

(2017) 05 DEL CK 0097

In the Delhi High Court

Case No : 4168 of 2017

UNION OF INDIA & ORS

APPELLANT

Vs

RAVI KANT SHARMA & ORS

RESPONDENT

Date of Decision : 16-05-2017

Acts Referred:

Citation : (2017) 05 DEL CK 0097

Hon'ble Judges : Vipin Sanghi, Deepa Sharma

Bench : DIVISION BENCH

Advocate : V.S. R. Krishna, Pratishtha Vij

Judgement

CAV. 480/2017

Since the caveator has put in appearance, the caveat stands discharged.

CM APPL. 18266/2017

(Exemption) Exemption allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 4168/2017 and CM APPL.18265/2017 (stay)

1. The petitioner has preferred the present writ petition to assail the order dated 07.02.2017 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (CAT/ Tribunal) in Original Application (OA) No.3573/2015. The said Original Application preferred by respondent Nos.1 to 3 herein-assailing the provisional seniority list dated 07.05.2014; the rejection of their representations against re-drawing of the seniority list dated 08.09.2015, and; the redrawn final seniority list dated 08.09.2015, was allowed. Consequently, the Tribunal quashed the redrawn seniority list dated 08.09.2015. The Tribunal further directed that the seniority of respondents 1 to 3 be fixed in accordance with the seniority list issued on 11.02.2004 and 15.02.2011, with all consequential benefits. The Tribunal has also directed that the respondent Nos.1 to 3, who were at the

relevant time Private Secretaries in the All India Institute of Medical Science (AIIMS), be considered for promotion to the post of Principal Private Secretary strictly in accordance with the said seniority lists of 11.02.2004 and 15.02.2011 with all consequential benefits.

2. The respondent Nos. 1 to 3, and respondent Nos. 4 to 8 were all serving as Private Assistants. The next promotional post was that of Private Secretaries. The post of Private Secretaries had two channels for promotion; one was a regular channel of promotion with eight years service in the grade of Private Assistants, whereas the other was five years regular service in the grade of Private Assistants through a Limited Department Competitive Examination (LDCE). The respondents Nos.1 to 3 were given ad hoc promotions as Private Secretaries in the year 1997. The DPC for holding promotions to posts of Private Secretary were held on 06.12.2000, wherein the names of respondent Nos. 1 to 3 were considered. The recommendations of the DPC were circulated on 27.12.2000. Respondent Nos. 1 to 3 were recommended for promotion as Private Secretaries. The petitioners-AIIMS held the LDCE in April, 2001, though it was notified on 29.11.2000. The promotions in respect of the Private Assistants who were successful in LDCE were made on 27.04.2001. The petitioners circulated the provisional seniority list in the cadre of Private Secretaries on 11.02.2004, wherein respondent Nos.1 to 3 were shown senior to the private respondents, i.e., respondent Nos.4 to 8, since they were promoted in December, 2000, whereas respondent Nos. 4 to 8 were promoted on 27.04.2001. The petitioners-AIIMS invited objections, if any, to the said seniority list by 15.02.2004. The petitioners-AIIMS did not take any further steps to disturb the seniority list as circulated on 11.02.2004, and the position remained unchanged. Once again in the year 2011, the petitioners circulated the same seniority list showing respondent Nos.1 to 3 senior to respondent Nos. 4 to 5 in the cadre of Private Secretaries vide Office Memorandum dated 15.10.2011. Once again, objections were invited within 10 days of the issue of the said Office Memorandum. Apparently, no objections were received and the said seniority list was not disturbed/ altered by the petitioners. Respondent Nos. 4 to 8 also did not assail the said two seniority lists of the year 2004, or 2011 by raising any grievance before the Tribunal.

3. The petitioners, thereafter, issued an Office Memorandum dated 01.02.2014, once again circulating a draft seniority list inter alia in respect of the Private Secretaries. Once again, the respondent Nos. 1 to 3 were shown senior to respondent Nos. 4 to 8 in the said seniority list. Apparently, on this occasion, representation was received from respondent No.4 claiming seniority over respondent Nos.1 to 3. This representation found favour with the petitioner-AIIMS and the said petitioner circulated the provisional seniority list dated 07.05.2014 showing some of the respondent Nos. 4 to 8 senior to respondent Nos.1 to 3. The respondent Nos. 1 to 3, thereafter, represented against the change of their well-settled seniority. The representation was rejected by the petitioners on 08.09.2015 and, on the same day, the final seniority list was

issued showing respondent Nos.1 to 3 juniors to respondent Nos. 4 to 8. Consequently, respondent Nos. 1 to 3 approached the Tribunal by filing the aforesaid Original Application.

