

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Writ Petition (Civil) No.423-424/2006**

% **Date of Decision: 05.10.2009**

UOI & Anr. Petitioners
Through Mr. J.P. Sharma, Advocate

Versus

S.K. Thakral Respondent
Through Nemo.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner seeks quashing of order/judgment dated 19.04.2005 passed in O.A. No.2130/2002 by the Central Administrative Tribunal directing the petitioners to consider afresh the case of respondent for notional promotion.

2. The respondent/applicant had filed an application being O.A. No.2130/2002 seeking a declaration that he was entitled to be promoted to the post of Additional Director General of Works, and to challenge his exclusion from the select panel on the basis of office

memorandum dated 25th January, 1990 as being illegal and arbitrary. The respondent had also prayed for his promotion to the post of Additional DGW with all consequential pensionary and other retiral benefits.

3. Brief facts to comprehend the controversies are that the respondent was a member of Indian Defense Service of Engineers and he was working as Chief Engineer since 1991. The next promotional post in the cadre was that of Addl. DGW. Two additional posts of Addl. DGW were sanctioned in the pay scale of Rs.22400-24500 on 31st March, 2000.

4. For the newly sanctioned posts for the year 1999-2000 and for one vacancy for the year 2000-2001, a Departmental Promotion Committee was constituted which was held on 20th April, 2000 which prepared a panel of 5 persons including the respondent for promotion to the post of Additional DGW. The panel recommended by the DPC was approved in May, 2000 by the Ministry of Defence. However, it was referred to the Appointment Committee of Cabinet for consideration. The Appointment Committee of Cabinet (referred to as ACC) approved the panel on 3rd August, 2000 which was published on 25th August, 2000. However, the name of the respondent was not included.

5. The respondent had retired w.e.f. 30th June, 2000 and on

enquiries made by the respondent, it was revealed that as per the policy decision of ACC, Chief Engineers having less than 3 months service were not considered for promotion to the post of Additional DGW.

6. Being aggrieved by his exclusion from consideration for promotion by the ACC, the respondent approached the Tribunal. The respondent contended that the action of the ACC was in clear violation of the DOP&T's Office Memorandum dated 12th October, 1998 which contemplated that the name of even those who had retired should be included in the panel for promotion and, if necessary for grant of notional promotion and consequential monetary benefits.

7. The petitioners had contested the petition contending, inter alia, that the recommendation of the DPC were advisory in nature and the post of Additional DGW was within the purview of ACC as it was a Group A officer post and the appointment could be made by the ACC under Article 73 of the Constitution of India in the name of the President of India. Regarding O.M. dated 12th October, 1998 it was contended that the same was not applicable as it applied when the DPC is not held due to administrative lapses for years even though the vacancies have arisen and the employees who had retired, therefore, could be considered for promotion.

8. After hearing the parties, the Administrative Tribunal held, after

considering various OMs, that the recruitment rules do not lay down any restriction on the promotion of Chief Engineers to the post of Additional DGW on the ground that they had less than three months service left before retirement. The Tribunal held that executive instructions could not have been issued in contravention of statutory rules, and therefore, when there was no limitation on the right of a candidate to be considered for promotion under the recruitment rules on the ground of the length of his remaining service, such a limitation could not be imposed by resort to executive instructions. In this respect, the Tribunal relied upon the decisions of the Supreme Court in AIR 1981 SC 411, S.L.Sachdev and Ors v. Union of India and Ors; Comptroller and Auditor General of India & Ors v. Mohan Lal Mehrotra and Ors, (1992) 1 SCC 20 and Chief Settlement Commissioner, Punjab v. Om Prakash, AIR 1969 SC 33. Reliance was also placed on a judgment of Calcutta Bench of the Tribunal in Sunil Bhattacharya vs. Union of India VII2002(2) AISTJ 294 where the OMs dated 11th April, 1989 and 25th January, 1990 were considered and were held to be illegal, arbitrary, unjust and unfair. The case relied on of the Administrative Tribunal of the Calcutta Bench also related to the same service where a Chief Engineer was not promoted, as he had less than three months service prior to his superannuation. The learned Tribunal also held that the OMs are executive instructions and the statutory provisions must prevail over the executive instructions. The Tribunal also noticed that good sense had prevailed over the Government and it

had of its own rescinded the OMs dated 11th April, 1989 and 25th January, 1990 on the basis of which the promotion was denied to the respondent.

