
(2013) 05 DEL CK 0446
In the Delhi High Court
Case No : Writ Petition (C) 2059 of 2012

Sunil Kumar Mehra

APPELLANT

Vs

MCD and Another

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2014) 209 DLT 505 : (2014) 2 ESC 1197 : (2013) 4 SCT 85

Hon'ble Judges : Pratibha Rani, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Raman Duggal, for the Appellant; Yatendra Sharma, Advocate for R-1 and R-2, for the Respondent

Judgement

Pradeep Nandrajog, J.—The factual backdrop in which we have to decide the instant writ petition is that on August 10, 1992 the petitioner joined the Town Planning Department of the Municipal Corporation of Delhi (hereinafter referred to as MCD) on the post of Junior Town Planner, a Group "A" post. The hierarchical structure of Group "A" posts in the Town Planning Department of MCD is as follows: - Chief Town Planner Additional Town Planner (re-designated as Senior Town Planner) Junior Town Planner (re-designated as Deputy Town Planner).

2. There are 3 sanctioned posts of Additional Town Planner in the pay band Rs. 15600-39100 in PB-III with Grade Pay of Rs. 7,600/- and 1 post of Chief Town Planner in the pay band Rs. 37400-67000 in PB-IV with Grade Pay of Rs. 10,000/- under MCD.

3. As is evident from the afore-noted hierarchical structure, the post of Junior Town Planner is a feeder post for promotion to the post of Additional Town Planner. In terms of the Recruitment & Promotion Regulations, 1985, for the post of Additional Town Planner in MCD, an officer who has put in five years of regular service in the post of Junior Town Planner is eligible to be considered for promotion to the post of Additional Town Planner. The eligible officers are required to be considered for promotion to the post of Additional Town Planner by

a DPC comprising of Chairman/Member of UPSC and Commissioner/Dy. Commissioner of MCD. The post of Additional Town Planner is a feeder post for promotion to the post of Chief Town Planner. In terms of the Recruitment Regulations for the post of Chief Town Planner in MCD, an officer who has put in eight years of regular service in the post of Additional Town Planner is eligible to be considered for promotion to the post of Chief Town Planner.

4. On July 01, 1996 a vacancy arose to the post of Additional Town Planner on account of superannuation of one Mr. Ashok Kumar Khanna on June 30, 1996 who was working as an Additional Town Planner.

5. On January 07, 1998 the petitioner was promoted to the post of Additional Town Planner on "ad-hoc" basis since he was the senior most officer working as Junior Town Planner and was eligible to be promoted to said post.

6. When the department did not convene a DPC to consider name of the petitioner for promotion to the post of Additional Town Planner on regular basis for a considerable period of time the petitioner submitted various representations to the competent authority in said regards.

7. On September 06, 2006 the Director (Personnel), MCD prepared a note regarding considering the candidature of the petitioner for promotion to the post of Additional Town Planner on regular basis, the relevant portion whereof reads as under:-

Self-Contained Note for DPC for promotion to the post of Addl. Town Planner.

There are 3 posts of Addl. Town Planner (now re-designated as Sr. Town Planner) in the pay of Rs. 12000-16500/-. Out of these 3 posts, two posts have been filled up on regular basis by Direct Recruitment of S/Shri V.K. Bugga, Sr. Town Planner (currently Chief Town Planner on ad hoc basis) and Shamsheer Singh, Sr. Town Planner. One post has been lying vacant w.e.f. 01.07.1996 due to retirement of Sh. Ashok Kumar Khanna on 30.06.1996, which is required to be filled up on regular basis.

?..

3. The Final Seniority List of Jr. Town Planner (feeder cadre of Sr. Town Planner), was issued vide F.8(20)/CED(II)/87/34/163668-73 dated 07.07.1995, containing two names viz. S/Shri Ashok Kumar Khanna and Sunil Kumar Mehra (copy enclosed). Out of these two officers, senior-most Sh. Ashok Kumar Khanna had already retired as Sr. Town Planner on 30.06.1996. Next senior-most at Sl. No. 2, Sh. Sunil Kumar Mehra, has already become eligible for consideration for promotion to the post of Sr. Town Planner in terms of the notified RRs to the post as he has completed more than 14 years of regular service as against the requisite 5 years. Further, Sh. Mehra has already been given ad hoc appointment as Sr. Town Planner in the pay scale of Rs. 12000-16500/- w.e.f. 07.01.1986. Also, as per the Vigilance Report dated 26.07.2006 (Annexure ____), AO (HQ)'s Report dated 08.08.2006 (Annexure M) and scrutiny of Personal File of the

officer, the said officer is not facing any Currency of Punishment/penalty for the last 10 years.

