
(2010) 01 DEL CK 0119

In the Delhi High Court

Case No : Writ Petition (C.) No. 186 of 2010

The Commissioner, Navodaya Vidyalaya Samiti

APPELLANT

Vs

Krishan Kumar

RESPONDENT

Date of Decision : 19-01-2010

Acts Referred:

Citation : (2010) 01 DEL CK 0119

Hon'ble Judges : Mool Chand Garg, J;Anil Kumar, J

Bench : Division Bench

Advocate : S. Rajappa, for the Appellant; M.K. Bhardwaj, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner, Commissioner Navodaya Vidyalaya Samiti has challenged the order dated 3rd August, 2009 passed in O.A No. 2225/2007 titled Krishan Kumar v. Commissioner Navodaya Vidyalaya Samiti allowing the petition of the respondent and directing the petitioner to promote the respondent as PGT (Geography) and quashing order dated 7th August, 2007 whereby seniority was declined to the respondent.

2. The respondent has been working as TGT (Social Science) in Jawahar Navodaya Vidyalaya, Mungeshpur, Delhi and was aggrieved by the discriminatory treatment to him in not counting his seniority on inter regional transfer whereas considering the seniority of Mohd. Abutaleb who had also availed inter regional transfer.

3. The grievance of the respondent, before the Tribunal, was that Mohd. Abutaleb was posted at the hard and difficult station and a request transfer was permitted and he was transferred to Patna region. However, on transfer to Patna region he was not placed at the bottom of the seniority of the Patna region and his seniority for promotion at Shillong, which was a hard and difficult station was considered. In case of respondent he was posted at Leh which is also a hard and difficult station and on his transfer, he has been placed at the bottom of the

seniority list of the transferred region and his seniority at Leh has not been considered for promotion.

4. The petitioner had contended before the Tribunal that the case of Mohd. Abutaleb was different as the transfer of Mohd. Abutaleb was not according to his choice. The Tribunal has noted the plea of the petitioner in the counter affidavit which did not carve any such distinction that if an employee is transferred pursuant to his request then he will lose his seniority and Mohd. Abutaleb was not transferred pursuant to a request made by him. The Tribunal also rejected the plea of the petitioner that the transfer policy carves out any distinction of foregoing of seniority only in case of the specific place of posting as per the choice of the employees.

5. Considering the pleas and contentions of the petitioner, the Tribunal had concluded that the case of Mohd. Abutaleb was not distinguishable from that of the respondent as in both the cases the employees had been transferred from hard stations on request basis on inter regional transfer and since the petitioner had not followed the uniform policy in as much as in case of respondent the seniority in Leh region has not been taken into account for the purpose of promotion whereas in case of Mohd. Abutaleb his seniority in Shillong region had been considered and, therefore, the relief sought by the respondent was allowed and order dated 7th August, 2007 was set aside with all consequential benefits and the petitioner was directed to promote the respondent as permissible under law. The Tribunal also considered that the plea of the petitioner was not that consideration of the seniority of Mohd. Abutaleb of Shillong region after his transfer to Patna region was contrary to transfer policy of rules. If that be so then the respondent was also entitled for consideration of his seniority of Leh region after inter regional transfer to Delhi region.

6. The learned Counsel for the petitioner Mr. Rajappa has very emphatically contended that in case of Mohd. Abutaleb as he had already become entitled for promotion before transfer therefore, his seniority at Shillong region was considered. The learned Counsel is, however, unable to explain as to under what circumstances and under what rules such exception can be carved out. If Mohd. Abutaleb was entitled for promotion according to his seniority at Shillong from where he was transferred at his request, the finding of the Tribunal that the respondent is also entitled for his seniority at Leh after inter regional transfer cannot be rejected.

7. The learned Counsel for the petitioner has also relied on K.P. Sudhakaran and Another Vs. State of Kerala and Others, in support of his contention. However in the said precedent the Apex Court had held that where the statutory rules govern the field, prior executive instruction ceases to apply. Rule 27 of the Kerala State and Subordinate Service Rules, 1958 was amended by GO dated 13th January, 1976 inserting a proviso to Clause (a), providing for the consequences of an "own request" transfer. The said proviso had categorically provided that the seniority of an employee getting transferred at his own request to another unit

within the same department or to another department will be determined with reference to the date of his joining duty in the new department. This proviso was an exception to the general rule contained in Clause (a) of Rule 27 that seniority of a person shall be determined by the date of the order of his first appointment. Thus in *K.P. Sudhakaran (supra)* the seniority of the transferred employee had to be reckoned only from the date of his joining duty in the new unit and he was not entitled to count his service prior to the date of his transfer on his request in accordance with the Rules. In contradistinction no such rule and proviso to such rule has been pointed out by the learned Counsel in case of employees of Navodaya Vidyalaya Samiti. The learned Counsel has also contended that the transfer policy is nothing but the administrative instructions and cannot be equated the statutory rules. The Counsel had contended that the seniority of Abutaleb had to be retained and considered because he was due for promotion whereas the petitioner was not due for promotion. This distinction cannot be substantiated from the transfer policy nor any rule or any office memorandum has been shown in support of this plea. Though the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, the transfer does not wipe out his length of service up to the date of transfer. But where an employee is so transferred on his own request, he will have to forego his seniority up to the date of transfer.

8. Mr. Abutaleb was transferred from Shillong to Patna region at his request and applying the general principle, he should have also forgone his seniority. But in his case though the transfer was made at his request, however, he had been allowed to retain his seniority. The case of the petitioner is not that Mr. Abutaleb was allowed to retain seniority contrary to rules. Had that been the plea of the petitioner, the respondent could not have claimed parity with him nor could invoke discrimination. The plea of the petitioner is, rather, that if an employee is due for promotion and is transferred then such an employee shall be entitled to retain his seniority. However, this contention cannot be justified and has not been justified on behalf of petitioner on the basis of any statutory rules or any office memorandum or any transfer policy. In the circumstances the respondent shall also be entitled to the same treatment as was admissible to Mr. Abutaleb. Consequently, the learned Counsel for the petitioners is unable to show any irregularity or illegality in the order of the tribunal impugned before us.

9. In the circumstances, we are not inclined to interfere with the order of the Tribunal declining the defense of the petitioner and accepting the pleas and contentions of the respondent. The writ petition in the facts and circumstances is without any merit and it is, therefore, dismissed.