

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

Judgment Reserved on November 07, 2013

Judgment Delivered on November 11, 2013

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W.P.(C) 7968/2012

P.P.VERMA

..... Petitioner

Represented by: Mr.Raj Kumar Sherawat,
Advocate

Versus

CHIEF SECRETARY AND ORS.

..... Respondents

Represented by: Ms.Zubeda Begum, Advocate
with Ms.Sana Ansari, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The petitioner in this petition has sought the following reliefs:

“Issue a writ in the nature of certiorari quashing the order dated 14.10.2011 & 18.01.2012 passed by Ms.Manjulika Gautam (Administrative Member) and Mr.M.L.Chauhan (Judicial Member) of Principal Bench of Central Administrative Tribunal, New Delhi and allow the O.A.No.383/2011 by upholding the judgment dated 14.10.2011 passed by Sh.George Pracken (judicial Member).

(b) Issue a writ of mandamus or any other appropriate writ or direction or order, quashing and setting aside the order dated 06.08.2010 passed by the respondents and direct the respondent to Promote the petitioner to the post of Assistant Director of Education (PE & NI) w.e.f. 01.12.2007 with all consequential benefits including arrears of pay.

DETAILS OF THE IMPUGNED ORDERS

2. Vide order dated October 14, 2011 the Member (Judicial) had allowed the Original Application No.383/2011 filed by the petitioner. The Member (Administrative) disagreed with the view of Member (Judicial) and penned her dissenting view whereby she dismissed Original Application No.383/2011 filed by the petitioner. This resulted in the Original Application No.383/2011 being referred to a third Member who vide his order dated January 18, 2012 was of the view that the petitioner is not entitled to the relief as sought by him in the original application.

FACTS

3. The petitioner worked as Supervisor (Physical Education) with effect from December 01, 1995 in the Directorate of Education, Government of NCT of Delhi.

4. On October 04, 2007 foreseeing an occurrence of vacancy in the grade of Assistant Director, due to the retirement of Mrs.Mohinder Kumar Saini on November 30, 2007 the petitioner made a representation for his consideration against the said vacancy. It is the stand of the respondents, though initially, that the vacancy created by the retirement of Mrs.Mohinder Kumar Saini the same has to be filled by a Scheduled Caste candidate.

5. The petitioner retired on attaining the age of superannuation on January 31, 2008. On April 20, 2010 and April 26, 2010 the petitioner made further representations to the authorities seeking his promotion as Assistant Director (PE and NI).

6. The representations were answered by the respondents vide their letter dated August 06, 2010 wherein they had stated that the said

vacancy has to be filled by a Scheduled Caste candidate. According to them the petitioner was not considered by the DPC held on December 10, 2009 and two general candidates were promoted. Pursuant thereto the petitioner made further representation on December 24, 2010 to the Lt.Governor. It appears that the whole matter was reviewed and it was found that the vacancy created because of retirement of Mrs.Mohinder Kumar Saini was actually to be filled by a general candidate.

7. The petitioner being aggrieved by his non promotion filed Original Application No.383/2011 inter alia seeking that he be promoted to the post of Assistant Director (PE and NI) w.e.f. December 01, 2007 i.e. the date when the vacancy became available with all consequential benefits including arrears of pay.

8. Vide order dated October 14, 2011 the Member (Judicial) was of the view that the Original Application need to be allowed. He did so and gave a direction that the petitioner be promoted as Assistant Director (PE and NI) from the due date with all consequential benefits irrespective of the fact that he had retired from the service on January 31, 2008 if necessary by creating a supernumerary post.

9. The Member (Administrative) did not agree with the view of the Member (Judicial) and penned her own view on the same date October 14, 2011 by holding as under:-

"I have perused the order written by Hon'ble Mr. George Paracken, Member (J) in OA 383/2011. Para 11 of the order which is operative part, proposes retrospective promotion for the applicant, creation of supernumerary post if necessary and grant of arrears of salary and pensionary benefits. I find myself unable to agree to this proposition. According to my understanding, the case of review DPC and review promotion is made out only when due to default on the

part of the respondents, persons junior to the applicant get promoted and even then, only the notional promotion is granted so that pensionary benefits are suitably modified. In the present OA, the applicant retired from service on 31.08.2000 and no person junior to him was promoted prior to that date. It is also not necessary to create a supernumerary post as the applicant has already retired and is no longer eligible for promotion. In the present case, it is admitted by the respondents that they made a mistake in holding that the 6th point in the roster was for SC candidate whereas it should have been for a general candidate but no DPCs were held prior to the retirement of the applicant and two persons who are junior to the applicant, have been promoted by holding DPC in the year 2009. Thus no claim is made out for either review DPC or of notional promotion in favour of the applicant. Similarly, the question of paying any arrears to the applicant does not arise.”

