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Mohan Lal and Others Vs. Delhi Electric Supply Undertaking and Others

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Court : Delhi

Decided On : May-07-2013

Judge : Valmiki J. Mehta

Appellant : Mohan Lal and Others

Respondent : Delhi Electric Supply Undertaking and Others

Advocate for Def. : Mr. Nikhil Singla

Advocate for Pet/Ap. : Mr. G.D.Gupta, Mr. Piyush Sharma

Judgement :
* IN THE HIGH COURT OF DELHI AT NEW DELHI + % W.P.(C) No. 4288/1995 7th May, 2013 MOHAN LAL & OTHERS Through: .....Petitioners Mr. G.D.Gupta, Sr. Adv. with Mr. Piyush Sharma, Advocate. VERSUS DELHI ELECTRIC SUPPLY UNDERTAKING AND OTHERS..... Respondents Through: Mr. Nikhil Singla, Advocate. CORAM: HONBLE MR. JUSTICE VALMIKI J.MEHTA To be referred to the Reporter or not? VALMIKI J.

MEHTA, J (ORAL) 1. This writ petition was filed by three petitioners. Counsel appearing for the petitioners state that petitioner no.3 has expired and therefore, the case has to be decided qua petitioner nos.1 and 2. The issue in the writ petition is the claim of seniority of petitioners as against the respondent nos. 3 to 14. Respondent nos.4 to 14 have however been deleted vide different orders of this Court, and I have therefore to decide the seniority of the petitioner nos. 1 and

2 only against original respondent no.3-Sh. Arvinder Singh Bedi and who is now as per the amended memo of parties respondent no.2. Reference in this judgment to the respondent no.1 will as per context mean reference either to Delhi Electric Supply Undertaking (DESU) which formed part of Municipal Corporation of Delhi (MCD) or Delhi Vidhut Board (DVB) or the present respondent no.1 BSES Rajdhani Power Ltd.

2. Before stating the facts of the case, and which show a long history, I must state that really all the facts will prove to be unnecessary because the judgment in the present case will simply be based on the principle of res judicata in view of the judgment of the Sub-Judge, First Class dated 1.9.1987 in Suit No. 584/1983 titled as Mohan Lal Sharma Vs. Municipal Corporation of Delhi. In spite of the fact that the present case can be decided on the simple principle of res judicata, however, detailed narration of the facts will still be required and hence are stated hereinafter.

3. The employer of the petitioner nos. 1 and 2 and the respondent no.2 was the original respondent no.1/M/s Delhi Electric Supply and Undertaking (DESU). Respondent no.2 was appointed in 1976, however, the appointment was subject to regularization after finalization of valid R & P Rules i.e Recruitment and Promotion Rules and this is so stated in Annexure P-3, being the document of employment of the respondent no.2. Employment of petitioner nos.1 and 2 as also respondent no.2 took place pursuant to panel created on 12.1.1977. Respondent no.2 was placed at serial no. 6 on the said list below the petitoiners. Appointments were to take place in order of merit as and when vacancies occurred and that being so provided in the panel notice dated 12.1.1977. Out of the panel dated 12.1.1977 only one person out of the 12 persons was appointed, and therefore, the other persons who were denied employment approached the Industrial Tribunal under the Industrial Disputes Act, 1947 seeking their appointment and regularization. The Industrial Tribunal vide its judgment dated 4.3.1980 directed employment and regularization of the said persons, including the respondent no.2, paras 16 to 19 of the said Award dated 4.3.1980 read as under:16. We have to examine again if there was any condition prescribed regarding physical test when the applications were called for the posts of Security Inspectors or when as the time of interview