4. The Tribunal allowed the Original Application holding that the petitioners could not disturb the well-settled seniority after such a long lapse of time. Respondent Nos. 1 to 3 having been ranked senior in the seniority lists issued in the year 2004, and again in the year 2011, the change of their seniority vis-a-vis respondent Nos. 4 to 8 in the year 2015 was held to be illegal. In this regard, the Tribunal placed reliance on B.S. Bajwa & Another Vs. State of Punjab & Others, (1998) 2 SCC 523 and H.S. Venkani & Ors. vs. State of Gujarat 2012(2) AISLJ (SC) 205 which, in turn, placed reliance on earlier decisions of the Supreme Court on the same issue.

5. The submission of Mr Krishna, learned counsel for the petitioner is that the seniority list circulated in the year 2004 and 2011 were provisional. In this regard, he has referred to communication circulating the said seniority list. He further submits that the seniority not having been finalized, was open to change and the principles laid down in B.S. Bajwa (supra) and H.S. Venkani & Ors. (supra) were not applicable in the facts of the present case. He further submits that Office Memorandum No. 22011/7/86-Estt.(D) dated 03.07.1986-which provides for rotation of vacancies amongst the Direct Recruits and Promotees, was applicable in the present case, since 50% posts in the cadre of Private Secretaries were to be filled by seniority, and remaining 50% through LDCE. Thus, the rota quota principle was applicable to fix the seniority inter se between the promotees under the two channels. The same having been not been done, on legal advice, the petitioners decided to revise the seniority list and issued a final seniority list by implementing the said rota quota rule.

6. Mr Krishna submits that the petitioners have followed the relevant rules in issuing the final seniority list, and merely because respondent Nos. 1 to 3 have been shown senior in the 2004 and 2011 provisional seniority lists, they do not get any vested right to retain their wrongly fixed seniority. Mr Krishna also submits that the Tribunal has erred in observing that the Office Memorandum dated 03.07.1986 was not applicable since the said Office Memorandum related to filling up of posts partly through direct recruitment, and partly through promotions. The Tribunal proceeded on the assumption that in the present case, all the posts of Private Secretaries were filled up through promotion only. He submits that promotions through LDCE are akin to direct recruitment. He further submits that the Tribunal, while issuing the operative directions, has directed the petitioners to grant promotion to respondent Nos. 1 to 3 to the post of Principle Private Secretary, which direction should not have been issued in any event of the matter. The Tribunal could have directed that the cases of respondent Nos.1 to 3 be considered by the DPC, and only if they are found fit for promotion under the Recruitment Rules, they could be promoted to the post of Principal Private Secretary.

7. On the other hand, learned counsel for respondent Nos.1 to 3/caveator has submitted that the petitioners could not have disturbed the settled seniority position after nearly 15 years of the seniority being maintained. It is pointed out that though the petitioners' claim that the seniority lists issued in the year 2004 and 2011 were provisional, the same, in fact, were as good as final seniority list since no objections apparently were filed to the said seniority lists within the time granted therefor, and the said seniority lists were given effect to over a long period of time. She further submits that the direction issued by the Tribunal has to be read as a whole, and the Tribunal has directed that respondents 1 to 3 be granted promotions to the post of Principal Private Secretary strictly in accordance with the seniority lists dated 11.02.2004 and 15.02.2011 and their cases be considered under the rules. She submits that the purport of the order of the Tribunal is that the cases of respondents 1 to 3 be considered for promotion to the post of Principal Private Secretary by holding the review DPC in terms of their seniority positions as reflected in the seniority list of 11.02.2004 and 15.02.2011. She further submits that respondent Nos. 1 and 3 have since retired from service and, therefore, though their cases should be considered by the Review DPC, if found fit by the DPC, they should be granted notional promotions so that their retirement dues are properly fixed.

8. Having heard learned counsels, perused the impugned order and examined the record, we do not find merit in the present petition. Vide memo dated 14.01.2001, respondent Nos. 1 to 3 herein were promoted to the post of Private Secretary by the petitioner - AIIMS. The said promotions were regular promotions made on the recommendations of the DPC and with the approval of the President, AIIMS. On the other hand, respondent Nos. 4 to 8 were similarly promoted to the post of Private Secretary vide memo dated 27.04.2001. Pertinently, the memo dated 27.04.2001-whereby respondent Nos. 4 to 8 were promoted, does not refer to the fact that they were promoted against the 50% quota to be filled through LDCE. The petitioner circulated the seniority list, inter alia, in respect of Private Secretaries on 11.02.2004, showing respondent Nos. 1 to 3 senior to respondent Nos. 4 to 8. Objections concerning seniority were invited which were required to be submitted by 25.02.2004. There is nothing placed on record to show that any objections were received against respondent Nos. 1 to 3 being ranked senior to respondent Nos. 4 to 8 in the said seniority list. Thus, even though, the seniority list circulated on 11.02.2004 was nomenclatured as "provisional", as a matter of fact, the same remained undisturbed throughout-till the impugned actions were taken by the petitioner. Similarly, on 15.10.2011, once again a provisional seniority list was circulated by the petitioner, inter alia, in the cadre of Private Secretaries. Once again, objections were invited within 10 days. Respondent Nos. 1 to 3 were again shown senior to respondent Nos. 4 to 8 and there is nothing to show that any objections were received to this office memorandum.

