) No. 2501/2004. Respondent withdrew the office order dated 21.2.2004. Writ petition filed by the petitioner was disposed of clarifying that it would be open to the respondent to issue a show cause notice to the petitioner, grant of opportunity of hearing and pass a reasoned order.

13. On 19.3.2004, the respondent issued to the petitioner a show cause notice, calling upon the petitioner to show cause as to why his promotion to the post of Dy. Director (Admn.) be not withdrawn. Show cause notice dated 19.3.2004 reads as under:-

Whereas it has come to the notice of the Chairman, NIOS that you had been irregularly promoted as Deputy Director (Administration) w.e.f. 15.11.2002 in the scale of pay of Rs. 10000-15200 (subsequently revised to Rs. 12000-16500) without fulfilling the conditions.

The eligibility conditions prescribed for the post were as under:

By promotion from amongst the officers having regular continuous service, for at least, 5 years in the scale of-275-13500/7 years in the scale of Rs. 7450-11500/10 years in the scale of Rs. 6500-200-10500 in any of the following fields:-

2. Whereas you did not fulfill the above conditions and in particular with regards to the following:

(i) That you did not possess regular continuous service of 5 years in the scale of-275-3500/7 years in the scale of Rs. 7450-11500/ 10 years in the scale of Rs. 6500-200-10500 as on 01-01-2002 i.e. the date for determining the eligibility.

(ii) That you did not possess the requisite length of service on the cut off date i.e. 01-01-2002 in the field prescribed in the recruitment rules quote above.

(iii) That you were given relaxation for promotion to the grade of Deputy Director in a discriminatory manner without the approval of the Competent Authority.

(iv) That you were promoted to the grade of Deputy Director only on adhoc basis till such time the scale of pay of Accounts Officer is revised to Rs. 10000-13500 on the recommendations of DPC. Your regularisation in the post of Deputy Director was done without the approval of the Competent Authority.

(v) That the deputation services rendered by you as Accounts Officer cannot be counted for the purpose of determining the eligibility.

3. You are hereby directed to show cause as to why your services as DD(Admn.) should not be reverted forthwith. If no reply is received by 29th March, 2004, it will be presumed that you have no Explanation to give and authority will proceed to decide the case on merits.

This issues with the approval of Competent Authority.

14. Petitioner filed his reply to the show cause notice. In brief, petitioner contended that since he was permanently absorbed under NOIS on 28.3.2000 and prior thereto he joined NOIS on deputation with effect from 2.7.1996, petitioner was fully eligible for being appointed as a Deputy Director (Admn.). Petitioner justified his eligibility as under:-

a) Petitioner was promoted as an Assistant Accounts Officer under the Central Government on 8.4.1994 in the pay scale of-3200. With effect from 1.1.1996, the scale was revised to Rs. 6500-10500. At the time of his promotion, proposal to revise the said scale to Rs. 7450-11500 was pending and vide order dated 28.2.2003 said scale was retrospectively granted on notional basis and, Therefore, petitioner had the requisite service of 7 years in the scale of Rs. 7450-11500 when he was considered for promotion. In other words, petitioner invoked the principle that the deeming/notional concept had to be given full effect to.

b) The scale of Rs. 7450-11500 in which the petitioner was absorbed with effect from 2.7.1996 was revised to Rs. 10000-15200 with effect from 1.1.1996, though notionally, actual pay being granted with effect from 30.12.2002, petitioner would be deemed to be having 5 years service in the grade of Rs. 10000-15200 and, hence, was eligible for being considered for promotion as he had 5 years" service in the grade of Rs. 10000-15200.

15. Pertaining to the field in which requisite experience was required, petitioner pointed out that the experience in the requisite field was administration which included finance. Since the petitioner was in the accounts department, he had the requisite experience in finance and, Therefore, had the requisite experience in the field of administration.

16. Petitioner was heard. His defense was rejected. Order dated 16.4.2004 was passed withdrawing petitioner's promotion to the post of Deputy Director (Admn.).

