

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

% *Judgment Reserved on: April 08, 2013*
Judgment Pronounced on: April 12, 2013

+ **W.P.(C) 8102/2012**
UOI & ANR. Petitioners
Represented by: Mr.R.V.Sinha, Mr.R.N.Singh and
Mr.A.S.Singh, Advocates.

versus

KL TANEJA AND ANR Respondents
Represented by: Mr.Mahabir Singh, Sr. Advocate
instructed by Mr.Sat Pal Singh and
Mr.Rakesh Dahiya, Advocates.

AND

+ **W.P.(C) 20/2013**
UOI & ANR. Petitioners
Represented by: Mr.R.V.Sinha, Mr.R.N.Singh and
Mr.A.S.Singh, Advocates.

versus

KL GOYAL & ORS. Respondents
Represented by: Mr.Mahabir Singh, Sr. Advocate
instructed by Mr.Sat Pal Singh and
Mr.Rakesh Dahiya, Advocates.

AND

+ **W.P.(C) 99/2013**
UOI & ANR. Petitioners
Represented by: Mr.R.V.Sinha, Mr.R.N.Singh and
Mr.A.S.Singh, Advocates.

versus

PK UDGATA & ORS. Respondents
Represented by: Mr.Mahabir Singh, Sr. Advocate
instructed by Mr.Sat Pal Singh and
Mr.Rakesh Dahiya, Advocates.

AND

+

W.P.(C) 104/2013

UOI & ANR.

..... Petitioners

Represented by: Mr.R.V.Sinha, Mr.R.N.Singh and
Mr.A.S.Singh, Advocates.

versus

SK AGGARWAL

..... Respondent

Represented by: Mr.Mahabir Singh, Sr. Advocate
instructed by Mr.Sat Pal Singh and
Mr.Rakesh Dahiya, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The respondents of the four captioned petitions were working in the office of the Provident Fund Commissioner as Group-A officers being appointed as direct recruits to the post of Assistant Provident Fund Commissioner, earning promotion to the post of Regional Provident Fund Commissioner Grade-II, all of them became eligible for promotion to the post of Regional Provident Fund Commissioner Grade-I. Being promoted as Regional Provident Fund Commissioner Grade-II in the year 1999 all acquired eligibility for being promoted as Regional Provident Fund Commissioner Grade-I in the year 2004 since the eligibility was 5 years service rendered in the feeder cadre. Persons senior to them and achieving the bench marks, respondents could not be promoted when the DPC met on May 27, 2005, and they have no grievance on said score.

2. In the years 2006-07, 2007-08 and 2008-09, 12, 6 and 25 vacancies respectively, existed in the post of Regional Provident Fund Commissioner Grade-I, but no DPC was held in the years 2006, 2007 and 2008. A DPC was held on May 21, 2009, which considered the names of the eligible candidates and recommended a year-wise panel. Regular promotions were made with effect from May 21, 2009. In the interregnum, the respondents and a few other persons were granted ad-hoc promotions with benefit of pay scale in the promotional post

3. The grievance of the respondents was that in the absence of a regular promotion from the date when the vacancy became due, to which they were ultimately promoted, their right to further promotion to the post of Additional Central Provident Fund Commissioner would be adversely affected because of the requirement of qualifying service in the feeder cadre i.e. the post of Regional Provident Fund Commissioner Grade-I, as also their seniority; and by which we understand that there are direct recruitments made to the post of Regional Provident Fund Commissioner Grade-I, for if not, we see no issue of seniority being adversely affected depending on how the seniority list is casted.