4. Last DPC for the post of Addl. Town Planner (now re-designated as Sr. Town Planner) was held at the UPSC in the year 1995. On the recommendation of the DPC, conveyed vide UPSC's letter No. F.1/30(14)/95/AU IV dated 26.10.1995, Shri Ashok Kumar Khanna was regularized to the post of Addl. Town Planner (now re-designated as Sr. Town Planner), notified vide this department's Office Order No. F.8(10)/CED(II)/86/67/30401-20 dated 04.12.1995 (copy enclosed).

In view of above, DPC is requested to consider the case for officiating promotion to the post of Addl. Town Planner (now re-designated as Sr. Town Planner) at the earliest.

8. Thereafter the MCD sent the proposal to convene a DPC to empanel a candidate for promotion to the post of Additional Town Planner on regular basis to UPSC which examined the proposal and sought certain clarifications from MCD. In response thereto, on August 21, 2007, the Director (Personnel), MCD sent a letter to UPSC, the relevant portion whereof reads as under:-

The regular vacancy in the post of Addl. Town Planner (re-designated as Sr. Town Planner) accrued on 01.07.1996 due to retirement of Shri Ashok Kumar Khanna, Addl. Town Planner. The vacancy has not been filled up by way of regular promotion till date.

It may be noted that Sh. Sunil Kumar Mehra, Sr. Town Planner, became eligible for regular promotion to the post of Addl. Town Planner (re-designated as Sr. Town Planner) on 01.01.1996 (date of eligibility and completion of required length i.e. five years, as per RRs). Therefore, it is requested to consider for regular appointment to the post of Addl. Town Planner (re-designated as Sr. Town Planner) as per rules.

With regard to comments on the representation dated 25.11.2006 of Sh. Sunil Kumar Mehra, Sr. Town Planner, it is submitted that due to administrative reasons, the proposal couldn't be sent to the UPSC in time.

In view of above, it is requested to convene the DPC in respect of Sh. Sunil Kumar Mehra, Sr. Town Planner, for promotion to the post of Addl. Town Planner (re-designated as Sr. Town Planner in the MCD), at the earliest.

(Emphasis Supplied)

9. On November 21, 2007 the DPC met and recommended the name of the petitioner to be promoted to the post of Additional Town Planner in respect of the vacancy year 1997-1998, which recommendation was approved by UPSC on November 23, 2007. Finally, on February 26, 2008 the petitioner was promoted to the post of Additional Town Planner on regular basis.

10. In the year 2011, MCD issued a provisional seniority list of Additional Town Planners, in which list the date of promotion of the petitioner to the post of

Additional Town Planner was shown as February 26, 2008 and seniority reckoned therewith. The petitioner objected to the said list and submitted a representation stating therein that the department ought to have treated his date of promotion to the post of Additional Town Planner as January 07, 1998 i.e. the date when he was promoted to said post on ad-hoc basis. Rejecting the representation, MCD issued the final seniority list of Additional Town Planners on May 25, 2011 as per the provisional list.

11. Aggrieved by the aforesaid, the petitioner filed an application u/s 19 of the Administrative Tribunals Act, 1985 before the Central Administrative Tribunal, Principal Bench, New Delhi pleading therein:-

(i) that the department ought to have considered his date of (regular) promotion to the post of Additional Town Planner as July 01, 1996 i.e. the date when a vacancy had arisen to the said post or at least January 07, 1998 i.e. the date when petitioner was promoted to said post on ad-hoc basis, for the reason he was eligible to be promoted to said post on the date the post fell vacant. He highlighted that in spite of a clear vacancy being available the department did not convene the DPC for a period of 9 long years without any justifiable reason and thus the petitioner cannot be penalized for the delayed action of the department;

(ii) the ad-hoc service rendered by the petitioner on the post of Additional Town Planner should be counted as "regular service" rendered by him in said post in view of the settled legal position that where an ad-hoc appointment matures into a regular appointment, the entire period of service including service rendered on ad-hoc basis should be counted as "regular service" in the grade for the purposes of determining eligibility for promotion to the post of Chief Town Planner; and

(iii) the past practice in MCD has been that ad-hoc service was counted as regular service for purposes of promotion.