9. In the light of the aforesaid background, in our view, it cannot be said that the seniority lists (circulated vide memorandum dated 11.02.2004 and 15.10.2011)

were merely, "provisional", since the said seniority lists were presumably not objected to by any of the affected persons, including, respondent Nos. 4 to 8 and they were not altered for over a decade. If any objections were received, and the objections were not accepted, the situation would be still worse for the petitioner. The said seniority lists, even if provisional when issued, matured and attained finality with passage of time as they were not disturbed. If the petitioner failed to issue the "final" seniority list after the date for receipt of objections was passed, it is their own omission and they cannot take advantage of their conduct to the prejudice of respondent Nos. 1 to 3. Respondent Nos. 4 to 8 also did not raise any grievance to their being ranked junior to respondent Nos. 1 to 3 for all these years and, thus, for them to rake up the said issue for the first time in the year 2015 was clearly impermissible. In B.S. Bajwa (supra) and H.S. Venkani & Ors. (supra), the Supreme Court has settled the legal position that questions of seniority should not be re-opened after a lapse of considerable period, since the same results in disturbing the settled position which is not justifiable.

10. The explanation furnished by the petitioner for re-fixation of seniority after a lapse of 15 years is the failure on the part of the petitioner to give effect to the office memorandum dated 03.07.1986 at the time when the seniority lists were circulated for the first time after the promotion of the respondents as Private Secretaries on 11.02.2004.

11. Firstly, the DoPT O.M. No. 22011/7/86 Estt. D. dated 03.07.1986 was present to the knowledge of the petitioners, as well as respondent Nos. 4 to 8, at the time when the seniority list was circulated by the petitioner on 11.02.2004. If the said OM was applicable, nothing prevented the petitioners from implementing the same, or respondent Nos. 4 to 8 from raising their grievances with regard to non-observance of the said O.M. Pertinently, in their counter affidavit filed before the Tribunal, the petitioners, inter alia, stated that in the light of the aforesaid O.M. dated 03.07.1986, it was decided to circulate revised draft seniority list in the year 2009. However, the said list was not circulated for which no reason has been recorded in the file. Thus, it was present to the mind of the petitioners even in the year 2009, that according to their interpretation, OM dated 03.07.1986 was attracted in respect of the fixation of inter se seniority of the (i) seniority based promotes, and (ii) LDCE based promotes, in the cadre of Private Secretaries, yet no steps were taken contemporaneously either by the petitioners or respondent Nos. 4 to 8. On this ground alone, the final seniority list was liable to be quashed, and was rightly quashed by the Tribunal.

12. Even otherwise, we find absolutely no merit in the submission of Mr. Krishna that the DoPT O.M. dated 03.07.1986 was attracted in the facts of the present case. The promotions made to the post of Private Secretary from the post of Private Assistants on the basis of the LDCE did not cease to be promotions. Even promotions made through LDCE are promotions albeit accelerated promotions. They cannot be categorized as direct recruitments. The DoPT O.M. dated 03.07.1986 is applicable for the purpose of fixing the inter se seniority of direct

recruits and promotes, where recruitment is made partly by direct recruitment, and partly by promotion. The said office memorandum cannot be pressed into service where the recruitments are made only by promotions-though partly based on seniority-cum-fitness, and partly through LDCE.

13. In *Central Provident Fund Commissioner and another Vs. N.Ravindran and others* 1995 Suppl. (4) SCC 654, the promotions were made to the next higher post partly on the basis of seniority-cum-fitness, and partly on the basis of the Limited Departmental Competitive Examination. The ratio between the two kinds of promotion was 75:25. The Ernakulam Bench of Central Administrative Tribunal came to the conclusion that both the categories must be treated as belonging to one single class, i.e. of promotees and, therefore, they must be promoted to the next higher post by first satisfying the 75% quota of those entitled to promotion by virtue of seniority-cum-fitness rule, and those 25%, who became entitled to promotion by virtue of having passed the Limited Departmental Examination, must take their position below to said 75%. The Supreme Court in its aforesaid decision observed as follows:

"Ordinarily, the examinees would rank below those who would be entitled to promotion on seniority-cum-fitness principle because of their placement in the seniority list in the lower cadre. In order to get accelerated promotion they may appear at the prescribed examination and pass it. The basic idea of providing this incentive is to strengthen the upper cadre by induction of young meritorious persons."

