

(2011) 07 DEL CK 0450

In the Delhi High Court

Case No : Writ Petition (C) No. 365 of 2008

The Management of Hotel Janpath

APPELLANT

Vs

Sh. Nelson Almeda

RESPONDENT

Date of Decision : 08-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 07 DEL CK 0450

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Karunesh Tandon, for the Appellant; S.S. Upadhyay, A.R., for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The Petitioner employer impugns the award dated 27th January, 2007 of the Industrial Adjudicator, answering the following reference:

Whether Sh. Nelson Almeda S/o Sh. A. Almeda is entitled to be promoted as Chef de rang w.e.f. 8th February, 2002 and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws / Govt. Notification and to what other relief is he entitled and what directions are necessary in this respect?

As under:

In the light of my findings on the issue as above, the workman is deemed to have (been) promoted w.e.f. 8th February, 2002 (to) the post Chef de rang (,) as his juniors were promoted and is to be paid the arrears of increased wages and other benefits as (if) he has retired from the said post. Thus the dues so calculated be paid to him within thirty days of publication of award. In case the amount is not paid to him within thirty days of publication of award (,) the management is also liable to pay interest @ 9% p.a. till its payment. An award is passed accordingly. Reference is also answered accordingly.

2. The undisputed facts are:

(i) That the Respondent workman joined the employment of the Petitioner employer in the year 1967 as a Plate Boy and was from time to time promoted to the post of Waiter, Senior Waiter in different higher grades and was in the year 2002 working as Demi Chef de rang i.e. with duty of taking orders from the guests and also serving the guests;

(ii) That in the year 2002, the Petitioner employer invited applications for three promotion posts of Chef de rang, a selection post;

(iii) The Respondent workman being eligible applied for the same;

(iv) The Selection Committee constituted by the Petitioner employer selected Sh. Anand Singh, Sh. Ramesh Chand and Sh. Ram Chander for the said three posts and placed the name of the Respondent workman on the panel. The said recommendation of the Selection Committee was accepted by the Petitioner employer and accordingly Sh. Anand Singh, Sh. Ramesh Chand and Sh. Ram Chander, all of whom were / are not parties, either before the Industrial Adjudicator or before this Court, were appointed to the said posts with effect from 8th February, 2002;

(v) That on 30th June, 2002 a vacancy arose in the post of Chef de rang but the Respondent workman inspite of being next candidate on panel was still not promoted;

(vi) That the Respondent workman raised a grievance / dispute of his non selection. It was the case of the Respondent workman that he was senior to Sh. Anand Singh and Sh. Ram Chander and Sh. Ramesh Chand and ought to have been promoted. Alternatively, it was urged that upon vacancy having arisen in the said post on 30th June, 2002 he ought to have been promoted;

(vii) The Respondent workman on attaining the age of superannuation retired from the employment of the Petitioner employer on 31st July, 2004;

(viii) That the Respondent workman first raised a dispute before the Civil Court and also sought interim injunction against his superannuation which was denied and thereafter withdrew the suit to approach the Industrial Adjudicator and where after the reference leading to the award impugned in this petition was made.

3. It was the case of the Respondent workman that he was not promoted on 8th February, 2002 and / or on 30th June, 2002 inspite of vacancy owing to being the President of one of the unions and the Petitioner employer being prejudiced against him. It is his case that he has 37 years of clean record and his services had been appreciated by the Petitioner employer by issuing appreciation letters and cash awards and that he has been wrongly denied the promotion to the post of Chef de rang and wrongly denied retirement from the said higher post.