9. The Tribunal also held that the delay in considering the panel proposed by DPC and approved by Defense Ministry, was on account of the acts on the part of the ACC which were not justifiable and, therefore, the policy of ACC for excluding the officer who had less than three months of residual service before the date of retirement from consideration was not legal and valid. The Tribunal also held that on the careful reading of OM dated 12th October, 1998, the case of the respondent cannot be advanced on the basis of the same as the said OM applied to a case where DPC could not be held within a year of the vacancy becoming available as a result of which while preparing year-wise panel, juniors were considered in place of seniors, who had retired. However, the Tribunal, taking note of the fact that the respondent was the senior most candidate recommended for appointment by promotion to the post of ADGW; that even on the date of creation of the vacancy he had 91 days of service, and; that at the fag end of his career the respondent should not have been deprived of his legitimate due promotion to the higher post, directed the petitioner to place the case of the respondent before the ACC for afresh consideration to examine whether he should be granted notional promotion from 30.06.2000 and his pay and allowances fixed as on 30.06.2000 (the date of his

superannuation) notionally, and he be granted pension and other pensionary benefits on the basis of this revised pay.

10. The learned counsel for the petitioner has relied on 1989 Supp (2) SCC 625 Union of India and Others vs. K.K. Vadera and Others and 1998 SCC (L&S) 1754 Baij Nath Sharma vs. Hon'ble Rajasthan High Court at Jodhpur and Another to contend that retrospective promotion from the date when the vacancy arose could not be granted.

11. We have heard the learned counsel for the petitioner in detail. It cannot be disputed that the two vacancies were created on 31st March, 2000 and DPC had recommended the panel including the name of the respondent on 20th April, 2000 which was also approved by the Ministry of Defense in May, 2000. The ACC did not consider the case of the respondent till 3rd August, 2000. Even when the case of the respondent was considered by the ACC on 3rd August, 2000, he was not empanelled on an erroneous premise that OMs dated 11th April, 1989 and 25th January, 1990 precluded the empanelment of those officers for promotion, who had less than three months of service left before superannuation. The said OMs, as noticed by the Tribunal, had already been struck down and rescinded by the Government vide OM dated 16.06.2003 issued by the DOP&T. The decision of ACC could, therefore, not have been sustained on this short ground, as his case was not considered for grant of even notional promotion on the basis of

erroneous and extraneous considerations viz. the said OMs dated 11.04.1989 and 25.01.1990.

12. The ACC may not have been guilty of delaying the consideration of the cases of promotion as the period for which the matter remained pending before it was about three months at the most.

13. No doubt, a possible view could be the one founded upon the decisions of the Supreme Court in K.K. Vadera (supra) and Brij Nath Sharma (supra). However, that in our view does not inhibit the ACC from considering the grant of notional promotion to the respondent from the date of his superannuation, so that he may get the benefits of higher pension and pensionary benefits, considering the fact that he was the senior most Chief Engineer and was recommended by the DPC and even granted approval by the Defence Ministry. Keeping in view the aforesaid aspects, the Tribunal has not granted promotion to the respondent from the date the vacancy had occurred, i.e., 31st March, 2000 or from any other date. Rather the Tribunal by its order dated 19th April, 2005 has directed the petitioners to consider afresh grant of notional promotion from 30th June, 2000 and to consider fixation of pay and allowances of the respondent from 30th June, 2000 notionally and to grant pension and other pensionary benefits on the basis of said dated.

14. Consequently, on the basis of the O.M dated 11th April, 1989 and 25th January, 1990 which were rescinded by the petitioners themselves, the promotion to the respondent could not be denied on the ground that on the creation of vacancies on 31st March, 2000, only three months were left in the service of the respondent. Considering the facts and circumstances, the direction given to the petitioners to reconsider the case of the respondent cannot be faulted. Obviously, the ACC is expected to take into account all the relevant facts and the law into account while examining the case of the respondent.

15. The decision of the Tribunal does not suffer from any patent illegality or such irregularity which will entail interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit and is liable to be dismissed.

16. For the foregoing reasons, therefore, there are no ground to interfere with the decision dated 19th April, 2005 of Central Administrative Tribunal, Principal Bench in O.A No.2130/2002 tilted Sh.S.K.Thakral v. Union of India. The writ petition is, therefore, dismissed and the petitioners are directed to complete the process of consideration of the case of the respondent within four months from the date of receipt of the copy of this order. Copies of the order be given dasti to the parties. All the pending application are disposed and

interim orders are vacated. Parties are, however, left to bear their own cost.

ANIL KUMAR, J.

October 05, 2009
'RS'

VIPIN SANGHI, J.