10. In view of the divergent views of Member (Judicial) and Member (Administrative) the matter was referred to a third Member.

11. The third member vide his order dated January 18, 2012 had agreed with the view taken by the Member (Administrative) and dismissed the Original Application on merit as well as on the ground of limitation.

12. Mr.Raj Kumar Sherawat, learned counsel appearing for the petitioner would submit that in terms of instructions issued by the Government of India the respondents were required to convene a DPC much in advance to prepare a panel for a vacancy that may accrue in the next one year. He would submit that the petitioner had represented to the authorities much before the vacancy became available calling upon them to consider his case for promotion. Unfortunately the stand taken by the respondents initially that the vacancy has to be filled by a

Scheduled Caste candidate was not correct as the vacancy was in fact filled by a general candidate. According to him for the fault of the respondents the petitioner must not suffer. He relies on the judgment of this Court in the case of Union of India & Ors. v. G.D.Goel WP(C) No.4657/2005 decided on March 14, 2008 (and other connected matters).

13. Mr.Raj Kumar Sherawal has drawn our attention to para 13 of the order in G.D.Goel's case (supra) to submit that this Court has deduced the principle on the basis the judgment of the Supreme Court which make it clear that if a promotion is denied to an employee because of the mistake of the administration and due to no fault of the employee then the authorities are bound to pay the arrears of salary upon giving him the benefit of retrospective promotion after realising their mistake.

14. The response of the respondents is that their initial understanding in so far as the vacancy which became available on retirement of Mrs.Mohinder Kumar Saini was that the same has to be filled by a Scheduled Caste candidate. Later, on a review it was found that understanding of theirs is not correct. The vacancy in question was to be filled by a general candidate. The DPC was convened on December 10, 2009. Since the petitioner stood retired on January 31, 2008, his candidature was not considered.

15. The issue which falls for our consideration is whether the petitioner is entitled for consideration and promotion to the post of Assistant Director, which became available on December 01, 2007, even after his retirement on January 31, 2008.

16. We are conscious of the fact that instructions have been issued by the DOP&T, Government of India dated September 08, 1998 and

September 14, 2007 to the extent that a panel for promotion must be prepared in advance against anticipated vacancies. As and when vacancy arises the promotion to that vacancy is made from the panel. At the same time the O.M. dated October 12, 1998 issued by DOP&T, Government of India, also stipulates procedure to be followed by DPC in regard to retired employees. In terms of the said instructions, which have been reproduced by the Tribunal, it is revealed that a retired employee is not entitled to any actual promotion after his retirement. In terms of the said instructions the names of the retired employees are included in the zone of consideration so as to determine the correct zone of consideration for relevant years except that their names are not included in the panel nor they are promoted.

17. Suffice it to say that this issue is no more res integra. This Court also on various occasions dealt with the issue in the following cases: WP(C)No.8102/2012 Union of India & Anr. v. K.L.Taneja & Anr. decided on April 13, 2013; W.P(C)No.4908/2007 Union of India v. R.N.Malhotra decided on July 06, 2012; 2007 (1) ILR Delhi 378 Union of India v. Rajender Roy; 2010 166 DLT 706 Ramakrishna Sharma v. Union of India.

16. In Rajender Roy's case (supra) this Court has held as under:-

“Reliance placed by the Tribunal on OM No. 22011/4/08/Estt. (DS) dated 12.10.1998 issued by the DOP & T also appears to be misplaced. The Tribunal has read words into the language used in the said office memorandum which presumably was issued after the judgment of the Supreme Court in the case of Baijnath Sharma (supra). The relevant extract of the said office memorandum reads as follows: “according to the legal opinion 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 also considered while preparing year wise, zone of consideration/panel, and consequently, their juniors to consider (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)". This part of the office memorandum is in consonance with the judgment of the Supreme Court in Baijnath Sharma (supra) since it provides that the superannuated employees should not be considered by the DPC, which is being held after their superannuation and in their place juniors, who are otherwise eligible should be brought into the zone of consideration.