4. The Petitioner employer contested the claim of the Respondent workman by

pleading that 50% of the posts of Chef de rang are to be filled through direct recruitment and 50% through promotion by the method of selection; at the time of selection various criteria are to be kept in mind by the Selection Committee and the primary among them being merit; reliance is placed on Clause 14(e)(iv) of ITDC Recruitment, Promotion and Seniority Rules providing that for promotion to selection posts, "merit will be primary factor, though other factors such as seniority, integrity and qualifications shall be given due consideration"; that past record of the Respondent workman was not satisfactory and was blemished and tainted; that the Respondent workman had been warned several times by the Petitioner employer to improve his working behavior but the Respondent workman did not pay any heed to the warnings; that the non bias of the Petitioner employer was evident from the Respondent workman having been placed at serial No. 4 in the merit and the recommendation of the Selection Committee being approved by the competent authority of the Petitioner employer; since only three posts were available at that time, the Respondent workman could not be accommodated; that promotions are made as per operational requirement and not just by availability of post at higher level; that in June, 2002 disinvestment process was in progress and "open house" earlier being operated by Hotel Janpath was leased out to M/s Sagar Ratna in May, 2002 resulting in reduction of work load and manpower requirement; accordingly inspite of vacancy on 30th June, 2002, the Respondent workman could not be appointed.

5. The Industrial Adjudicator with reference to the Rules for promotion held that AC Rs for the last three years were to be considered. The Industrial Adjudicator with reference to the Minutes of the Selection Committee held that the AC Rs of the Respondent workman and of Sh. Anand Singh and Sh. Ramesh Chand aforesaid were the same i.e. "Satisfactory". It was thus held that since the seniority of the Respondent workman was more than that of Sh. Anand Singh and Sh. Ramesh Chand, the Respondent workman had become entitled to selection and was wrongly not selected.

6. The Industrial Adjudicator further held that as per the Rules of the Petitioner employer, marks had to be given by the Selection Committee to each candidate considered for promotion but the Minutes of the Selection Committee produced did not show that any marks were given. It was thus held that there was a complete violation of the Rules; considering the seniority of the Respondent workman over and above the aforesaid Sh. Anand Singh and Sh. Ramesh Chand, it was held that the Respondent workman had been wrongly denied promotion on 8th February, 2002 when those junior to him were promoted.

7. The Industrial Adjudicator did not also believe the version of the Petitioner employer of there being no operational vacancy inspite of a retirement from the post for the reason of one Mr. Avinash Chander having been promoted from the post of Chef de rang to Senior Chef in October, 2002. It was held that the said promotion of Mr. Avinash Chander demolished the plea of the Petitioner employer

that flow of promotion had come to a stop. It was further held that the leasing out to Sagar Ratna did not stop the flow of promotion in ITDC.

8. The Industrial Adjudicator thus held that the Respondent workman was denied promotion with effect from 8th February, 2002 for mala fide reasons.

9. The challenge by the Petitioner employer to the award is three fold. Firstly, it is contended that there was no evidence of Sh. Avinash Chandra being promoted in October, 2002. It is contended that in fact there is no post of Senior Chef de rang; that Sh. Avinash Chander was working as Senior Comm. de rang in September, 2002 and was promoted to the post of Demi Chef de rang only on 16th November, 2005. Secondly, it is contended that the Industrial Adjudicator erred in holding that under the Rules of the Petitioner employer, the Selection Committee was required to give marks to each candidate. It is contended that the Rules require marks to be given to each candidate only for Executive posts, the post of Chef de rang was not an Executive post. Lastly, it is contended that no mala fides can be attributed to the Selection Committee inasmuch as the selection was to be as per merit and the Selection Committee found Sh. Anand Singh & Sh. Ramesh Chand to be more meritorious than the Respondent workman.

10. Notice of the petition was issued and implementation of the award stayed on deposit of Rs. 50,000/- by the Petitioner employer on the contention of the Petitioner employer of the Industrial Adjudicator having erroneously construed the Rules of the Petitioner employer as requiring the Selection Committee to give marks.

11. Counter affidavit has been filed by the Respondent workman. The counsel for the Petitioner employer stated that no rejoinder needs to be filed thereto. The records of the Industrial Adjudicator have been requisitioned. The Respondent workman has filed CM No. 11868/2010 to place on record certain additional documents. Notice of the said application was issued. No reply thereto has been filed. The counsels have been heard.