the selected candidates were not informed of any such condition or any notice had been given under Section of the Industrial Dispute Act, 1947. The management itself concedes that there was no such condition prescribed when the applications were called for the the posts or when the interviews of the selected candidates had takes. It also concedes that no notice under Section of the Industrial Dispute Act had been given. On behalf of the management it had been submitted that under Section 98 of the D.M.C. Act, 1957 regulations had been framed for recruitment in the post of Security Inspectors vide Corporations decision dated 13.12.76 and thus the condition regarding physical fitness/standard including physical test was justified and moreover these regulations were approved by the Union Public Service Commission, and subsequent to the approval of the Union Public Service Commission were again approved by the Municipal Corporation of Delhi for taking necessary action. Therefore, in view of the clause in the advertisement that the adhoc appointments would be subject to regularization in accordance with the finalized R&P Regulations the physical fitness standard and physical test clause prescribed in the regulations was approved by the Corporation. Further it has been contended that the clause, assessment of the candidates with regard to the physical standard/physical test is not illegal. Now the main question is whether qualifications with regard to the physical test existed at the time when the first selection made in respect of the persons in Annexure X, had existed. The answer in the negative.

17. Now, it would be proper at this stage to examine the legal aspect in this connection. Reliance was placed in the case Nafe Singh Verma Director of T.F.Haryana (Haryana & Punjab) (1972) SLR-675). It had held that the selection is to be made in terms of advertisement. In vide of the citation the persons named in Annexure had been selected on the basis of the first office order, wherein condition in regard to the physical test had not existed. Again reference is made to 1972 SLR-706, where it had been held that. Hence the qualifications have appeared in the advertisement inviting applications, these qualifications cannot be changed and selection has to be made out of the candidates possessing those qualifications. The rules were framed on 16.11.77 and it came into force on that date only. The now rules could not be applicable prior to 16.11.77 and the management has acted illegally by complying these rules in the case of the

persons selected and named in Annexure X. The office order had not referred with regard to any physical test sooner or later. Even this had been done them it was obligatory on the part of the management to observe the necessary formalities.

18. In view of the aforesaid discussion it would have to be held that the first employment notice dated 18.9.76 had no condition with regard to physical test. The notice dated 12.1.77 give the names of candidates selected had only referred that the assessment in regard to prescribed physical test will be made in due course. By making this condition at a inter stage would seen that these persons were going to be selected and the physical test if any was a more formality. As required under Section 9-A of the I.D.Act, the change in R&P rules or framing of now rules will tantament to change in service candidates. In any case the change could not be affected unless the notice was given by the management as required under Section 9-A of the I.D.Act, 1947. The action of the management rather colafide as it had employed persons as Security Inspectors even after the framing of the rules and without holding the physical test.

19. In view of the aforesaid discussion it would have to be held that the first employment notice dated 18.9.76 had no condition with regard to physical test. The notice dated 12.11.77 giving the names of the candidates selected had only referred that the assessment in regard to prescribed physical test will be made in due course. By making this condition at a later stage would mean that these persons were going to be selected and the physical test if any was a mere formality. Again no doubt this panel was to remain valid for one year from the date of issue but the record shows that the other persons had been employed during the period of one year particularly Shri Rajender Kumar. Of course, it had been stated that he qualified the physical test. It was never the case of the management that the passing of the physical test was obligatory and in case the management was serious about it the employment notice ought to have contained this condition. It would be thus seen that the section of the management is rather illegal and unjustified. The persons named in Annexure who had been declared successful after having held the interviews are entitled to be posted as Security Inspectors. These persons so appointed would derive the same benefit as has been given to Shri Rajender Kumar who had been appointed during the period of one year i.e.

when the panel had been announced on 12.1.77. The guard is passed accordingly. Sd/(K.L.Kakkar) 4th March