12. Opposing petitioner's claim, MCD pleaded that:-

(i) in view of the instructions contained in the Office Memorandum dated April 10, 1989 issued by the Department of Personnel and Training, the petitioner is not justified in claiming "retrospective promotion" i.e. promotion from a back date to the post of Additional Town Planner; and (ii) the counting of ad-hoc service rendered by the petitioner on the post of Additional Town Planner as regular service would have no bearing on the seniority of the petitioner to the post of Additional Town Planner for the reason the officer who is placed above the petitioner in the seniority list of Additional Town Planner; namely: Shamsheer Singh, would still be senior to him since Shamsheer Singh was directly recruited in the year 1994 as an Additional Town Planner and petitioner was promoted to said post on ad-hoc basis on January 07, 1998.

13. Relevant would it be to note that in the reply filed, MCD did not speak a

single word as to what prevented DPC to be convened in the year of the vacancy i.e. the year 1997 when a post of Additional Town Planner fell vacant. MCD did not speak a word as to why it took 9 long years to convene a DPC.

14. Since MCD heavily relied upon the memorandum dated April 10, 1989 not only before the Tribunal but even before us, we note the relevant portions thereof. They read as under:-

17.10 The general principle is that promotion of officers included in the panel would be regular from the date of validity of the panel or the date of their actual promotion whichever is later.

17.11 In cases where the recommendations for promotion are made by the DPC presided over by a Member of the UPSC and such recommendations do not require to be approved by the Commission, the date of Commission's letter forwarding fair copies of the minutes duly signed by the Chairman of the DPC or the date of the actual promotion of the officers, whichever is later, should be reckoned as the date of regular promotion of the officer. In cases where the Commission's approval is also required the date of UPSC's letter communicating its approval or the date of actual promotion of the officer whichever is later will be the relevant date. In all other cases the date on which promotion will be effective will be the date on which the officer was actually promoted or the date of meeting of the DPC whichever is later. Where the meeting of the DPC extends over more than one day of the last date on which the DPC met shall be recorded as the date of meeting of the DPC.

15. After noting the rival contentions of the parties, following 2 questions were formulated by the Tribunal for a decision:-

(a) Whether applicant can be promoted on regular basis with retrospective effect from the date of availability of vacancy?

(b) Whether ad-hoc service rendered by applicant could be counted as regular service?

16. With respect to question (a), it has been held by the Tribunal that in view of dictum of law laid down by the Supreme Court in the decision reported as Baij Nath Sharma Vs. Hon'ble Rajasthan High Court At Jodhpur and Another, at Jodhpur & Anr. and the instructions contained in the Office Memorandum dated April 10, 1989 it can safely be concluded that promotion is effective from the date of inclusion of the name of an employee in a panel or date of assumption of charge to the promotional post, whichever is later, and not from the date when vacancy accrued. With respect to question (b), it has been held by the Tribunal that the petitioner is not justified in contending that the ad-hoc service rendered by him on the post of Additional Town Planner be counted towards regular service rendered by him on said post in view of the dictum of law laid down by the Supreme Court in the decisions reported as Union of India (UOI) and Others Vs. Sheela Rani, Dr. M.S. Patil Vs. Gulbarga University and Others, Ch. Narayana

Rao Vs. Union of India (UOI) and Others, and Central Council for Research in Homeopathy Vs. Bipin Chandra Lakhera and Others, to the effect that if the ad-hoc service rendered by an employee is regularized from a back date, it will disturb the seniority of regularly appointed employees in the cadre, therefore, ordinarily the regularization must take effect prospectively and not retrospectively.

17. Vide impugned judgment dated January 09, 2012 the Tribunal directed as under:-

In view of aforementioned, we are not inclined to grant the relief prayed by the applicant. However, we find that in letter dated 30.03.2009 (Annexure R-1 to rejoinder) the Additional Commissioner (Engg.) has indicated that as per practice, for promotion to higher post, length of service in the feeder grade is counted from the date of grant of ad hoc promotion. Since the applicant preferred to file said letter along with the rejoinder, MCD did not get any opportunity to comment upon the same. In the circumstances, we deem it appropriate to observe that the respondents may consider, "whether in case of promotion to the post of Chief Town Planner also, ad hoc service rendered by Sr. Town Planner can be counted as eligible length of service, irrespective of clause 12 of Recruitment Rules for the post of Chief Town Planner in MCD" and take a view in the matter.

