

(2010) 08 DEL CK 0352

In the Delhi High Court

Case No : Writ Petition (C) 3874 of 2010

Y.S. Dwivedi and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-2010

Acts Referred:

Citation : (2010) 08 DEL CK 0352

Hon'ble Judges : Pradeep Nandrajog, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : A.K. Behera, in W.P. C 3874/2010 and Rajiv Manglik, in W.P. C 4455/2010, for the Appellant; A.K. Bhardwaj, Jagriti Singh, Anuj Aggarwal for UOI, Naresh Kaushik, Amita Kalkal, Aditi Gupta for R-3, Party-in-Person for R-4 in W.P. (C) 3874/2010, Naresh Kaushik, Amita Kalkal, Aditi Gupta, for R-3, A.K. Trivedi, for R-5, Atul Nanda, Gaurav Gupta for UOI, Party-in-Person for R-4 in W.P. (C) 4455/2010, for the Respondent

Judgement

Pradeep Nandrajog, J.—The writ petitioners of the above captioned writ petitions were applicants before the Central Administrative Tribunal and they were fighting the battle with respect to an issue raised by Shri S.K. Jain, respondent No. 4 in both the writ petitions.

2. Since legal issues which arise for consideration are the same, learned Counsel for the parties agree that the facts pertaining to WP(C) No. 3874/2010 be noted and the said petition be treated as a lead petition.

3. The litigating parties i.e. the petitioners and respondent No. 4 are employees in the Engineering Cadre of the Military Engineering Services (MES). All of them are highly qualified engineers and as of the year 1999-2000 were working as Executive Engineers.

4. The next promotional post available to them is that of Superintending Engineer.

5. Profiling the entry into service of the litigating parties, suffice would it be to state that pursuant to an examination conducted by UPSC in the year 1982, the

petitioners and respondent No. 4 joined service as batch-mates, but with petitioners being senior to respondent No. 4, since they were empanelled higher above respondent No. 4 in the select list prepared by UPSC. Thereafter, the petitioners and respondent No. 4 earned promotion to the post of Executive Engineer on various dates in the year 1997 and even as Executive Engineers, petitioners were placed senior to respondent No. 4.

6. There existed, as per the department, 53 vacancies to fill up the post of Superintending Engineers pertaining to the year 1999-2000 and 24 vacancies pertaining to the year 2000- 2001.

7. For the vacancies relating to the year 1999-2000, DPC met on 2nd and 5th March 2001. As per rule applicable, the zone of consideration extended to twice the number of vacancies + 4, i.e., $53 \times 2 + 4 = 110$. For the next year i.e. the year 2000-2001 the number of candidates considered were $24 \times 2 + 4 = 52$.

8. Whereas the petitioners were within the zone of consideration since their seniority position as Executive Engineers was above the number 110, respondent No. 4 being at serial No. 113 of the seniority list, was not short-listed for being considered for promotion at the DPC for the year 1999- 2000. The petitioners were found eligible for promotion and their names were entered in the select panel but could not earn promotion for vacancies pertaining to the year 1999-2000 on account of persons senior to them filling up all the vacancies.

9. Same thing happened for the panel drawn pertaining to the year 2000-2001.

10. Pertaining to the year 2001-2002, DPC met on 28th and 29th November 2001. In the said DPC, petitioners ranked senior enough and hence earned promotions to the post of Superintending Engineer.

11. At that stage, respondent No. 4 raised an issue pertaining to the persons screened and placed within the zone of consideration for the vacancies which were filled up in the year 1999-2000. His grievance was that 4 resultant vacancies which came into being on account of the death of Shri A.K. Seth who died on 8.3.1999, the acceptance of voluntary retirement with effect from 31.7.1999, when Shri H.R. Sharda voluntarily retired, the vacancy which ensued on 31.5.2000, when Shri Kukreja retired and the vacancy which ensued on 31.8.2000, when Kanwarjit Singh retired also ought to have been filled up and accordingly the zone of consideration ought not to have been limited to 110 candidates but ought to have been extended to 114 candidates. Needless to state, the seniority position of respondent No. 4, as an Executive Engineer, was 113 and if the zone of consideration was extended to 114 candidates, his candidature had to be considered.

12. Without impleading the petitioners or any other persons as respondents and only impleading the department as a respondent, respondent No. 4 filed OA No. 128/2002 before the Chennai Bench of the Central Administrative Tribunal in which an order was passed on 30.1.2002 directing the department to consider

the representation of respondent No. 4 and pass a reasoned order.