4. Industrial Tribunal Delhi. The respondent no.1-DESU accepted the Award of the Industrial Tribunal dated 4.3.1980 and appointed the persons whose names were found in the panel dated 12.1.1977. However, appointments were given in 1980 i.e after the Award of the Tribunal on 4.3.1980. Meanwhile, considerable water had flowed under the bridge. Petitioners had in the meanwhile been selected and appointed by the respondent no.1. The appointments of the petitioners were after finalization of the R&P Rules and in terms of an advertisement which did not state that petitioners would be appointed on adhoc basis i.e petitioners were to be appointed on regular basis in terms of the R&P Rules. However, when the petitioners were appointed, as per Clause 3 in their appointment letters, their appointments were subject to the decision of the Industrial Tribunal because the panelists of the panel dated 12.1.1977 had in the meanwhile approached the Industrial Tribunal as already stated above. Petitioners took appointment subject to the decision of the Industrial Tribunal. After the Industrial Tribunal decided in favour of the 1977 panelists including the respondent no.2, the services of the petitioners were terminated in terms of Clause 3 of the letter of appointment which provided that the employment of the petitioners was subject to decision of the Industrial Tribunal qua the 1977 panelists.

5. Whereas the petitioner no.2 adopted the procedure of Industrial Disputes Act, 1947 to challenge the termination of his service, the petitioner no.1 approached the Civil court. The Labour Court in the disputes raised by the petitioner no.2 decided the issue in favour of the petitioner no.2 and ruled that the termination of services of the petitioner no.2 by the respondent no.1 was illegal. The Award of the Labour Court is dated 21.1.1987. The relevant portion of the judgment of the Labour Court reads as under:ISSUE NO.1 The services of the workman were terminated by the management of D.E.S.U vide their order Ex.WW1/5. Under the provisions of section 98 of the Delhi Municipal Corporation Act, the management of DESU was required to frame regulations pertaining of matters mentioned thereunder, including R&P Regulations for various post in DESU while the post of Security Inspector had been created and were in existence for some years when

no R&P regulations could be frame till November, 1977. R&P Regulations in respect of Security Inspector were notified by Delhi Administration vide notification WW1/1. So that, appointment to the post of Security Inspector perior (sic) to November, 1977 could only be made on ad-hoc basis and regular appointment could be made after November, 1977. On 12.1.77 the management issued a notice Ex.WW1/8 declaring a panel of 15 candidates (12 General category and 3 SC/ST candidates) para No. 2 of that notice reads as under:The assessment in regard to the prescribed physical standard and physical test of the above candidates. Will be made in due course. This condition was not in the Employment Notice Ex.WW1/6 because the appointments were to be made on ad-hoc basis. Regular appointments were to be made after framing recruitment and promotion regulations which were at draft stage in January, 1977. On 16.11.77 the Recruitment Regulations for the post of Security Inspector were notified vide Ex.WW1/1 and now regular appointment to the post of Security Inspector could be made on in accordance with the provisions of Recruitment Regulations against Column No.7 of the essential qualification laid down with regard to physical test etc. The workman had applied in response to the employment notice dated 5.9.77 Ex.WW1/2 which was for making regular appointment and he was selected vide Ex.WW1/3. So he was entitled to be appointed on regular post. The services were terminated on the plea that the award dated 4.3.80 in I.D.No. 15/78 had been awarded in favour of the workman in dispute in that case. Assuming that the services of the workman could be terminated in the manner it has been done by the management, it was necessary for the management to comply with the provisions of Section 25-F of the I.D.Act, 1947. Violation of Section 25-F of the I.D.Act is sufficient of the workman. The action of the management in appointing the workman on ad-hoc when he had/been /already selected for regular appointment and to prefer those whose appointment was in contravention of the provisions of the notified recruitment and promotion regulations Ex.WW1/1 is therefore malafide and illegal. The reference is accordingly answered in favour of the workman and against the management, entitling him to be reinstated in the post of Security Inspector on regular basis with full back wages. Consequently it is held that the termination of services of the workman is illegal and unjustified and he is entitled to reinstatement in the post of Security Inspector with full back