12. The Industrial Adjudicator found the selection to be vitiated for the reason of the Minutes of the Selection Committee not disclosing any reason whatsoever for preference of Sh. Anand Singh and Sh. Ramesh Chand whose AC Rs the Minutes showed to be the same as that of the Respondent workman, over the Respondent workman. The reason which prevailed with the Industrial Adjudicator was that the AC Rs being equal, the Respondent workman being admittedly senior to the other two, ought to have been given preference. Though the Selection Committee has in the Minutes recorded that as per interview, qualifications, experience, ACR markings and job knowledge they had placed the said Sh. Anand Singh and Ramesh Chand above the Petitioner in the order of merit but no evaluation on the said various aspects is disclosed.

13. The counsel for the Petitioner employer has relied upon the "note" given at the foot of the Rules providing marking system to the effect that the same

applies "for all promotions through selection in the Executive posts". It is contended that thus the reasoning of the Industrial Adjudicator of the selection being bad for being without allocation of marks is contrary to the Rules.

14. The counsel for the Respondent workman along with his application for filing additional documents has filed a reply to the RTI query from another unit of ITDC viz. Hotel Samrat to show that for the post of Chef de rang which is also a non executive selection post governed by the same rules, marks were allocated under the heads of ACR, Qualification, Service and Interview. In fact, it has been the grievance of the Respondent workman that the Petitioner employer has along with the Minutes of the Meeting of the Selection Committee not produced the sheet containing the marks allocated to each of the candidates considered.

15. In the face of the aforesaid, it cannot be said that the view taken by the Industrial Adjudicator is perverse or so implausible which could not have been taken by any reasonable person. The Minutes of Meeting of the Selection Committee also contain a column of "Marks". The whole purpose of constituting a Selection Committee would be lost if the criteria for selection is not documented and if the appointments are found to be whimsical and arbitrary. Thus, the possibility of the Petitioner being prejudiced for his Union activities cannot be ruled out.

16. The Legislature has not provided for any appeal against the award of the Industrial Adjudicator. This Court is exercising the powers of judicial review under Article 226 of the Constitution of India and in garb of exercise of such powers cannot exercise appellate powers. As long as the view taken by the Industrial Adjudicator is found to be plausible, no interference is called for.

17. The Petitioner employer has also not placed before this Court any document whatsoever to show that the post of Chef de rang which existed till February, 2002 had become non operational in June / July, 2002 as claimed by it for denying promotion to the Respondent workman inspite of vacancy and inspite of the Respondent workman being next meritorious candidate in the panel as per the Minutes of the Selection Committee also. It is inconceivable that there would be no document recording the said decision if any taken. On record of the Industrial Adjudicator also, I only find a copy of the agreement entered into with Sagar Ratna Restaurant. However, the same can be no reason for reduction in post and had any reduction in post as claimed been effected, the same would have been duly documented.

18. Similarly, with respect to Mr. Avinash Chander, the Petitioner employer has not placed any document before this Court. Even if the version of the Petitioner employer were to be accepted, the same still shows that the promotions were being effected inspite of disinvestment and inspite of agreement with Sagar Ratna Restaurant. Thus no fault can be found with the reasoning of the Industrial Adjudicator on the said aspect also.

19. The Petitioner employer on the record of the Industrial Adjudicator only

placed warning letters dated 9th October, 1989, 6th May, 1993 and 26th August, 1994 issued to the Respondent workman. Else, no other document qua incompetence of the Respondent workman has been placed on record. The said warning letters were issued to the Respondent workman prior to the consideration for promotion on 2002 and without finding any mention in the Minutes of the Selection Committee even, cannot be said to be of any bearing. It cannot be lost sight of that the Respondent workman was being promoted from time to time. No other material justifying denial of promotion to the Respondent workman has been placed on record.

20. I am even otherwise of the opinion that the Respondent workman who has spent his lifetime in the employment of the Petitioner employer and who at the time of promotion process had barely two years of service left, ought not to have been denied promotion. Equity also demands that this Court should not interfere with such an award.

21. There is thus no merit in the petition; the same is dismissed. The Respondent workman shall be at liberty to, after four weeks of today, withdraw the amounts deposited by the Petitioner employer in this Court together with interest accrued thereon. The Petitioner employer is directed to within eight weeks of today release to the Respondent workman the balance monetary dues in terms of the award. Cost of litigation has already been paid by the Petitioner employer.