

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.07.2012

+ **W.P.(C) 3946/2012**

SANDAL SINGH

... Petitioner

versus

UNION OF INDIA & ANR

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr R.K. Saini, Mr S.C. Pandey, Mr Arvind Kumar

For the Respondent : Mr Sumeet Pushkarna

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner is aggrieved by the order dated 27.09.2010 passed in R.A. No. 16/2010 in O.A 783/2009 as well as by the order dated 22.03.2011 passed in O.A. 783/2009 by the Central Administrative Tribunal, Principal Bench, New Delhi.

2. Initially the petitioner's said Original Application had been allowed by the said Tribunal by an order dated 25.08.2009 wherein it was mentioned that the petitioner's case was squarely covered by the decision of Supreme Court in the case of **S.K. Thakur v. Union of India & Ors:** (Civil Appeal

No. 7347/1997 decided on 22.02.2001) as also by the decision of the Tribunal in O.A 1519/2008 in the case of **R.S. Gupta v. Govt. Of National Capital Territory of Delhi: (decided on 24.02.2009).**

3. It is now clear even as per the learned counsel for the petitioner that the decision of the Supreme Court in the case of **S.K. Thakur** (*supra*) is not at all applicable to the facts and circumstances of the present case. However, the learned counsel for the petitioner continues to urge that the present case would be covered by the decision of the Tribunal in the case of **R.S. Gupta** (*supra*) and, in fact, according to the learned counsel for the petitioner, the present case is on a far better footing than that of **R.S. Gupta** (*supra*).

4. Inasmuch as the respondent was aggrieved by the said order dated 25.08.2009, it filed a writ petition being W.P. (C) No. 13477/2009 before this court. However, that writ petition was withdrawn on 27.11.2009 with liberty to file a review application before the Tribunal.

5. Pursuant thereto, the respondent herein filed the said review application being R.A. No. 16/2010. That application was disposed of by the impugned order dated 27.09.2010 whereby the earlier order dated 25.08.2009 was re-called and the said original application being O.A. 783/2009 was restored to its original number and was directed to be heard

afresh for adjudicating the disputes involved therein.

6. Thereafter, the said original application was heard afresh and was disposed of, ultimately, by virtue of the order dated 22.03.2011 which is also impugned before us. This time, the Tribunal, after hearing the matter afresh, dismissed the petitioner's said original application and it is because of this that the petitioner is before us by way of this writ petition. The issue involved in the writ petition is as to whether the petitioner would be entitled to notional promotion, even though no person junior to him had been promoted prior to his superannuation?

7. According to Mr Saini, the learned counsel appearing on behalf of the petitioner, the promotions were to be considered for the year 2005-06 but the DPC thereof was convened only on 29.03.2006. Immediately thereafter, on 31.03.2006 the petitioner retired. It is subsequent thereto that DPC minutes were approved by the Chairman UPSC and on 13.04.2006 were sent to the Intelligence Bureau for onward transmission to the competent authority (President of India). The approval of the President of India came on 26.04.2006.

8. It is the case of the petitioner that since the DPC meeting was initially held on 29.03.2006, prior to the superannuation of the petitioner on

31.03.2006, the representation of the said DPC would relate back to 29.03.2006 and therefore he ought to be granted notional promotion, if not actual promotion.

9. It is a settled position of law that in a case of retired employee notional promotion can be granted to him only if an officer junior to him had been granted promotion prior to his superannuation. This aspect of the matter is clearly spelt out by the Supreme Court decision in the case of **Union of India v. K.K. Vadera** (1989) Supp (2) SCC 625 and **Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur & Anr**: 1998 SCC (L&S) 1754.

Both of these decisions were considered by us recently i.e. on 06.07.2012 in the case of **Union of India v. R.N. Malhotra**: (W.P. (C) 4908/2007 decided on 06.07.2012). We had also considered the purported meaning of the DOPT OM of 12.10.1988 which pertains to the procedure to be followed by the Departmental Promotion Committee with regard to retired employees. After considering the same we had noted as under:-