13. The representation was duly considered and rejected on 17.4.2002. The said order was challenged by respondent No. 4 by filing a petition before the Hyderabad Bench of the Central Administrative Tribunal. In this petition, respondent No. 4 raised the issues pertaining to the death and retirement of the afore-noted 4 persons i.e. Shri A.K. Seth, Shri H.R. Sharda, Shri Kukreja and Shri Kanwarjit Singh and additionally that 15 vacancies on account of deputation ought also to have been considered when the DPC met to consider the candidates for empanelment pertaining to the year 1999- 2000. In other words, as per the claim of respondent No. 4, the vacancies which required to be filled up were $53 + 4 + 15 = 72$. Thus, as per his claim, the zone of consideration should have been extended to 148 Executive Engineers.

14. Vide order dated 22.7.2005, OA No. 933/2003 filed by respondent No. 4 before the Hyderabad Bench of Central Administrative Tribunal was disposed of holding that as per OM dated 9.4.1996, vacancies which would have arisen in the year 1999-2000 ought to have been considered when the panel was drawn up. In other words, the Tribunal held that the department ought to have considered the entitlement for empanelment of 57 persons and accordingly draw up the zone of consideration. Direction was issued to conduct a review DPC in which name of respondent No. 4 was directed to be considered for promotion as Superintending Engineer pertaining to the vacancies for the year 1999-2000.

15. Relevant would it be to note that respondent No. 4 did not implead any private person as a respondent in OA No. 933/2003.

16. Challenge by the department to the order dated 22.7.2005 before the High Court at Hyderabad failed. Petition for Special Leave to Appeal before the Supreme Court against the order dated 22.7.2005 was dismissed in limine. Thus, the department had no option but to comply with the direction issued by the Tribunal on 22.7.2005.

17. Complying with the direction, review DPC was held. Name of respondent No. 4 was considered and he was empanelled and placed in the seniority list at serial No. 3A.

18. This was to the detriment of the interest of the petitioners, who, as noted above, were promoted as Superintending Engineers with respect to the vacancies when the DPC met on 28th and 29th November 2001; the vacancies being for the year 2001-2002. Needless to state, respondent No. 4 was placed above the petitioners as a Superintending Engineer notwithstanding that as an Assistant Executive Engineer and as an Executive Engineer, he was junior to the petitioners. Needless to state, he was junior to the petitioners when order dated 14.12.2001 was issued promoting the petitioners as Superintending Engineers.

19. The petitioners as also a few other persons filed 4 OAs before the Central Administrative Tribunal at Delhi. The simple contention urged by these

petitioners was that as per OM dated 17.9.1998 (Annexure P-2 at page 75) the cut-off date for determining the vacancies to be filled up would be the first day of January of the year in question. Thus, for the vacancies pertaining to the year 1999-2000, 1st January 1999 was the cut-off date. In harmony with the said office memorandum, it was urged by these petitioners that on 1.1.1999 nobody could have predicted the death of Shri A.K. Seth who died on 8.3.1999. None could have envisaged Shri H.R. Sharda voluntarily retiring with effect from 31.7.1999. The question of considering the vacancies pertaining to the retirement of Shri Kanwaljit Singh and Shri Kukreja on 31.8.2000 and 31.5.2000 respectively did not arise, for the reason, these retirements were known, but for the year 2000- 2001 and that these anticipated vacancies could have been taken note of pertaining to the panel for the year 2000-2001 i.e. while drawing up the list of eligible candidates as of 1.1.2000.

20. To put in a nutshell, the petitioners urged that the Central Administrative Tribunal at Hyderabad was not justified in extending the zone of consideration by holding that 2 more anticipated vacancies pertaining to Shri A.K. Seth and Shri H.R. Sharda should have been taken note of when the eligibility of officers for promotion was determined with reference to the cut-off date 1.1.1999 for the reason these were not anticipated vacancies.

21. Respondent No. 4 opposed the petitions, inter-alia, on the ground that the department was bound to implement the mandamus issued by Hyderabad Bench of the Central Administrative Tribunal in OA No. 933/2003. He questioned the locus standi of the petitioners to maintain the Original Applications. On merits, he justified the directions issued by the Central Administrative Tribunal at Hyderabad and additionally pleaded that vacancies on account of Superintending Engineers being on deputation as also chain vacancies arising out of further promotions of Superintending Engineers to Additional Chief Engineers ought to have been considered. In other words, the defence of respondent No. 4 predicated a claim on long term deputation vacancies and chain vacancies in addition to what was held in his favour by the Central Administrative Tribunal, Hyderabad Bench.