5. Subject to aforementioned observations. Original Application is dismissed. No costs.

18. Aggrieved by the impugned judgment dated January 09, 2012 passed by the Tribunal, the petitioner has filed the present petition primarily contending that the action of MCD to convene DPC for effecting promotion to the post of Additional Town Planner in respect of the vacancy year 1997 after 9 years being not explained gave birth to a right in favour of the petitioner to seek benefit of ad-hoc service rendered as regular service. To buttress said contention, the petitioner placed considerable reliance upon:-

(i) Office Memorandum dated September 08, 1998 read with Office Memorandum dated October 13, 1998 issued by DoPT which prescribed a Model Calendar for holding DPCs;

(ii) Office Memorandum dated December 14, 2000 issued by DoPT which emphasizes that the time-frame stipulated in the Model Calendar needs to be strictly adhered to and in case of the prescribed time-frame not being maintained, steps should be taken to fix responsibility for the lapse; and

(iii) judgment rendered by a Division Bench of this Court in W.P. (C) No. 5549/2007 titled as "Dr. Sahadeva Singh v. Union of India & Ors" decided on February 28, 2012 wherein it was held that in the absence of any rules to the contrary, the OMs issued by DoPT on a subject, from time to time, including the OM suggesting the Model Calendar for holding DPCs become applicable on the

government departments; it is therefore obligatory on the government departments to adhere to the time schedule laid down in the Model Calendar and where no explanation is given by the department for not convening the DPC within the time stipulated in the Model Calendar or the explanation given by the department is not found acceptable, the employees should not be made to suffer on account of inaction or delay on the part of the department in convening the DPC.

19. On April 12, 2013, a Division Bench of this Court, of which one of us namely, Pradeep Nandrajog J. was a member of, had decided a batch of writ petitions, lead matter being WP (C) No. 8102/2012 UOI & Anr. vs. K.L. Taneja & Anr. on the subject as to when can a person be granted promotion from a retrospective date. The Bench had noted various decisions of the Supreme Court on the point as under:-

- (i) K. Madhavan and Another Vs. Union of India (UOI) and Others,
- (ii) Union of India and Others Vs. K.K. Vadera and others, (iii) Vinod Kumar Sangal Vs. Union of India (UOI) and Others,
- (iv) Baij Nath Sharma Vs. Hon"ble Rajasthan High Court At Jodhpur and Another,
- (v) P.N. Premachandran Vs. The State of Kerala and Others,
- (vi) Sanjay K. Sinha-II and Others Vs. State of Bihar and Others,
- (vii) State of Uttaranchal and Another Vs. Dinesh Kumar Sharma,
- (viii) Nirmal Chandra Sinha Vs. Union of India (UOI) and Others,
- (ix) Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others,

20. The Bench had held that the cornucopia of case law noted above brings out the position:-

- (i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.
- (ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.
- (iii) Since mala fides taints every act, requiring a person wronged to be placed in the position but for the mala fide or tainted exercise of power, promotion from a retrospective date can be granted if delay in holding DPC is attributed to a mala fide act i.e. deliberately delaying holding DPC with the intention to deprive eligible candidates the right to be promoted.
- (iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.

21. From a perusal of the claim of the petitioner, we find that the issue of

seniority is actually a non-issue because even if the petitioner were to be given promotion from a retrospective date his seniority would be the same because the person above him Sh. Shamsheer Singh was a directly recruited Additional Town Planner as of the year 1994. What the petitioner is actually fighting for is ad-hoc service as an Additional Town Planner to be counter as regular service so that he becomes eligible to be promoted as a Chief Town Planner, the Recruitment Rules whereof require 8 years regular service as an Additional Town Planner as the eligibility norm.