wages. Sd/(BHOLA DUTT) DT. 21.1.87 6. PRESIDING OFFICE, LABOUR COURT VII, DELHI So far as the petitioner no.1 is concerned, he has filed a civil suit in the civil court. The petitioner no.1 was successful and the suit was decreed in his favour vide judgment dated 1.9.1987. Very importantly it be noted that the respondent no.2 herein was a defendant in the civil suit. In the said case the following issues were framed:i) ii) Whether stipulations of conditions by deft. is the notice defendant 18.7.78 and plaintffs appointment letter was malafide and illegal? iii) Whether the plaintiff has legal right for regular appointment as Security Inspector on the basis of penal dt. 13.7.78? iv) Whether the plaintiff is entitled to the relief claimed for? v) 7. Whether the suit of the plaintiff is barred Ups 478 of DMC Act? Relief. The relevant discussion pertaining to these issues and the decision of the court is from paras 9 to 16 of the said judgment and which read as under:9. This facts are not in dispute in this case. The admitted facts are that firstly, the deft. Issued employment notices Ex.PW3/4 dt. 18.9.76 inviting applications from departmental candidates sons etc. of regular employees and sons and grant sons of retied employees for appointment on ad-hoc basis subject to regularization after finalization of R&P Rules. The employment notice also shows that applications were invited only for four post of Security Inspectors. It is also an admitted case that the deft. Prepared a penal Ex.PW2/1 dt. 12.1.77. It has been specifically mentions that the penal will remain valid for the priod of one year form time of issue. It is also an admitted fact that the deft. Advertises for six posts on regular basis vise advertisement Ex.PW3/1 dt. 2.9.77. It is also a admitted case that the deft prepared penal Ex.PW3/2 dt. 18.7.78 in pursuance of interview held after advertisement dt. 2.9.77. Thus the plaintiff selected on regular basis in pursuance of advertisement issued for recruitment on regular basis. On the other hand, the penal prepared on 12.1.77 in pursuance of employment notice dt. 18.9.76 was for appointment on adhoc basis subject to regularization after finalization of R&P rules.

10. The dispute arose between the persons mentioned in the first penal and dft. No.1 because while issuing the panel, the deft. had stipulated that assessment in regard to prescribed physical standard and physical test of the candidates will be made in due course. It was done as the draft rules for this past required physical test and physical standard. The persons mentioned in the panel raised a industrial

dispute which was referred to the industrial tribunal and the tribunal gave award on 4.3.80. While issuing letter of after to the plaintiff, it was specifically mentioned that his name will be placed below the candidates selected earleire(sic) if the case penmding (sic) before the industrial tribunal is deicied (sic) in their favour. No regular appointment was given to the plaintiff and other mentioned in the second penal.

11. After the award of insustrial (sic) Tribunal, the deft. filled all the 10 vacancies from amongst the persons mentioned in the senocn (sic) penal, in the plaintiff.

12. The entire case of the deft. reveled around the award of the Tribunal. I have carefully gone through the award of the Tribunal. The dispute before the tribunal was whether the stipulation about physical test in the first penal was justified or not. The tribunal held that there was not such condition prescribed when the applicants had applied for the posts and even at the time of the interview the candidates were not informed of any such condition and no noticed/issued J.O. Act was given to the employees before making addition of this condition. It was further held that even in the panel notice dt. 12.1.77 the physical test was not made a condition precedent to the appointment and it prescribed that physical test will be made indue course. The Tribunal held that the persons named in the annexure were entitled to be posted as Security Inspector and would derive benefit as qas (sic) given to the Sh. Rajinder Kumar who has passed physical test and was appointed during the period of one year from the date of commencing of penal.

13. In my view, the award of the tribunal cannot be construed to mean that the persons mentioned in the panel were to be appointed as well as regular basis. The physical standard and physical test. The deft. had absolutely no jurisdiction either to appear on regular post or regularized defts. 2 to 11 if they do not fulfill the requirement laid down in R&P regulations. Admittedly, they do not pass the physical standard/physical test prescribed in R&P regulations and consequently their regularization/appointment on regular basis are illegal and without jurisdiction.

14. Moreover, the employment notice dt. 16.9.76 was only for four posts. The deft. could have appointed only four persons in pursuance of this employment notice, irrespective of the fact that the panel contained more than 4 names. Regarding the remaining six vacancies the deft advertised separately for appointment on regular basis and these six posts could have been fill only out of the persons mentioned in the panel dt. 18.7.78 prepared in response to the advertisement dt. 2.9.77.