22. Needless to state, the Tribunal Bench at Hyderabad, had granted relief to respondent No. 4 against the mandate of the office memorandum dated 17.9.1998, which we note was not even considered by the said Bench. Indeed, for the year 1999-2000, the cut-off date for determining the eligibility was 1.1.1999 and as of said date, nobody except God knew that Shri A.K. Seth would die on 8.3.1999 and Shri H.R. Sharda would voluntarily retire on 31.7.1999. Thus, the directions issued by the Tribunal at Hyderabad were ex-facie contrary to law.

23. But, vide impugned order dated 17.3.2010, dismissing the Original Applications filed by the petitioners and a few other persons, the Full Bench of the Tribunal has held that the department was obliged to consider vacancies on account of long term deputation. The plea of respondent No. 4 that chain

vacancies also ought to have been included has been repelled.

24. Treating the figure pleaded by respondent No. 4 that vacancies on account of long term deputation were 19 in number, the Tribunal has held that for the reason the department incorrectly determined the number of vacancies as of 1.1.1999 has resulted in the vacancies being restricted to 53, ignoring the vacancies on account of long term deputation, it has been held that the empanelment of respondent No. 4 was not requiring any judicial interference. The result is the dismissal of the Original Applications filed by the petitioners and a few other persons.

25. From a perusal of the impugned order dated 17.3.2010, it may be noted that on what basis has the Tribunal determined that there existed 19 vacancies to the post of Superintending Engineer on account of long term deputation is not clear, save and except to accept the pleading of respondent No. 4.

26. As regards the locus standi of the petitioners to question the promotion in favour of respondent No. 4, the Tribunal has rightly relied upon the decision reported as K. Ajit Babu and others Vs. Union of India and others, and Gopabandhu Biswal Vs. Krishna Chandra Mohanty and Others, In the said decisions it has been held that a decision by a Court which affects a person who is not impleaded as a respondent would not bind the said person affected and that the person concerned would have a right to maintain an independent substantive petition before the appropriate Forum.

27. Shri A.K. Behera, learned Counsel for the petitioner in WP(C) No. 3874/2010 has made a very neat submission. Learned Counsel urges that long term deputation vacancies are such vacancies which flow out of the office memorandum dated 3.10.1989 and as per para 4 thereof, long term deputation vacancies would be only those where the person concerned has proceeded on deputation as per sub-paras 4.1 to 4.10 of the office memorandum. Further, learned Counsel urges that the prerequisite is that the person concerned is on deputation to a department for the post in question if the recruitment rules thereof permit selection by transfer on deputation. For facility of reference, paras 4.1 to 4.10 of the office memorandum are being noted as under:

4.1 An accurate assessment of the vacancies to be filled by the above methods should be made sufficiently in advance so that the Ministries/Departments will be able to follow the prescribed procedures properly.

4.2 Wherever the recruitment rules prescribe different sources of recruitment and where various categories of officers are eligible for being considered, the circulation of vacancies will be considered proper only where the Ministry concerned ensures that all such categories are tapped simultaneously. In other words, the Departments should not confine circulation of the vacancies to only one or two sources mentioned in the Recruitment Rules.

4.3 As a corollary to para 4.2 above, wherever employees of the public sector

undertakings/autonomous bodies and non-sectt. officers are also eligible under the Recruitment Rules, the Administrative Ministry concerned should specifically request the Departments to circulate the vacancy to all such organizations with whom they are concerned so that the requirements of the Recruitment Rules are duly met.

4.4 The vacancy circular should invariably be published in the "Employment News".

4.5 The minimum time allowed for receipt of nominations should be two months. If in a few cases where there are compelling reasons to fill up the vacancy on urgent basis, a shorter time limit, which should not be less than six weeks, may be prescribed with the approval of the Joint Secretary concerned.

4.6 All the salient features of the vacancy circular (e.g.,) qualifications and experience, officers eligible, last date for receipt of nominations as prescribed by the originating Department should invariably be published in the "Employment News".

4.7 The circular should be addressed to all the agencies or sources of selection specified in the Recruitment Rules. As a proof of having complied with this instruction, the Departments should, while making a reference to the UPSC for selection, render a certificate to the Commission that the vacancy circular has been dispatched to all the agencies prescribed in the rules.

4.8 While calling for applications for appointment on transfer on deputation/transfer basis, the Ministries/Departments may call for the bio-data of the candidates in the proforma given at Annexure-A.