22. What is meant by "malice"?

23. Malice is of two kinds - one, "Malice in Fact" and two, "Malice in Law". "Malice in fact" is ill-will or spite towards a party and any indirect or improper motive in taking an action. "Legal Malice" or "Malice in Law" means "something done without lawful excuse". In other words, "it is an act wrongfully done without reasonable or probable cause, and not necessarily an act done from ill-will or spite". (See the decision of the Supreme Court reported as Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another,

24. Let us recap the basic facts which are as follows:-

(a) A vacancy had arisen to the post of Additional Town Planner on July 01, 2007, on which date the petitioner, who was working as a Junior Town Planner was eligible to be considered for promotion to the post of Additional Town Planner.

(ii) On January 07, 1998 the petitioner was promoted to the post of Additional Town Planner on "ad-hoc basis".

(iii) On September 06, 2006 the Director (Personnel), MCD prepared a note regarding promotion of the petitioner to the post of Additional Town Planner on "regular basis".

(iv) After a period of over 9 long years, on November 21, 2007 MCD convened a DPC for considering name of the petitioner to be promoted as an Additional Town Planner pertaining to the vacancy for the year 1997.

(v) On February 26, 2008 the petitioner was promoted to the post of Additional Town Planner on "regular basis".

25. From the above-noted cauldron of facts, one question which stares us in the face is that: What was the MCD doing regarding convening of DPC for making promotion to the post of Additional Town Planner for the vacancy year 1997 for the period from July 01, 1996 i.e. the date when the vacancy had arisen till September 06, 2006 when the Director (Personnel), MCD prepared a note for convening a DPC?

26. The reply filed by the MCD is stunningly silent. In spite of copious pleadings made by the petitioner that in spite of various representations sent by him and there being no impediment, officers of MCD kept on sleeping and thereby deprived him the benefit of a regular service as an Additional Town Planner,

nothing in word has been spoken of by MCD, except that there were administrative reasons for the delay, an expression used by the Corporation in its letter dated August 21, 2007, but what were the facts constituting the administrative reasons have not been stated.

27. MCD was under a legal duty to convene a DPC to make promotion to the post of Additional Town Planner in respect of the vacancy year 1997 because a vacancy arose on July 01, 1996 when Mr. Ashok Kumar Khanna superannuated a day prior. MCD did not do the needful but waited for 9 long years to convene the DPC in question. The action of MCD of delaying the convening of DPC in question for a period of 9 long years without there being any lawful excuse for same amounts to "Malice in Law".

28. As held in K.L. Taneja" case (supra), retrospective promotion can be made in a case where the DPC was not held at the required time and such delay is attributable to "malice". Since in the instant case, we have held that the delay of 9 years caused by MCD in convening DPC in question is attributable to "malice in law", the petitioner is entitled to be promoted to the post of Additional Town Planner from a retrospective date, which in the present case would be January 07, 1998 i.e. the date when the petitioner was promoted to the post of Additional Town Planner on ad-hoc basis.

29. There is another side to the present matter.

30. It is well settled legal position that where an incumbent is initially appointed to a post as per the applicable Rules, whether on ad-hoc basis or otherwise and is later on regularly promoted to said post, his seniority to the said post has to be reckoned from the date of his initial appointment and not from the date of his confirmation/regularization. However, where the initial appointment is not made as per the Rules but is only a stop-gap arrangement, the period of officiation in such post cannot be taken into account for determination of seniority.

31. In the instant case, it is not in dispute that the ad-hoc promotion of the petitioner to the post of Additional Town Planner was in terms of the applicable Recruitment Rules. In view of above legal position, it has to be held that the seniority of the petitioner on the post of Additional Town Planner has to be reckoned from the date of his ad-hoc appointment to the said post. As a necessary corollary thereof, the ad-hoc service rendered by the petitioner on the post of Additional Town Planner shall be counted towards his regular service on the said post.

32. As regards the office memorandum dated April 10, 1989, the same would be applicable if DPCs are held as required by the office memorandums noted by a Division Bench of this Court in Dr. Sahadeva Singh's case (supra).

33. In view of above discussion, we allow the present petition and hold that the date of promotion of the petitioner to the post of Additional Town Planner be treated as January 07, 1998 i.e. the date when the petitioner was promoted to

said post of ad-hoc basis; the seniority of the petitioner on the post of Additional Town Planner should be reckoned from the date of his ad-hoc appointment to said post and the ad-hoc service rendered by the petitioner on the post of Additional Town Planner shall be counted towards his regular service on the said post. No costs.