20. However, we notice that, curiously, the next two sentences used in the same office memorandum go contrary to the earlier part. It goes on to say "names of the retired officials may also be included in the panel(s) such retired officials would, however, have no right for actual promotion".

21. While as per the earlier part the superannuated employees are not to be placed in the zone of consideration/panel, contradicting the said statement, the later part states that names of the retired officials may also be included in the panel. The use of the expression "actual promotion" in the following sentence gives the impression that the same has been used in contradistinction with "notional promotion". It appears that the Tribunal was influenced by the latter portion of the said OM and, therefore, construed it in favour of the respondent.

22. We feel that the Tribunal erred on this count as well. The thrust of the OM, which was issued soon after the decision of the Hon'ble Supreme Court in Baijnath Sharma (supra) is to clarify that the superannuated employees should not be considered for promotion where the DPC is being held after their superannuation. The later part of the OM, which is

contradictory to the dictum of the Hon'ble Supreme Court in Baijnath Sharma (supra) obviously cannot be given effect to. Pertinently even the said OM does not in clear terms say that the retired/superannuated employees, if considered and recommended by the DPC would be granted notional promotion from a back date. However, the Tribunal has read this aspect into the OM which, in any event, it could not have done.

23. In view of the aforesaid, we find that the decision of the Tribunal is erroneous and the directions given therein are contrary to the judgments of the Hon'ble Supreme Court in K.K. Vadera (supra) as well as Baijnath Sharma (supra)."

18. In Ramakrishna Sharma's this Court relying upon Rajender Roy's case (supra) has held as under:-

"It may be observed here that a Division Bench of this Court in the case of UOI v. Rajendra Roy (Supra) considered as to whether in that case the respondent who had superannuated before the consideration of his case for promotion by the DPC, could be granted promotion on a notional basis, by requiring his case to be considered by the DPC, as and when it is held, and in the event of his being empanelled by the DPC, from the date the vacancy against which he could be promoted becomes available. The Tribunal answered this question in favour of the petitioner. Union of India came before this Court when it was held that the decision of the Tribunal was erroneous & was contrary to the judgment of the Supreme Court in UOI and Ors. v. K.K. Vadhera 1989 Supp. (2) SCC 625 as well as in the case of Baijnath Sharma v. Hon'ble Rajasthan High Court at Jodhpur and Anr. 1988 SCC (L&S) 1754 discussed in that order".

19. In K.L.Taneja's case (supra) this Court has held as under:-

“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”.

20. Even in R.N.Malhotra’s case (supra) this Court referring to the judgments of the Supreme Court in 1989 Supp.(2) SCC 625 Union of India v. K.K.Vadera and 1998 SCC (L&S) 1754 Baijnath Sharma v.Hon’ble Rajasthan High Court at Jodhpur & Anr., which were referred to by this Court in Rajender Roy’s case (supra) has held as under:-

“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.”

21. Even this Court in its recent decision dated October 28, 2013 in W.P.(C)No.1581/2012 *G.G.Tandon v. MCD & Ors.* upheld the order of the Central Administrative Tribunal dated November 28, 2011 in Original Application No.1640/2011 wherein the Tribunal rejected the prayer of Mr.G.G.Tandon who sought promotion from a date prior to May 14, 2008 when he took voluntary retirement.

22. We find that the issue for our consideration being well-settled the petitioner would not be entitled to any relief.

23. We note that the third Member of the Tribunal had formulated three questions for his consideration. All the three questions he had

answered in the negative. Even though we may not in agreement on certain reasoning given by the Member (Judicial) in his order dated January 18, 2012, keeping in view the position of law as it exists in terms of the judgments noted above we are in agreement with the ultimate conclusion of the Tribunal that the petitioner would not be entitled to the relief as he has prayed for. We dismiss the writ petition. There would be no orders as to costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

NOVEMBER 11, 2013
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