4.9 After circulation of the post, the proposal should be sent to the UPSC as early as possible and in any case within three months from the closing date for receipt of applications. While forwarding the proposal to the UPSC the requisite details in the proforma given at Annexure-B should be sent to the Commission. Further, the details of the applicants, both eligible and ineligible, along with the Department's comments on their eligibility or otherwise should also be furnished in the proforma given at Annexure-C.

4.10 In the vacancy circular, it should be specifically mentioned that the candidates who applied for the post will not be allowed to withdraw their candidature subsequently.

28. Thus, the contention urged is two-fold. Firstly, that the Tribunal, without determining whether or not there existed any, much less 19 vacancies on account of deputation, could not have upheld the empanelment of respondent No. 4 pertaining to the year 1999-2000. Secondly, if it was held that there existed 19 vacancies on account of deputation, then the panel for the year 1999-2000 should have been drawn up not limited to 53 candidates but 53 + 19 and had this been done, the petitioners who lost out on promotion on account of the fact that 53 persons senior to them were empanelled, would have earned

promotions, since the empanelled candidates would have gone up by the number 19. As an adjunct to this submission, learned Counsel urges that if 19 more vacancies were considered for empanelment of candidates, the zone of consideration would have extended much beyond seniority position 113 in which respondent No. 4 was placed and would have extended to seniority position till serial No. 148.

29. Shri A.K. Bhardwaj, learned Counsel for the department concedes that the department did not work out and notified the vacancies which had to be filled up on account of long term deputation. On being asked whether it is correct that there were 19 vacancies on account of long term deputation, learned Counsel states that since the department has not determined the vacancy position as per the applicable office memorandum, he is unable to furnish any positive information.

30. Respondent No. 4 who appears in person questions the entitlement of the petitioners to maintain a substantive action before the Tribunal and states that by a second round of litigation, the decision in his favour by the Tribunal Bench at Hyderabad cannot be nullified. On merits, respondent No. 4 has only one submission to make: That he was entitled to be considered for promotion in the year 1999-2000 on account of the vacancies arising on account of the death of Shri A.K. Seth and the voluntary retirement of Shri H.R. Sharda and additionally on account of vacancies arising out of long term deputation/transfer.

31. As regards the entitlement of the petitioners to maintain a substantive action, the law is clear. As laid down by the Supreme Court in K. Ajit Babu's case (supra) and Gopabandhu Biswal's case (supra), petitioners who were not impleaded by respondent No. 4 when he first took recourse to action before Chennai Bench of the Tribunal and then before the Hyderabad Bench of the Tribunal, would have a grievance if respondent No. 4 would steal a march over them as a Superintending Engineer.

32. On merits, it may be noted that the Full Bench of Tribunal at Delhi has not sustained the claim of respondent No. 4 with respect to the vacancy arising out of Shri H.R. Sharda's voluntary retirement on 31.7.1999. But, his entitlement has been justified on account of the vacancy arising when Shri A.K. Seth died on 8.3.1999 as also by treating 19 vacancies on account of long term deputation/transfer.

33. As regards holding that the department ought to have considered the vacancy on account of the death of Shri A.K. Seth on 8.3.1999, suffice would it be to state that while drawing the panel for the year 1999-2000, vide OM dated 17.9.1998, cut-off date being 1.1.1999, the question of drawing up the list of eligible candidates with reference to the vacancy which arose when Shri A.K. Seth died on 8.3.1999, does not arise. The zone of consideration had to be determined with reference to the vacancy position and anticipated vacancies for the ensuing year as of 1.1.1999 and since nobody knew that Shri A.K. Seth

would die on 8.3.1999 the resultant vacancy arising out of his death could not have been taken into account. Thus, to this extent the impugned decision needs correction.

34. As regards the 19 vacancies resulting on account of long term deputation/transfer, suffice would it be to state that the Tribunal has gone by the word of mouth of respondent No. 4. The Tribunal has not called upon the department to file an affidavit indicating with clarity as to how many vacancies existed on account of Superintending Engineers under MES being on long term deputation/transfer. It be noted that the stand of the department even before us is that the department has not issued any order or notification determining the vacancies to the post of Superintending Engineer (MES) on account of long term deputation/transfer. But, learned Counsel Shri A.K. Bhardwaj very fairly concedes that there would be some vacancies to the post of Superintending Engineer which required to be filled up on account of long term deputation/transfer in terms of the OM dated 3.10.1989.