4. With reference to the decisions reported as 1987 (4) SCC 566 K.Madhavan vs.UOI, 1997 (9) SCC 287 UOI & Ors. vs. N.R.Banerjee & Ors. and 2004 (1) SCC 245 P.N.Premchandaran vs. State of Kerala & Ors. as also a decision of the Tribunal, view taken by the Tribunal is that the respondents would be entitled to notional promotions from the date vacancy against which they were promoted fell due for the reason the respondents before the Tribunal i.e. the Union of India and the Provident Fund Commissioner could not

furnish any justification for not holding DPCs on time. Though not expressly noted by the Tribunal, we may state that in the reply filed to the Original Applications, the petitioners simply said that due to unavoidable reasons and administrative reasons beyond the control of the petitioners, DPC could not meet. What were the facts on basis whereof said stand was taken were never pleaded.

5. We need to speak a word.

6. That I could not do something required to be done by me because of an unavoidable reason or a reason beyond my control, is a conclusion stated. What was the fact which constituted the unavoidable reason or a reason beyond my control has to be stated for somebody to accept a justification. The rules of pleadings guide us that if an inference from a fact is pleaded as a justification, the fact has to be pleaded and not the inference alone.

7. As we would proceed to note the law on the subject, we would find that to the normal rule of law that nobody can be promoted with a retrospective effect except the exception is that when there exist facts which necessitates so or there is a rule which permits so. Thus, the facts which necessitated the exception to be applied have to be specifically pleaded.

8. In the decision reported as 1987 (4) SCC 566 K.Madhavan & Anr. vs.UOI & Ors., the Supreme Court held that nobody can claim a right for appointment to a post as a matter of right. It was held that as a rule, retrospective appointment or promotion to a post should not be resorted to unless on a sound reasoning and foundation it becomes necessary to sparingly do so. With respect to scheduled DPCs, only if they were cancelled mala

fide, arbitrarily or without any reasonable justification to the prejudice of an employee, could the Government in such a case, to undo the injustice caused, grant promotion from a retrospective date.

9. In the decision reported as 1989 Supp (2) SCC 625 Union of India & Ors. vs. K.K.Vadera & Ors. the protagonists were the respondents, holding the post of Junior Scientific Officers (Group 'B' posts) in the Defence Research & Development Service. They had earned promotion to the said post as and when a post fell vacant. The promotion order stipulated that they would be promoted to the posts of Scientists 'B' with effect from October 16, 1985 or from the date they would actually assume charge of the post to which they were promoted. The respondents filed an application before the Central Administrative Tribunal, Allahabad, claiming that they should have been promoted to the post of Scientists 'B' with effect from July 1, 1984. The Tribunal rejected the prayer of the respondents that their promotions should have been made with effect from July 1, 1984 but directed that their promotions should be with effect from the date on which the promotional posts were created. The Supreme Court was deciding the Appeal against the view taken by the Tribunal. Allowing the Appeal the Supreme Court observed in para 5 as under:-

“5. 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 fall vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted.”

10. Relevant would it be to note that as per the decision there was no rule which was cited before the Court as per which promotion to the post had to be with retrospective effect i.e. from the date the post fell vacant. The observations of the Supreme Court that '*We do not know of any law*' would mean that service jurisprudence does not jurisprudentially recognize retrospective promotions. The decision would therefore mean that unless a specific rule exists evidencing to the contrary, promotions take effect from the date the person is actually promoted and not retrospectively.

11. In the decision reported as (1998) 7 SCC 44 Baij Nath Sharma vs. Hon'ble Rajasthan High Court At Jodhpur & Anr., relying upon the law declared in *K.K.Vadera's* case (supra), since no rule was shown which could justify a retrospective promotion, and no mala fides pleaded or proved in delaying promotions, the Supreme Court held that the appellant, a Member of the Rajasthan Judicial Service, could not be promoted from the date a vacancy accrued in the Rajasthan Higher Judicial Service against which vacancy he was ultimately promoted.

