

HIGH COURT OF MADHYA PRADESH : JABALPUR

WRIT PETITION No.246/2008

Dhani Ram Dubey

Vs.

The State of Madhya Pradesh & others

Present : Hon'ble Shri Justice K.K. Trivedi

Shri Vishal Dhagat, learned Counsel for the petitioner.

Shri Rajesh Tiwari, learned Govt. Advocate for the respondents-State.

Shri S. Pandey, learned Counsel for respondent No.5.

O R D E R

(31/07/2013)

By this petition under Article 226 of the Constitution of India the petitioner, said to be working on the post of Lower Division Clerk in Govt. Post Graduate College, Damoh, has challenged the validity of order dated 30.10.2007 by which his representation made pursuant to the direction issued by this Court in his earlier writ petition, W.P. (S) No.2649/2004 on 05.05.2004, has been rejected. It is contended by the petitioner that initially he was appointed in a private college on the post of Peon. In the year 1976, the said college was taken over by the State Government. The petitioner had passed the Higher Secondary Examination and, therefore, he was considered and promoted by the orders of the competent authority, i.e. the Principal of the College on the post of Laboratory Attendant on 04.10.1983. The Laboratory Attendants were required to be promoted on the post of Laboratory Assistant. However, the post of Laboratory Assistant was merged with the post of Laboratory Technician. Instead of considering the case of

the petitioner for promotion on the post of Laboratory Technician, he was promoted on the post of Lower Division Clerk on 15.02.1989 but was posted against the post of Laboratory Technician. In fact the said promotion of the petitioner was considered in terms of the circular issued by the Directorate of Higher Education way back on 21.02.1983. A quota of promotion was prescribed for the Laboratory Attendants on the post of Laboratory Assistant or Laboratory Technician on completion of five years of service. The only condition mentioned in the said circular was that such Laboratory Attendants should have passed the Higher Secondary Examination or 12th Class with Science subject. In case such Class-IV employees with the aforesaid qualification were not available, then the Class-IV employees, who have passed the Higher Secondary examination in Arts subject may be considered for promotion. An amendment in the said circular was made on 20.12.1989 deleting the word 'promotion' and substituting by the word 'appointment'. The educational qualifications were changed stating that instead of 'Higher Secondary with Science subject', the 'Higher Secondary with related subjects' be substituted.

2. It is contended that many juniors to the petitioner were considered and promoted as Laboratory Technicians whereas the order of promotion was issued in respect of the petitioner promoting him as Lower Division Clerk against the vacant post of Laboratory Technician. Bringing to the notice the anomaly created in the matter of promotion, the petitioner made a representation but as the same was not considered, he approached this Court by way of filing W.P. (S) No.2649/2004. This Court has disposed of the said writ petition of the petitioner in the anvil of the directions issued by the Court in certain disposed of writ petitions. It was observed that in case it is found that petitioner was to be promoted on the post of Laboratory Technician, notional

fixation be done in his case. The representation was made by the petitioner pursuant to this order, which has now since been rejected by the impugned order, present writ petition is required to be filed. It is contended that similarly situated persons like respondents No.5 and 6 have been given the benefit of promotion on the post of Laboratory Technician and, therefore, such a benefit could not have been denied to the petitioner. That being so, since the petitioner is discriminated, the present writ petition is required to be filed.

3. Upon service of the notices of the writ petition, the respondents have filed their return and have contended that the petitioner is not a Laboratory Attendant as his initial appointment was on the post of Peon. He could not have been promoted on the post of Laboratory Assistant in terms of the provisions of *Madhya Pradesh Non-Gazetted Class-III Services (Collegiate Branch) Recruitment & Promotion Rules, 1974* (herein after referred to as 'Rules'). It is contended that channel of promotion is prescribed for the ministerial post of Peon on completion of requisite years of service on the post of Lower Division Clerk. The Lower Division Clerks are to be further promoted on the post of Upper Division Clerk as prescribed in the Schedule of the Rules. There was an error committed by the authority promoting the petitioner on the post of Laboratory Attendant whereas he should not have been promoted as such. Thus, it is contended that the representation of the petitioner was rightly considered and rejected. A rejoinder has been filed by the petitioner denying such allegations and again contending that all similarly situated persons were promoted on the post of Laboratory Technician even when they were not having the qualification of Higher Secondary with Science subject. Only on this count the claim of the petitioner is rejected saying that he was not qualified. Even as a Lower Division Clerk, claim of the

petitioner was not considered for further promotion on the post of Upper Division Clerk whereas the juniors to him were promoted. No additional return has been filed by the respondents denying such allegations.

