(2011) 2 CHN 729

Calcutta High Court

Case No: Writ Petition No. 335 of 2007

Ram Chander		APPELLANT
	Vs	
Lieutenant Governor		RESPONDENT

Date of Decision: Nov. 25, 2010

Acts Referred:
Constitution of India, 1950 â€" Article 14

Citation: (2011) 2 CHN 729

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: Anjili Nag, for the Appellant;A.K. Ray and M.A. Rehman Advs. for the Respondent Nos. 1-3, Chandranath Mukherjee, Sumanta Biswas and Mohammed Tabraiz Advs. for the Respondent No. 7, Arul Prasanth, for the Municipal Council, Gopala Binnu Kumar, for the Respondent No. 9, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.
This application has been taken out by the Petitioner, Assistant Engineer (Electrical), who has been promoted

undisputedly following the promotional rules. The order of promotion was not very easy and that was to be cleared after he could come to this

Court asking for a direction upon the administration to take steps for examining his case for promotion by the Departmental Promotion Committee.

He got promotion in the year 2004 and before her client was promoted, Mr. Mukherjee''s client and Mr. Gopala Binnu Kumar''s client were also

promoted by the department in the year 1999 but it was done on ad hoc basis and without following rules and norms laid down for granting

promotion.

2. I do not find any provision for granting any promotion on ad hoc basis. Nonetheless, those Respondents were continuously in service on

promotion and discharged their duties satisfactorily. Unfortunately, their promotion was kept on ad hoc basis till 2004. However, Mrs. Nag

disputed those submissions. I am not entering into the controversy of the matter since ultimately those Respondents were regularized by granting

promotion in the year 2004. The order of regularization has not been challenged by the Petitioner as the Petitioner is not aggrieved by the said

order. This writ petition is challenged against fixation of seniority list. The Administration has taken into consideration of the initial appointment on

promotion of all the Respondents in 1999. According to the Petitioner, the service period on ad hoc basis on promotion can not be counted for the

purpose of fixing the seniority. Mr. Anjili Nag appearing for the Petitioner has drawn the attention of the Court to the decision of the Hon''ble

Supreme Court on this issue reported in Ram Ganesh Tripathi and others Vs. State of U.P. and others, . Mr. Chandra Nath Mukherjee appearing

for the Respondent No. 7 submits that in real sense his client was promoted in the year 1999 and the order of regularization is nothing but

perfecting his promotion. Therefore, there is No. illegality and infirmity in placing his client in the seniority list as he deserved. This submission has

also supported by Mr. Gopala Binnu Kumar appearing for the Respondent No. 9. According to them, that admittedly those Respondents are

senior to the Petitioner in the initial cadre. If this aspect is taken into consideration after regularization of their promotional post fixation of seniority

as done is not improper and unfair. Rather it would be unfair and is inequitable if the seniority as fixed is not granted to the Petitioner who is

otherwise senior. It is the mistake or fault of the department who did not follow the rules as such his client can not be made victim to ad hocism.

The argument of Mr. Mukherjee is undoubtedly thought provoking though it is difficult to accept his argument as I do find in the rules that there

was any provision for giving promotion on ad hoc basis. Even in the rules I do not find there is any provision for regularization. Since these issues

are not before me, I do not wish to observe anything in this regard.

3. The Court, while entertaining individual action, can not take up any issue which is not alleged nor argued by any of the parties. Leaving aside the

said issue, I need to look into whether the seniority should be accepted in this case, taking into consideration of initial promotion order on ad hoc.

The Constitution Bench of Supreme Court in the case of the The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of

Maharashtra and others, , has very clearly laid down the proposition regarding extent of benefit can be given for ad hoc appointee at the time, of

regularization. In paragraph 44 of report as appropriately pointed out by Mr. Mukherjee, it is ruled as follows:

44. To sum up, we hold that -

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according

to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and

made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority

(emphasis supplied).

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly

till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one sources, it is permissible to fix the ratio for recruitment from the different sources, and if

rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation.

In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible

that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following

the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source

inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such

relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the

executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the

single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given, after careful consideration should be respected rather than

scrutinized for finding out any possible error. It is not in the interest of service to unsettle a settled position,...

4. The decision in the case reported in AIR 1997 SC 621, the Supreme Court held in paragraph 7 that if any promotion is made on ad hoc basis

after, regularization ad hoc period can not be taken into consideration for the purpose of determining seniority.

5. In these circumstances, I am constrained to hold that the period served by the Respondents on ad hoc basis can not be counted for the purpose

of seniority in terms of the Constitution Bench judgment, but other benefits can be given. Another decision of the Supreme Court has been brought

to the attention of this Court which was rendered in the case of U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others, by Mr.

Mukherjee. In my view, this decision was rendered on the point of discrimination and arbitrariness with regard to regularization of services. Here

the question of discrimination is not all involved. In this case the Hon''ble Supreme Court while distinguishing the Uma Devi''s case, reported in

2006 (14) SCC 1, held Article 14 of Constitution of India must have pervading application. The decision of the Supreme Court cited by Mr.

Mukherjee in the case of AIR 1986 345 (SC) is not helping in any way on issue involved in this matter as No. law has been laid down on the

issue. In these circumstances, I find some weight in the submission of Mrs. Anjili Nag. The seniority determined and prepared by the Respondents

which is impugned here is not in accordance with law. Mr. Mukherjee has mildly submitted that the seniority list was published in the year 2004

and action has been taken in the year 2007. I think the delay is not so inordinate for this action should be thrown away.

6. In the conclusion, I set aside and quash the seniority list impugned here, therefore direct the Municipal Council to re-fix the seniority list on the

basis of substantive order of promotion having been granted to the respective parties without taking into consideration of length of service rendered

on ad hoc basis. It will be better for the Municipal Council if a separate seniority list is prepared in respect of the different cadres if possible.

However, I can not give any direction in this regard it is made clear that the Municipal Council is to take a decision accordingly. I, direct the

Municipal Council to examine this aspect whether a separate seniority list can be prepared for the separate cadre.

7. With the aforesaid observation and direction, I dispose of this writ petition without any order as to costs.