35. Thus, the position would be this. Though petitioners were considered for promotion pertaining to the vacancy year 1999-2000 and notwithstanding being empanelled, lost out on promotion for the reason the department filled up only 53 posts and persons senior to them were empanelled. Just as respondent No. 4 gets the benefit on account of the number of available vacancies being extended, even the petitioners would be entitled to a similar benefit, if number of vacancies to be filled up is in excess of 53. If the claim of respondent No. 4 is correct that there existed 19 vacancies on account of long term deputation/transfer, the number of posts to be filled up would be $53 + 19 = 72$ and if this be the position, persons from serial No. 1 to 72 in the select list would earn promotions. Further effect would be that the candidature which has to be considered would be of $72 \times 2 + 4 = 148$ eligible candidates and not 110 which were considered when the DPC met on 2nd and 5th March 2001 and the time when DPC met to consider the sole claim of respondent No. 4. We note that the date is 14.10.2008.

36. A contention was urged by respondent No. 4 that why should this Court bother about those who have not chosen to take recourse to action as contemplated by law.

37. The answer is simple. If an aberration takes place which is jurisdictional and relates to a wrong determination of the vacancy position, corrective action has to be in accordance with law and the direction has to be to consider all eligible candidates and not only the ones who have taken recourse to action in a Court of Law.

38. Suffice would it be to state that the aforesaid view is in harmony with the OM dated 9.4.1996 (Annexure P-3) which categorically mandates that if due to an error in determining the actual number of regular vacancies which are proposed to be filled up, the correct thing is to hold a review DPC by giving effect to a consideration of the names of the candidates in the extended panel.

39. At this stage, it may be noted that the second writ petition, being WP(C) No. 4455/2010 which has been filed by the petitioners against the order dated 25.3.2010 passed by the Central Administrative Tribunal Delhi Bench in OA No. 1484/2009 whereby the Central Administrative Tribunal has directed to consider respondent No. 4 for further promotion as Additional Chief Engineer within a period of 6 weeks. The said direction of the Tribunal is based upon the impugned judgment/order dated 10.3.2010 which is the subject matter of challenge in WP(C) No. 3874/2010. Besides, the said direction is also based upon the ante dated promotion/seniority granted to respondent No. 4 vide order dated 19.11.2008. Since we have interfered with the judgment of the Central Administrative Tribunal dated 10.3.2010 and have also interfered with the ante dated promotion/seniority granted to respondent No. 4 vide order dated 19.11.2008, the impugned order in WP(C) No. 4455/2010 cannot be given effect to at this stage and has to be subject to the directions which we give below.

40. The two writ petitions are accordingly disposed of by passing the following directions:

A. The department shall consider and notify the vacancies which required to be filled up in the year 1999-2000 with reference to long term deputation/transfer; required to be notified in terms of the office memorandum dated 3.10.1989.

B. If it is found that long term deputation/transfer vacancies existed, limited to said number, review DPC be held of all eligible candidates with reference to the extended panel by including said vacancies as available for Executive Engineers to be promoted as Superintending Engineers. The panel would be given effect to with retrospective date.

C. Vacancy arising out of the death of Shri A.K. Seth and voluntary retirement of Shri H.R. Sharda, which events took place on 8.3.1999 and 31.7.1999, would not be treated as vacancies available for the cut-off date i.e. 1.1.1999, relatable to the year 1999-2000.

D. Ante dated seniority granted to respondent No. 4 vide order dated 19.11.2008 (Annexure P-13) is set aside with a clarification that the inter-se seniority of the petitioners and respondent No. 4 would be as per the select panel which would now be drawn up and, needless to state, till that is done, the seniority would be governed by the promotion order dated 14.12.2001.

E. Needless to state, if it is found that there were no vacancies arising out of long term deputation/transfer which required to be filled up for the year 1999-2000, that would be the end of the matter and in said circumstances promotion of respondent No. 4 as Superintending Engineer for the panel pertaining to the year 1999-2000 shall be treated as having been set aside and his entitlement for promotion which otherwise enured in the year 2001-2002 and in respect whereof he earned his promotion, would be given effect to and in said circumstance his seniority would be accordingly fixed.

F. As far as WP(C) No. 4455/2010 is concerned, since we have quashed the order dated 19.11.2008 whereby respondent No. 4 was granted ante dated promotion/ seniority as Superintending Engineer, the impugned order of the Tribunal dated 25.3.2010 cannot be given effect to. However, if in pursuance to our direction given in (B) above any change in vacancy for the year 1999-2000 for promotion to the grade of Superintending Engineer is determined and consequently any review DPC, as directed above, takes place then the consequential benefit would automatically flow to all concerned including respondent No. 4.

41. No costs.