15. Even, if I presume auspite (sic) of my view to the contrary that the award of the tribunal provides for regularization/appointment on regular basis. Award at they were not party to the same. As a matter of fact, one person namely Sat Pal, whose services were terminated like that of plaintiff, had already get an award in his favour whereby his termination has been held illegal and he has been orders to be reinstated with full back wages. One more reason why the appointment itself of defts. 2 to 11 as illegal is that the panel was valid only for one year. It has been specifically asntised (sic) so in the panel. But, the appointment of defts.2 to 11 has been made after expiry of one years from the date of issues of panel. The deft. could not have even appointed defts. 2 to 11 after expiry of one year from the date of issue of panel and their appointment is perverse illegal and without jurisdiction.

16. The plaintiff applied for appointment on regular basis and not on adhoc basis. The advertisement dt. 7.9.77 was for appointment on regular basis in accordance with the R&P regulations. The second panel was prepared accordingly. The deft. was under an obligation to appoint the plaintiff on regular basis as he was selected after interview for appointment on regular basis. The act of the deft. in issuing appointment letter at the plaintiff on adhoc basis was illegal and it was under an obligation to appoint him on regular basis. More acceptance of after of appointment on ad-hoc basis at the plaintiff could not preclude him from contending that he ought to have been appointed an regular basis. Being at the receiving and, he had no option but to accept the appointment as offered to him by the deft. He does not issue his legal right to get appointment an regular basis, if he is able to show that he was entitled to it as a matter of right. As the deft. was pound to appoint the plaintiff on regular basis, the termination of the service of the plaintiff is absolutely illegal and without jurisdiction, and the plaintiff is untitled to be reinstated as regular Security Inspector w.e.f. the date on which he was appointed

on ad-hoc basis. He is also entitled to fall wages and other benefits as a regular Security Inspector, w.e.f. the date on which he was appointed on ad-hoc basis. The issue are decided against the deft. and in favour fo the plaintiff.

8. A reading of the first judgment of the Industrial Tribunal dated 4.3.1980, the second judgment of the Labour Court dated 21.1.1987 and the third judgment of the civil court dated 1.9.1987 shows that there are quite clearly contradictions and conflicting findings in the said judgments. Different courts have ruled differently with respect to the same issue and in different manners. Whereas the Industrial Tribunal as per its judgment dated 4.3.1980 ruled that 1977 panelists stand regularly appointed because the requirement of physical test was a formality, the judgment of the Labour Court and the Civil Court have however contrarily held that the 1977 panelists could not have been regularly appointed against their posts because not only the recruitment rules were not finalized, but also because the 1977 panelists had failed in the physical tests, taken with the fact that actually there was only one regular post as per the 1976 advertisement as per which the panel dated 12.1.1977 was drawn up. There would have been consequentially considerable difficulty for this Court to reconcile the three separate judgments i.e of the Industrial Tribunal, Labour Court and Civil Court, however, as I stated at the beginning of this judgment that the issue in the present case of seniority of the petitioner nos.1 and 2 as against the respondent no.2 will be decided in terms of principle of res judicata.

9. The judgment of the civil court dated 1.9.1987 shows that the respondent no.2 herein namely Mr. Arvinder Singh Bedi was defendant no.5 in the civil suit. Being a defendant in the civil suit, the judgment of the civil court dated 1.9.1987 will be res judicata against the respondent no.5 therein and who is the respondent no.2 herein. The principle of res judicata will apply with respect to all the issues which are decided by the civil court in its judgment dated 1.9.1987. One issue decided in the said judgment was with regard to the validity and seniority of the appointment of the respondent no.2. I have already reproduced paras 9 to 16 of the judgment of the civil court above, and these paras show that appointments of 1977 panelists including the respondent no.2 has been held to be bad as compared to the appointment of the petitioner no.1 in the present case and who was the plaintiff in