17. In holding against the petitioner, respondent held that the petitioner, having been absorbed in the service of NIOS on 28.3.2000 began his regular service from 28.3.2000 only and was entitled to promotion as per the qualifying conditions as stated in the RRs of NIOS, only thereafter. Operative part of the order dated 16.4.2004 reads as under:-

It is stated that in the case of Sh. Tanwar, he has been promoted contrary to the rules and omitting to consider other eligible persons who were to get rightful promotion in accordance with rules. These aspects have been considered by the Review DPC and the Review DPC was of the opinion that rules have not been strictly followed. Taking into consideration, the totality of circumstances and the facts of the case as also the rule position, the undersigned is further of the view that:-

(a) Shri S.K.Tanwar, having been absorbed into the service of NIOS on 28-03-2000 began his regular service from 28-03-2000 only and was entitled to promotion as per the qualifying conditions as stated in the RRS of NIOS, only thereafter.

(b) Shri S.K. Tanwar's promotion to the post of Deputy Director (Admn.) was ab-initio, erroneous as the same was not in conformity with the operating RRs in NIOS rather the same was in violation of the same.

18. Impugned order shows that the respondent proceeded to revert the petitioner only on one count, that the petitioner joined service under NIOS on regular basis with effect from 28.3.2000 and qualifying conditions had to be reckoned with effect from said date. The impugned order does not hold against the petitioner that he did not have the experience in the requisite field of administration.

19. Decision in the present writ petitioner, Therefore, centers around the issue whether the respondent was justified in reckoning the qualifying service in the grade with effect from 28.3.2000 when the petitioner was permanently absorbed under NIOS.

20. During arguments, Sh. Parag Tripathi, Sr. Advocate appearing for the respondent urged that since replacement scale to the post of Assistant Accounts Officer in the scale of Rs. 7450-11500 was granted on notional basis with effect from 1.1.1996, actual payments being made from 19.2.2003 and further that the pay scale of Rs. 7450-11500 was notionally revised with effect from 1.1.1996 only in the year 2000, petitioner even otherwise would not have 7 years" of regular service in the pay scale of Rs. 7450-1150 and 5 years" of regular service in the pay scale of Rs. 10000-15200.

21. Counsel also urged that the petitioner did not have the experience in the field

of administration as contemplated by the recruitment rules.

22. The twin issue whether the petitioner had 7 years" of regular service in the grade of Rs. 7450-11500 and 5 years" regular service in the grade of Rs. 10000-15200 and what is the effect of the order dated 28.2.2003 retrospectively revising petitioner's pay scale with effect from 1.1.1996 to Rs. 7450-11500 though notionally, actual payments being made from 19.2.2003 and the effect of the order dated 30.12.2002 retrospectively revising petitioner's pay scale to Rs. 10000-15200 with effect from 1.1.1996 though notionally, actual payment being with prospective effect needs to be decided first.

23. Petitioner was on deputation under NIOS with effect from 2.7.1996. He was permanently absorbed on 28.3.2000. Petitioner contends that the rules require regular service in the scale and not regular service in the scale under the respondent. Petitioner further contends that where a deputationist is permanently absorbed, service reckoned in the department as a deputationist cannot be ignored. Respondent contends that regular service in the scale means regular service under it, post permanent absorption on. ate but was later on absorbed on a date after the direct recruit had entered service under the CBI was in issue. Direct recruit claimed seniority by alleging that the deputationist who was subsequently absorbed, has to be granted seniority with effect when a person is appointed to a post against a permanent vacancy on probation, his appointment is on a regular basis, but when a person is appointed to a post on a purely temporary or on an ad hoc basis, the appointment is not on a regular basis. The expression "on a regular basis" in the 1975 Rules cannot in our opinion, be interpreted to mean as on absorption in the CBI as SP. The general principle is that in the absence of any specific provision to the contrary, the length of service from the date of appointment to a post should be taken into consideration for the purpose of either seniority in that post or eligibility for the higher post. As no Explanation has been given in the 1975 Rules of the said expression, we do not think it desirable to deviate from the established principle of computing the length of service for the purpose of seniority or eligibility for the higher post from the date of appointment. In our view, Therefore, the expression "on a regular basis" would mean the appointment to the post on a regular basis in contradiction to appointment on ad hoc or stop-gap or purely temporary basis. Respondent 5, in our opinion, satisfied the eligibility test of the 1975 Rules for consideration for the post of DIG. But, it is not disputed by the parties that the petitioners and respondent 5 have, by the lapse of time during the pendency of this litigation, become eligible for appointment to the posts of DIG. Indeed, they are holding the posts of DIG, may be on ad hoc basis, under the inter orders of this Court and there is no chance of their being reverted to the next lower post of SP. The question, Therefore, boils down to the seniority of the petitioners vis-a-vis respondent 5 in the post of DIG. That again will depend upon the Decision deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to

