

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.07.2012

+ **W.P.(C) 4908/2007**

UNION OF INDIA

... Petitioner

versus

R. N. MALHOTRA

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr R. V. Sinha with Mr A. S. Singh.

For the Respondent : Mr Ashok Bhalla.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition has been filed by the Union of India being aggrieved by the order dated 07.02.2007 passed in OA No.1466/2006 by the Central Administrative Tribunal, Principal Bench, New Delhi.

2. The issue before the Tribunal was whether the respondent (Shri R. N. Malhotra), who was a retiree and had not been considered for promotion during the period prior to his superannuation as the DPC was not convened in time, could be granted notional promotion pursuant to the DPC convened after his superannuation. The Tribunal disposed of the Original

Application by directing the Union of India to consider the grant of notional promotion for the purposes of pay fixation and retiral benefits to the said Shri R. N. Malhotra. The Tribunal also directed that the said Shri R. N. Malhotra would be entitled to consequential retiral benefits which shall be provided within a period of two months of the date of receipt of copy of the order dated 07.02.2007.

3. Mr Sinha appearing on behalf of the Union of India submitted that the direction given by the Tribunal by virtue of the impugned order dated 07.02.2007 is based on complete misreading of the DOPT OM dated 12.10.1998. He also submitted that the direction given by the Tribunal is contrary to the Supreme Court decision in the case of **Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur and Another: 1998 SCC (L&S) 1754**. Mr. Sinha submitted that the decision of the Supreme Court in the case of **Baij Nath Sharma** (*supra*) is an authority for the proposition that promotion cannot be granted prior to the convening of the DPC. Since the DPC in this case was convened after the superannuation of the respondent Shri R. N. Malhotra, he cannot be granted any promotion. He further submitted that even notional promotion cannot be granted to Shri R. N. Malhotra, inasmuch as, no officer junior to the said Shri R. N. Malhotra

had been promoted prior to his superannuation. Had that been the case, the respondent Shri R. N. Malhotra might have been eligible for notional promotion. But, as no officer junior to Shri R. N. Malhotra had been promoted prior to his superannuation, the question of even granting notional promotion does not arise.

4. Mr Sinha also submitted that the DOPT OM of 12.10.1998 has been completely misread by the Tribunal. Insofar as the said OM is concerned, Mr Sinha submitted that it only provides that if a DPC is convened after an officer has superannuated in respect of the year when the officer was not in service, then such officer is to be considered only for the purpose of empanelment so that the correct zone of consideration is identified. He submitted that this is the true meaning and purport of the said OM of 12.10.1998. He also submitted that the Tribunal misconstrued this OM to mean that although actual promotion may not be granted to a retired officer, he would be entitled to notional promotion.

5. On the basis of the aforesaid arguments, Mr Sinha submitted that the impugned order cannot be sustained in law and would have to be set aside.

6. The learned counsel appearing on behalf of the respondent submitted that the order passed by the Tribunal was virtually a consent order.

According to him, the case of the respondent Shri R. N. Malhotra had throughout been only for the grant of notional promotion. The Union of India was opposed to the idea of actual promotion but, did not, in fact, oppose the question of notional promotion which had been raised by the respondent before the Tribunal. It is on this basis that the Tribunal has passed the order dated 07.02.2007. It was, therefore, submitted by the learned counsel for the respondent that the Union of India cannot now take an entirely different stand and oppose even the notional promotion, which has been granted by the Tribunal.

7. The learned counsel for the respondent further submitted that the view taken by the Tribunal is also supported by the OM dated 12.10.1998. According to the learned counsel the said OM categorically provides that names of retired officials are also to be included in the panel when the DPC is convened. The only restriction that has been provided according to the learned counsel by the said OM is that such retired official would, however, have no right for actual promotion. The OM itself, according to the learned counsel, makes a distinction between actual promotion and notional promotion and while there is a bar to actual promotion no such bar has been set up insofar as notional promotion is concerned. Thus, according to the

learned counsel for the respondent, the Tribunal was right in directing that the respondent Shri R. N. Malhotra be granted notional promotion for the purposes of pensionary benefits etc.

8. We have considered the arguments advanced by the counsel for the parties and have also gone through the said OM of 12.10.1998 as also the decision of the Supreme Court in the case of *Baij Nath Sharma (supra)*. In the first instance, it would be appropriate to set out the relevant portion of the said OM of 12.10.1998 which is as under:-

“Procedure to be followed by the Departmental Promotion Committees in regard to retired employees.--

2. Doubts have been expressed in this regard as to the consideration of employees who have since retired but would also have been considered for promotion, if the DPC(s) for the relevant year(s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs). It may be pointed out in this regard that there is no specific bar in the aforesaid Office Memorandum, dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing yearwise panel(s), who were within the zone of consideration in the relevant year(s). According to legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered

while preparing yearwise zone of consideration/panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration, if the DPC(s) had been held in time. This is considered imperative to identify the correct zone of consideration for relevant year(s). Names of the retired officials may also be included in the panel(s). Such retired officials would, however, have no right for actual promotion. The DPC(s), may, if need be, prepare extended panel(s) following the principles prescribed in the Department of Personnel and Training, O.M. No.22011/8/87-Estt. (D), dated 9-4-1996. (Copy enclosed)

4. Ministries/Departments are requested to bring these instructions to the notice of all concerned including their Attached and Subordinate Offices.”

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 yearwise 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 yearwise 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.”

11. ***Baij Nath Sharma*** (*supra*) followed the earlier decision of the Supreme Court in the case of **Union of India v. K. K. Vadera : 1989 Supp (2) SCC 625** which categorically stated as under:-

“We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant.”

12. It was further observed in ***K.K. Vadera*** (*supra*) as under:-

“If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion.”

13. The clear view taken by the Supreme Court is that a promotion cannot be granted prior to the convening of the Departmental Promotion Committee which considered the question of promotion. The only rider is where a junior has been promoted prior to the superannuation of the retired employee.

14. In view of the foregoing, we are in agreement with the submission made by Mr Sinha that the order passed by the Tribunal on 07.02.2007 cannot be sustained in law. We also note that even if it is considered that

the order passed by the Tribunal was a consent order, there cannot be a concession against the law. Consequently, this writ petition is allowed and the impugned order is set aside. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JULY 06, 2012

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