12. The same view was reiterated in the decisions reported as AIR 2004 SC 3460 Sanjay K.Sinha & Ors. vs. State of Bihar & Ors., 2006 (13) SCALE 246 State of Uttaranchal & Ors. Vs.Dinesh Kr.Sharma and 2008 (14) SCC 29 Nirmal Chandra Sinha vs. UOI & Ors. The last decision i.e. in *Nirmal Chandra Sinha's* case (supra) referred to certain observations made by the Supreme Court in the decision reported as 1997 (8) SCC 89 UOI vs. B.S.Aggarwal which tends to show to the contrary, as being made on the special

circumstances of that case and on humanitarian consideration (refer para 9 of the decision in *Nirmal Chandra's* case.)

13. In the decision reported as (2007) 1 SCC 683 *State of Uttaranchal & Anr. vs. Dinesh kumar Sharma* it was observed:-

“Respondent was working as a Subordinate Agriculture Services Group-I. Subsequently, he became eligible for promotion. A promotional post became vacant and thereafter, substantive appointment of Respondent to said post was made. Respondent claimed seniority and consequential benefit from date when promotional post became vacant. State Government rejected claim made by Respondent. On writ, Division Bench of High Court directed state to reconsider case of Respondent. Hence the appeal was filed which was allowed and it was held that under Rule 8 of Uttar Pradesh Government Servants Seniority Rules, 1991 a person appointed on promotion shall not get seniority of any earlier year but shall get seniority of year in which his/her appointment is made. Hence respondent was not entitled to seniority from date when promotional post became vacant as no retrospective effect could be given to order of appointment order under the Rules.”

14. The decision is in line with the reasoning that unless a rule to the contrary exists, promotions cannot be made or directed to be made retrospectively.

15. With reference to the decisions where benefit of promotion from a retrospective date was accorded, we find an unreported decision of the Supreme Court disposing of Civil Appeal No.1655/1997 titled *Union of India & Anr. vs. Santhanakrishnan & Ors.* The facts were that there was delay in holding the examination to fill up posts which had fallen vacant in the 33.33% quota known as Limited Departmental Competitive Examination under Rule 2(iii) of

the Relevant Rules. Whereas vacancies in the remaining 66.66% quota were being filled up in the year said vacancies arose, this was not done with respect to posts falling vacant in the 33.33% quota. The question involved was the computation of required minimum period of service among the class of promotees whose results were published in May 1985 whereas the actual promotions were effected in June 1985, for further promotion as Senior Assistant Engineer. The Tribunal gave due leavage for completing the process of examination and fixed the notional date of promotion as 12.9.1982. Supreme Court observed that view taken by the Tribunal was right keeping in view that by virtue of such notional date of promotion, the department was not put to any monetary loss and the promotees concerned were not entitled to any arrears of salary from that date, though for other purposes, including seniority it was ordered to be counted.

16. The decision is purely on facts and from the observations: *'After hearing the learned counsel appearing on either side, we are of the view that de-hors the niceties of the legal issues involved as also the interpretation of the relevant rules, substantial justice seems to have been rendered by attempting to resolve an unprecedented and one time problem which seems to have cropped up'* it is but apparent that the Supreme Court had in mind *'substantive justice'* and thus the decision can be traced to the power of the Supreme Court under Article 142 of the Constitution of India.

17. In the decision reported as AIR 2004 SC 255 P.N Premachandran vs. The State of Kerala & Ors., the private respondents before the Supreme Court could not be promoted on Regular Basis as Assistant Directors in time on account of

administrative lapses; however they were granted temporary promotions; DPC were not convened from the year 1964 to 1990 and hence the State of Kerala took a conscious decision that those who had been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and were subsequently found to be eligible by the Departmental Promotion Committee to be promoted at a later date, should be granted benefit of promotion with retrospective effect. In these circumstances noting a residual provision conferring power upon the State Government being Rule 39 of Kerala State & Subordinate Services Rules 1958, the Supreme Court upheld the grant of promotion to the private respondents with effect from a retrospective date.