the same or an equivalent post in another government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he has been transferred. It has been observed by this Court that it is a just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected and presented by taking the same into account in determining their ranking in the new service cadre. See *R.S. Makashi and Others Vs. I.M. Menon and Others*, ; *Wing Commander J. Kumar Vs. Union of India (UOI) and Others*,

24. Concept of regular service was explained by the Supreme Court in its decision reported as AIR 2000 SC 1819 *UOI Vs. K.B. Rajoria*. Vide order dated 10.6.1998, appellant No. 4 was notionally promoted with effect from 22.2.1995 to the post of Additional Director General (Works). On 1.7.1997, the post of Director General had fallen vacant. Since appellant No. 4 had been granted notional promotion to the post of Additional Director General on 22.2.1995, he was considered for promotion as the recruitment for the post of Director General stipulated 2 years" regular service in the grade of to the post of Additional Director General as the eligibility norm. Respondent K.B Rajoria challenged the said promotion. The High Court took the view that the word

"regular service" mean actual service and, Therefore, promotion by fiction or notional promotion did not make appellant No. 4 eligible. The High Court took the view that the words "regular service in the grade" meant "actual physical service".

25. Overruling the decision of the High Court, the Supreme Court held as under in paras 10 to 14:-

Contrary to any principle of law?

In that case it was held (Para 10 of AIR): to the present case. *Inder Singh's* case dealt with the right of a deputationist for permanent absorption in the department under which he was serving as a deputationist and the right of the employer to repatriate him. *Ishar Singh's* case dealt with the issue of inclusion of ad-hoc service while reckoning the length of service required under the service rules. The decisions applicable are the ones in *K. Madhavan's* case (Supra) and *K.B. Rajoria's* case (Supra).

26. Decision of the Supreme Court in *K.B. Rajoria's* case (Supra) concludes the issue of what is the effect of a notional service, which would include the concept of notional service in a grade. Decision of the Division Bench of this court reported as 82 that notional promotion would mean that for all practical purposes the incumbent was regularly appointed to the post.

27. Grant of notional scales with retrospective effect to the petitioner would

mean that for all practical purposes, petitioner would have to be treated as regularly appointed in the said grade.

28. Decision of the Appeals Court in East End Dwelling Case (1951) 2 All ER 587 may also be noted in the context of a deeming fiction. It was observed as under:-

29. Whether the petitioner is entitled to include the service as a deputationist on being permanently absorbed for purposes of determination of his length of service in the scale stands conclusively decided by the decision of the Supreme Court in K. Madhav an"s case (Supra).

30. It is accordingly held that the petitioner was fully eligible for being promoted as Dy. Director as on 1.1.2002.

31. An order has to be justified on the reasoning contained in the order. It cannot be improved upon. In the decision reported as AIR 1978 SC 51 M.S. Gill Vs. Chief Election Commissioner, it was observed as under:-

32. It is not the reasons contained in the impugned order that the petitioner did not have the experience in the requisite field. Be that as it may, the recruitment rule requires experience in the field of administration. The field of administration includes finance. Petitioner had admittedly been working in the accounts department since inception of his service in the year 1983. Field of experience of the petitioner being finance, petitioner had the requisite experience in the field of administration as per the recruitment rules.

33. Before concluding, I may note that the petitioner had challenged the promotion of respondent No. 4 but during arguments Mr. G.D. Gupta, learned Senior Advocate for the petitioner stated that there are enough posts and petitioner is not desirous of challenging the promotion of respondent No. 4.

34. Writ petition is allowed. Impugned order dated 16.4.2004 reverting to the petitioner is quashed. Mandamus is issued to the respondent to post the petitioner as Dy. Director (Admn.). Petitioner would be entitled to consequential reliefs flowing from the quashing of the impugned order dated 16.4.2004 which would mean that petitioner would be entitled to continuity of service and benefit of promotion to the post of Dy. Director (Admn.) with effect from 15.11.2002. No costs.