4. Heard learned Counsel for the parties at length and perused the record.

5. Though reliance is placed by learned Counsel for the petitioner in one of the original application, which came on transfer to this Court and decided on 04.03.2004 but it appears that such reliance placed by the petitioner is misconceived. In fact there were certain persons, who were appointed on the post of Laboratory Attendant, though were not having the qualification of Higher Secondary with Science subject, when the Rules of 1974 were not framed. When the Rules were framed, since for the post of Laboratory Technician the qualification was prescribed with Science subject, they were not being considered for promotion. A writ petition was filed before this Court claiming inter alia that the Rules and their conditions would not bar the right of such persons for consideration for promotion on the post of Laboratory Technician as there was nothing in their service conditions prescribed at the relevant time. On establishment of the M.P. State Administrative Tribunal, the said writ petition was transmitted to the Tribunal and was registered as ***T.A. No.1237/1988, Nand Kishore & others vs. State of Madhya Pradesh & others.*** The Tribunal, after considering the scheme of the Rules, came to the conclusion that the persons who were inducted in service prior to coming into force of the Rules, could not be denied benefit of promotion by making application of the Rules against them. Finally the claim of such persons was decided in their favour. The State Government preferred an appeal against the order of the Tribunal before the Apex

Court, which was dismissed on 23.07.1993. Such persons were considered and thereafter granted the benefit of promotion on the post of Laboratory Technician, though they were matriculate with other subjects than Science subject. This benefit was not being extended to other similarly situated employees, even to those who were inducted in service after coming into force of the Rules. Such persons approached the Tribunal and their petitions came on transfer to the High Court. One of such Writ Petition No.11381/2003 was considered by this Court and vide order dated 08.12.2003, this Court has allowed the said writ petition with the similar directions in the following manner :

“The petitioners, five in number, were appointed as Laboratory Attendants in between 1988 to 1990. Their claim is for promotional post, namely, Lab. Technician. It is submitted by Mr. Verma, learned counsel for the petitioners that the case of the petitioners is squarely covered by the decision rendered in the case of Nand Kishore & 26 others vs. State of M.P. & others (T.A. No.1237/88) passed by the Tribunal. It is further contended by him that the State Government has accepted the judgment and issued an order promoting certain persons on 16.12.1994 and there is no distinction between the persons who have been conferred the benefit and the present petitioners.

2. It is submitted by Mr. Verma that whatever rules may be applicable, the petitioners would be eligible in view of the decision of the Tribunal rendered in the case of Satish Mariya vs. State of M.P. & others (O.A. No.188/93). It is also put forth by Mr. Verma that certain persons who were appointed after the petitioners have been given the benefit in view of the order passed by the Tribunal in the case of Phoolchand Thakur and others vs. The State of M.P. & others (O.A. No.532/95).

3. Mr. Rahul Jain, learned counsel for the State has submitted that the whole thing has to be scrutinized and without scrutiny this Court cannot pass an order extending the benefit to the petitioners. As certain facts are to be gone

into, I am inclined to direct the petitioners to submit a representation to the respondent No.1, Secretary, Higher Education annexing the necessary documents which would include the decision rendered by the Tribunal vide Annexures A-7, A-12 and A-13 within a period of two months from the date of receipt of the order passed today and the respondent No.1 shall decide the matter by giving cogent and germane reasons on the anvil of the judgments passed by the Tribunal from time to time. The aforesaid exercise shall be completed within a period of three months from the date of receipt of the representation filed by the petitioners. This Court hopes and trusts that the respondent No.1 shall scrutinise every facet and pass a reasoned order so that grievance of the petitioners shall stand mitigated and they would be given the benefit if it is lawfully due to them.

With the aforesaid directions, writ petition stands disposed of. There shall be no order as to costs."