“9. A plain reading of the said OM clearly indicates that the question of how the retired employees are to be considered by the DPC was expressly dealt with in the said OM. This is clear from the first portion of the above extract that doubts had been expressed with regard to the consideration of employees who had since retired but

would also have been considered for promotion, if the DPC for the relevant year had been held in time. The OM specifically points out that the matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs) and further points out that there was no specific bar in the OM dated 10.04.1989 or any other related instructions of the DOPT for consideration of retired employees, while preparing year wise panels, who were within the zone of consideration in the relevant year. It was further pointed out that according to the legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year, but are not actually in service when the DPC was held, are not considered while preparing year wise zone of consideration/panel and, consequently the juniors are considered (in their place) who would not have been in the zone of consideration, if the DPC was held in time. In other words, what the OM specifies is that the persons who had retired but would have been considered by the DPC if the DPC had been convened in time had to be empanelled while considering the promotion of persons who are in service. According to the OM, if this was not done then the correct zone of consideration for the relevant year would not be identified properly. This is so because the persons who had retired would not be empanelled and in their place persons junior to them would be considered. That would not be a proper identification of the correct zone of consideration for the relevant year, inasmuch as those junior persons would not have been in the zone of consideration had the DPC been convened in time. It is for this reason that the OM specifically provides that names of the retired officials may also be included in the panel. It further clarifies that such retired officials would have no right for actual promotion. The purport and meaning of the OM is that persons who have retired and who ought to have been considered by the DPC for the

relevant year when they were in service would be empanelled for the purpose of consideration of promotion of the persons who are in service but, they (the retired officials) would not be eligible for actual promotion. The entire objective behind including the names of the retired officials is only for the purposes of empanelment and not for the purposes of grant of promotion.

10. Insofar as the plea of notional promotion is concerned, that is also settled, inasmuch as a retired officer would not be entitled to notional promotion unless and until an officer junior to such retired officer had been promoted prior to his superannuation. This is not the case here. Mr Sinha has made a categorical statement at the Bar that no officer junior to Shri R. N. Malhotra had been promoted prior to Mr Malhotra's superannuation. This view is supported by the decision in ***Baij Nath Sharma*** (*supra*) wherein the Supreme Court observed as under:-

“The appellant could certainly have a grievance, if any, if his juniors had been given promotion from a date prior to his superannuation.”

10. Mr Saini drew our attention to the decision of the Supreme Court in the case of **K. Madhavan and Another v. Union of India and Ors: 1987 (4) SCC 566** and particularly to the contents of paragraph 15 thereof which reads as under:-

“There can be no doubt that if the meeting of the DPC scheduled to be held is arbitrarily or mala fide cancelled without any reasonable justification therefore to the prejudice of an employee and he is not considered for

promotion to a higher post, the government in a suitable case can do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held, with retrospective effect so that he is not subjected to a lower position in the seniority list...”

11. Upon reading the said extract from the said Supreme Court decision which has been relied upon by the learned counsel for the petitioner, we find that it also refers to the fact that promotion can be granted to a person with retrospective effect so that he is not subjected to a lower position in the seniority list. This would obviously mean that he would be lower to his juniors. In other words his juniors would have been promoted prior to his superannuation. This is clearly not the case here. The promotion order, in the present case, was made on 27.04.2006, which was subsequent to the petitioner’s retirement on 31.03.2006. The learned counsel for the respondent drew our attention to the DOPT OM dated 10.04.1989, of which paragraphs 17.10 and 17.11 are relevant. The same are set out herein below:-

“17.10 The general principle is that promotion of officers included in the panel would be regular from the date of validity of the panel or the date of their actual promotion whichever is later.

17.11 In cases where the recommendations for

promotion are made by DPC presided over by a Member of the UPSC and such recommendations do not require to be approved by the Commission, the date of Commission's letter forwarding fair copies of the minutes duly signed by the Chairman of the DPC or the date of the actual promotion of the officers, whichever is later, should be reckoned as the date of regular promotion of the officer. In cases where the Commission's approval is also required the date of UPSC's letter communicating its approval is also required the date of UPSC's letter communicating its approval or the date of actual promotion of the officer whichever is later will be relevant date. In all other cases the date on which promotion will be effective will be the date on which the officer was actually promoted or the date of the meeting of the DPC whichever is later. Where the meeting of the DPC extends over more than one day the last date on which the DPC met shall be recorded as the date of meeting of the DPC."

It is apparent from a plain reading of the above extracted portion of the said OM dated 10.04.1989 that in cases where the UPSC approval is also required the date of the UPSC letter communicating its approval or the date of actual promotion of the officer "whichever is later" will be the relevant date. It further provides that in all other cases the date of promotion which will be effective will be the date on which the officer was actually promoted or the date of the meeting of the DPC whichever is later. In the present case the approval of the Chairman UPSC came on or about 13.04.2006, the

President's approval came on 26.04.2006 and the actual promotion order was issued on 27.04.2006. Thus, in any eventuality the petitioner having superannuated on 31.03.2006 cannot get the benefit of notional promotion. The only way in which the petitioner could have got notional promotion was if some officer junior to him had been promoted prior to the date of his superannuation i.e. on 31.03.2006. This has not happened here.

12. Consequently, we do not find any error in the Tribunal's decisions dated 27.09.2010 and 22.03.2011. The writ petition is dismissed. There shall be no orders as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JULY 09, 2012
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