18. The decision is in conformity with the consistent view taken by the Supreme Court that where an ad-hoc, temporary or stop-gap promotion which is not fortuitous is followed by regular promotion and on the date of ad-hoc, temporary or stop-gap promotion the person was eligible for regular promotion and there existed a vacancy in the quota applicable and it was followed by a regular promotion, for purposes of service benefits past service could be reckoned as a regular service if a Rule so permitted.

19. In the decision reported as 1995 (4) SCC 246 Vinod Kumar Sangal vs. UOI & Ors. due to reorganization of the cadre, DPC could not meet from the year 1979 to 1984. Bunching all the vacancies DPC was held in the year 1985, which was obviously wrong. The Supreme Court directed DPC to be convened with reference to vacancies accruing each year. It was directed that benefit

of retrospective promotion would be given. But we find no discussion on the legal issue whether as a matter of rule retrospective promotion can be effected, and it appears that the consequential directions found a mention and a place in the decision not as a result of a conscious view taken pursuant to a debate.

20. In a latest decision reported as 2010 (4) SCC 290 UOI & Anr. vs. Hemraj Singh Chauhan & Ors., the facts were that the respondents, Members of the State Civil Service, were expecting promotion to the Indian Administrative Service under the promotion quota requiring State Cadre review to be done well in time as per Rule 4(2) of the Indian Administrative Service (Cadre) Rules 1954 and the panel to last only for 60 days. There was an unexplainable delay causing severe prejudice to the respondents. Expressly invoking its power under Article 142 of the Constitution of India benefit of retrospective promotion was granted.

21. The cornucopia of case law above noted brings out the position :-

- (i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.
- (ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.
- (iii) Since mala fides taints any exercise of power or an act done, requiring the person wronged to be placed in the position the person would find himself but for the mala fide and tainted exercise of power or the act, promotion from a retrospective date can be granted if delay

in promotion is found attributable to a mala fide act i.e. deliberately delaying holding DPC, depriving eligible candidates the right to be promoted causing prejudice.

(iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.

22. The Tribunal has not kept afore-noted distinctions in mind and thus it has to be held that the impugned decision dated March 01, 2012 is required to be set aside, but before passing formal orders, we need to note something more.

23. The respondents have been functioning on *ad hoc* basis as Regional Provident Fund Commissioner Grade-I from the date vacancies fell due and have been receiving salary in the grade applicable. In other words all of them were promoted on *ad hoc* basis without a DPC being convened. It is not in dispute that the *ad hoc* promotion was with respect to vacancies available in the year in which they were promoted. It is a case of *ad hoc* promotion being followed by confirmation/regular promotion. There is no financial implication of the impugned decision which grants regular retrospective promotion for the reason the respondents, being promoted on *ad hoc* basis were being paid salary in the higher grade. They earned annual increments. The only effect of the impugned decision would be to affect their seniority, which obviously would be with respect to direct recruits for the reason within promotees, if everybody's promotion is delayed, it makes no difference for purposes of seniority. On the concept of further right to be promoted with reference to service in the grade, it all depends upon the language of the service rule. Whether it contemplates regular service in the

grade, post regular appointment/regular promotion? Or it envisages continuous service in the grade? The issue has to be decided in light of the service rules.

24. Making it clear that an inter se issue of seniority between direct recruits and promotees cannot be resolved by a judicial fora without impleading persons likely to be affected, and with reference to the service to be rendered for further promotion in the context of eligibility, issue has to be decided on the basis of the language of the applicable rule, we dispose of the writ petition setting aside the impugned order dated March 01, 2012 but clarify that this does not mean that we have held respondents not entitled to seniority from the date they were promoted on *ad hoc* basis nor have we held that for purposes of further promotion qualifying service would be determined from the date they were actually promoted. These issues, if at all they would become necessary for adjudication, can be raised by the respondents with appropriate pleadings and impleading such persons whose seniority would likely to be affected by a decision favourable to the respondents.

25. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

APRIL 12, 2013
skb/rk