6. In one of such cases of the Laboratory Attendants, promotion was considered and order was prepared but the same was not issued to the person concerned. On the other hand when they made a representation on the anvil of the law laid-down by this Court, on the basis of the decision rendered in the case of **Nand Kishore & others** (supra) as quoted herein above, their representation was rejected. Such persons approached this Court by way of filing **W.P. (S) No.3108/2005, Ashok Kumar Chouksey & others vs. State of M.P. & others**. The said writ petition came up for hearing before this Court. It was held by this Court that after the aforesaid enunciation of law by the Tribunal and by this Court, nothing was left to be adjudicated. The findings recorded by this Court in the said case are quoted herein below :

"There was nothing left to be adjudicated by the respondents as the claim of identically placed persons was already decided by the Tribunal, duly affirmed by the Apex Court and, therefore, similar benefit was required to be extended to the petitioners. In detail the representation was

made by the petitioners and they have described each and every claim in the said representation, which has been placed on record as Annexure P-7. A careful perusal of this document will indicate that not only parity was indicated, it was also pointed out who were appointed when and within what time they were granted the benefit of promotion. Even this much was pointed out that some of those persons were appointed much after appointment of petitioners and thus junior to them. When these facts were placed before the Commissioner of the Higher Education, he directed that the order should be issued in respect of promotion of the petitioners. The order of promotion was prepared but could not be issued only because the order impugned was passed by the Director of Higher Education, Madhya Pradesh, Bhopal. This being so, it is not open to the respondents to say that the petitioners were not identically placed and were not entitled to grant of similar benefit."

It was considered by this Court in the case of **Ashok Kumar Chouksey** (supra) that if some sort of treatment is granted to those, who were similarly situated, it cannot be denied to others as the parity is to be maintained. Relying in the case of **State of Karnataka vs. C. Lalitha, (2006) 2 SCC 747**, this Court has held that there cannot be any discrimination in the matter of grant of benefit of promotion to the persons like petitioner. The findings recorded in this respect in the case of **Ashok Kumar Chouksey** (supra) in paragraph 7 are reproduced below :

"7. There is no doubt now left in view of the law laid-down by the Apex Court in the aforesaid case that the petitioners were also entitled to the benefit of promotion as was extended in case of others. As has been pointed out, the Joint Director has also found petitioners fit for such promotion and has prepared an order granting them benefit of promotion on the vacancies indicated in the order. However, such a benefit is not extended to the petitioners only because of the order of respondent No.2. Consequently, it has to be held that the petitioners are entitled to the similar benefit as was granted to other similarly situated persons by virtue of the order passed by the M.P. State Administrative Tribunal

in the case of ***Nand Kishore & others (supra)***.”

7. Now the question would be whether there was a consideration of the petitioner for promotion on the post of Laboratory Technician or not. The circular of the State Government relied by the petitioner categorically prescribes that in case there are vacancies on the post of Laboratory Assistant or Laboratory Technician, the cases of those Laboratory Attendants, who are having the Higher Secondary qualification, should be considered. That being so, in fact there was consideration of petitioner for promotion on the post of Laboratory Technician as the said post was lying vacant. Only because the petitioner was having Higher Secondary in Arts subject, he was said to be promoted on the post of Lower Division Clerk. The salary of the post of Lower Division Clerk and that of the Laboratory Technician is slightly different but this itself will not make any change in the consideration. Specially in such circumstances where pursuant to the order issued by this Court in the earlier round of litigation, despite a direction given by this Court, appropriate consideration was not done by the respondents. It is seen that the petitioner has placed on record various documents to show that similarly situated persons like respondents No.5 and 6 were given the benefit of promotion on the post of Laboratory Technician. They are also persons who have passed Higher Secondary with Arts subject. The proof in that respect is produced by the petitioner. Detailed information given by the Principal of the College where the petitioner was working, also contains the said facts. Thus, if such a plea was raised by the petitioner, which has not been denied or explained by the respondents effectively, the petitioner cannot be denied the benefit of promotion on the post of Laboratory Technician. The issue in this respect has already been put at rest on

earlier occasion. That being so, this petition has to be allowed.

8. Consequently, the petition is allowed. The order dated 30.10.2007 (Annexure P-7) is hereby quashed. The respondents are directed to treat the petitioner as promoted on the post of Laboratory Technician from the date the order was issued in his respect promoting him against the post of Laboratory Technician, as Lower Division Clerk. The petitioner would be entitled to notional fixation of his pay applicable to the post of Laboratory Technician from the date of initial promotion, i.e. 15.02.1989 but will get the benefit of arrears of salary only from the date his representation was rejected by the respondents, i.e. 30.10.2007. The seniority of the petitioner be fixed on the said post from the date of initial appointment. Let the aforesaid exercise be completed within a period of four months from the date of receipt of this order.

9. The writ petition is allowed to the extent indicated herein above. However, there shall be no order as to costs.

(K.K. Trivedi)
Judge

Skc