the civil suit. The civil court while deciding the issues has categorically held that appointments of 1977 panelists including the respondent no.2 was illegal because these 1977 panelists had failed to clear the physical test which was mandatory as per R & P Rules subsequently framed- the appointments of the 1977 panelists being subject to finalization of the R & P Rules. The Civil Court also held that appointments of all 1977 panelists, except one was bad because advertisement in 1976 for the panel created in 1977 was only for one regular post and therefore others in 1977 panelists could not have been appointed. The civil court also has held that appointment of persons after one year of the creation of the panel was illegal because appointments of various 1977 panelists including the respondent no.2 herein were after the period of one year of the panel.

10. The effect of the above is that in a judgment of a civil court, to which both the petitioner no.1 and respondent no.2 were parties, there is a finding of illegality of appointment of respondent no.2 and validity of appointment of petitioner no.1 herein, and which judgment also ruled effectively on the seniority of the petitioner no.1 as compared to the respondent no.2 herein thereby giving the petitioner no.1 seniority to respondent no.2. The petitioner no.2 being put in merit above the respondent no.2 in the list dated 12.1.1977 will also get the same benefit of seniority which the petitioner no.1 got against respondent no.2 and will be senior to the respondent no.2 11. The seniority issue will flow because the respondent no.2s appointment was held to be illegal because the respondent no.2 had failed to comply with the requirements of R & P Rules as regards the physical test , and which is in addition to the fact of lapsing of the 1977 panel when the respondent no.2 finally was appointed by the respondent no.1 The judgment of the civil court dated 1.9.1987 therefore operates as an issue estoppel and an issue res judicata against the respondent no.2 herein. Admittedly, the respondent no.2 herein and who was defendant no.5 in the civil court did not challenge the judgment dated 1.9.1987 and which therefore becomes binding between the parties. As I have already stated above, three separate judgments giving three separate views with respect to legality or illegality of the appointments of the petitioners and the respondent no.2 would have indeed been difficult for this Court to reconcile because each of the judgments had become final. Saving grace obviously was the principle of res judicata and only on which basis I am deciding the present case.

12. In view of the above, the writ petition is allowed by holding that petitioners will be given seniority over the respondent no.2. The appointment of the respondent no.2 even if taken as valid by the respondent no.1 because respondent no.1 chose to implement the judgment of the Industrial Tribunal dated 4.3.1980, however, the respondent no.2 will be placed in a seniority list immediately after the present petitioners and the present petitioners will therefore be senior in service to the respondent no.2. Petitioners will hence be entitled to all consequential benefits including promotion in accordance with rules, subject to the issue that the rules provide for automatic promotions. In case, rules did not provide for automatic promotion i.e promotion is by seniority cum merit or merit cum seniority, then respondent no.1 will be entitled in accordance with law to only give such promotions to the petitioners which were permissible as per the service rules. As already stated above with reference to respondent no.1 in the direction given would include wherever the context so requires to the original respondent no.1 or DVB and the present by successor-in-interest namely BSES Rajdhani Power Limited. I may further clarify that by this present judgment I am only giving seniority to the petitioners as against the respondent no.2, however, what would be the final effect of seniority to be given to the petitioner including as to whether or not they are entitled to all the consequential monetary benefits, will be the subject matter of appropriate independent proceedings once the respondent no.1 takes decision as to entitlement of the petitioners to benefits by giving the petitioners seniority as against the respondent no.2. The issue of monetary benefits which would be available to the petitioners on the seniority being given to them qua respondent no.2 will be decided by the respondent no.1 in accordance with law.In case the respondent no.1 has to pay monies to the petitioners pursuant to this judgment, and which the respondent no. 1 may have paid to the respondent no.2 herein, the respondent no.1 will be at liberty in accordance with law to recover such amounts from the respondent no.2 who has not chosen to contest these proceedings by addressing arguments.

13. The writ petition is accordingly allowed and disposed of subject to aforesaid observations. Parties are left to bear their own costs. MAY 07.2013 ib WPC 4288/1995

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