14. The Supreme Court upheld the order of the Tribunal which treated both kinds of promotees as belonging to one single class, and directed the fixation of seniority in the promotional post by placing the promotees who were promoted on account of seniority-cum-fitness above those who got promoted on account of their clearing the Limited Departmental Examination.

15. The Division Bench of this Court in *Man Singh Vs. Union of India and Ors.* (2013) 196 DLT (CN) 48 (DB) also examined the said issue. While so examining the issue, the Division Bench relied upon the stand of the Ministry of Home Affairs (Personnel) as well as the Department of Personnel and Training (DOP&T), Government of India. The relevant extract from this decision reads as follows: "Appointment through LDCE - Whether promotion or direct recruitment?"

17. In support of her first contention, Ms. Rekha Palli, learned counsel for the petitioner has drawn our attention to the stand of the Ministry of Home Affairs (Personnel), New Delhi as well as the Department of Personnel and Training of the Government of India in their records which have been filed in a pending matter before the Supreme Court of India. The first noting (dated 18th November, 2011) is extracted in extenso hereafter and reads as follows:-

"Department of Personnel & Training Estt (res) Reference notes of Ministry of Home Affairs on pages 2-3/ante.

2. Regarding clarification whether LDCE is Direct Recruitment or a mode of promotion, the RR Branch of this Department has clarified that the LDCE is a mode of promotion. On the issue of change in category of a person, who has been appointed on the basis of reservation, it is clarified vide this Department's OM dated 11.7.2002 that SC/ST candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against unreserved points will retain their status of SC/ST and will be eligible to get benefit of reservation in future/further promotions, if any.

-sd-

(Sharad Kumar Srivastava) Under Secretary (Res)"

(underlining by us)

18. This noting was reiterated by the Ministry of Home Affairs in a noting dated 22nd November, 2011 of Shri R.P. Sati, Under Secretary referring to a writ petition filed in this court. The noting dated 22nd November, 2011 reads as follows:-

"Ministry of Home Affairs Pers - II Reference note on pre-pages.

2. This is regarding Writ Petition(C) No. 5460/2011 filed by Shri Sundeep Kumar Dubey, Constable (GD) of CRPF in the High Court of Delhi against his non-selection for the post of Sub, Insp(GD) through Limited Department Competitive Examination (LDCE), 2010.

3. The matter was considered in this Ministry (p-2/n) and DoP&T was requested to clarify the position as mentioned in para - 3(p-2/n). In this connection DoP&T vide their UO dated 18.11.2011 (p-4/n) has clarified the following:- "Regarding clarification whether LDCE is Direct Recruitment or a mode of promotion, the RR Branch of this Department has clarified that the LDCE is a mode of promotion. On the issue of change in category of a person, who has been appointed on the basis of reservation, it is clarified vide this Department's OM dated 11.7.2002 that SC/ST candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against unreserved points will retain their status of SC/ST and will be eligible to get benefit of reservation in future/further promotions, if any."

4. We may convey the above mentioned clarification of DoP&T to CRPF.

-Sd-

(R.P. Sati) Under Secretary 22.11.2011 Director (Pers)/DS(Pers-I)"

(Underlining supplied)

The correctness and authenticity of these notings have not been disputed before us by the respondents.

19. The respondents have urged in the present proceedings that appointments

through the LDCE is a mode of fast tracked promotion. In the above notings, the respondents have themselves taken the position that appointment through the LDCE is a mode of promotion. Given the stand of the respondents in the notings aforesaid and before this Court it is clear that appointment to LDCE is merely an appointment by promotion, albeit fast tracked. It would, therefore, follow that the recruitment rules or guidelines for appointments which would apply to appointments through the LDCE, would have to be those which are applicable to appointment by promotions."(Emphasis supplied by us by highlighting the relevant portions in "bold")

16. The decision in Man Singh (supra) has subsequently been followed by two Division Benches in Ajay Pandey Vs. Union of India and Ors. 2014 SCC Online Del 3830 and Satvir Singh Vs. Union of India & Ors. 2015 SCC OnLine Del 7272.

17. Thus, even otherwise, there is no merit in the submission of Mr. Krishna that the vacancies filled on the basis of seniority-cum-fitness on the one hand, and the vacancies filled through LDCE on the other hand in the cadre of Private Secretaries had to be rotated by application of the O.M. dated 03.07.1986.

18. For the aforesaid reasons, we do not find merit in the present petition and dismiss the same leaving the parties to bear their respective costs.