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

+ **W.P.(C) No.385/2014 & CM Nos.765, 766 & 767/2014**

Date of Decision: 23rd January, 2014

NATIONAL TECHNICAL RESEARCH

ORGANIZATION

..... Petitioner

Through Mr.Ruchir Mishra, Adv.

versus

P. KULSHRESTHA & ORS.

..... Respondents

Through Mr.M.K. Bhardwaj, Adv.

AND

+ **W.P.(C) No.407/2014 & CM Nos.801, 802 & 803 /2014**

NATIONAL TECHNICAL RESEARCH

ORGANIZATION

..... Petitioner

Through Mr.Ruchir Mishra, Adv.

versus

MS MAHUA BANERJEE

..... Respondent

Through Mr.M.K. Bhardwaj, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J (Oral)

CM Nos.766-767/2014 in WP (C) Nos.385/2014 & CM Nos.802-803/2014 in WP (C) No.407/2014

1. Allowed, subject to just exceptions.

W.P.(C) No.385/2014 & CM No.765/2014
WP (C) No.407/2014 & CM No.801/2014

2. The respondents in this case are scientists who are working with the National Technical Research Organization as Scientists and claiming that they were beneficiaries of the Flexible Complementing Scheme ('FCS' hereafter) issued by the Government of India vide OM No.2/41/97-PIC dated 9th November, 1998. The applicants filed an original application being OA Nos.2142 of 2011 and 578 of 2012 before the Central Administrative Tribunal (Principal Bench) seeking a direction against the respondents for promotions from the date of completion of eligible service in the promotional post wherein they were given in situ promotion at subsequent dates. The petitioners placed reliance on a judgment of this court dated 5th October, 2010 titled as ***S.K. Murti Vs. Union of India*** which was carried in appeal by way of Special Leave to Appeal (Civil) (CC No.6864 of 2011) entitled ***Union of India & Ors. Vs.Dr.S.K. Murti & Anr. Union of India & Ors*** dismissed by the Supreme Court by a judgment dated 2nd May, 2011. It is undisputed that the judgment of this court in WP (C) No.14263 of 2004 and the Supreme Court decision dated 2nd May, 2011 arose out of a consideration of the benefits under the Flexible Complementing Scheme which was relied upon by the present respondents before the Central Administrative Tribunal.

3. As per this scheme, the process to award promotion to the next higher grade is required to be completed prior to completion of three years and four years in the scales of pay of Rs.15600-39100 + Grade Pay Rs.5400/- and Rs.15600-39100 + Grade Pay Rs.7600/-. The scheme further postulates that assessment by a duly constituted Assessment Board under the Chairmanship of the concerned department by the Government of India based on the minimum residency period linked to the performance for in situ promotion to the higher grade of Scientists. Thereafter, the Assessment Board would make recommendations to the competent authority for award of promotion to the grade of Scientists “B” to “C” in the scale of Rs.15,600-39,100 + Grade Pay Rs.5400/-, Scientist “C” to “D” in the scale of Rs.15600-39100 + Grade Pay Rs.7600/- and Scientist “D” to “E” in the scale of Rs.37400-67000 + Grade Pay Rs.8700/- from the date of completion of residency periods. The provisions exist for the effective date of promotion to the next higher grade either w.e.f. 1st January or 1st July of every calendar year based on recommendation of the Assessment Board.

4. In the instant case, the respondents contended that they became due for promotion on 1st July, 2009 and in some cases on 1st January, 2009. They were, however, denied consideration and promotion till the respondents passed an order on 29th October, 2010 whereby they were actually granted promotions.

5. The respondents made a grievance before the Tribunal that the petitioner had even failed to fulfil the Annual Confidential Reports of the Scientists within the stipulated period which were required to be completed 90 days prior to the ending of 31st December of the respective year.

6. In addition, no steps whatsoever have been taken to constitute the Assessment Board. We are today informed on behalf of the respondents that the petitioner has not constituted any Board since 2010 after the passing of the order dated 29th October, 2010.

7. A material fact which requires to be noted herein is that it is an admitted position that the petitioner has only effected in situ promotions to the respondents. Nothing has been placed before us which would show that there is any distinction in the work which was being discharged by the respondents prior to their promotion or thereafter. It appears that the only variation is in the financial benefit which would accrue to the respondents after their promotions.

8. It is noteworthy that a similar claim made by ***Dr.S.K. Murti & Ors.*** by way of OA No.826 of 2003 culminated in a judgment dated 3rd December, 2003, which was rejected. The Tribunal had held that those applicants were entitled only to notional promotions from the date of being declared successful by the Departmental Review Committee/Screening Committee. This was assailed by way of WP (C)

No.14263 of 2004.

9. It appears that just as in the present cases, both sides relied on the FCS Scheme set out in the Office Memorandum dated 17th July, 2002, the relevant extracts whereof reads as follows:-

“The recommendations made by the Fifth Central Pay Commission for modifying the Flexible Complementing Scheme (FCS) in operation in scientific and technological departments for in situ promotion of scientific technical personnel with a view to removing the shortcomings/inadequacies in the scheme had been examined some time back and this Department in O.M. No.2/41/97-PIC dated 9.11.1998 had issued detailed guidelines modifying the then existing FCS. From a number of references received in this Department, it appears that an element of confusion exists in some scientific departments on the date from which in situ promotions under FCS are to be given effect. Promotions are made effective from a prospective date after the competent authority has approved the same. This is the general principle followed in promotions and this principle is applicable in the case of in situ promotions under FCS as well.

2. As a matter of fact, no occasion requiring application of promotion with retrospective effect should arise in FCS cases, as it is provided in the rules for scientific posts that the Assessment Boards shall meet at least once a year to consider cases of in situ promotions. Rules notified for scientific posts also contain a provision for review of promotion by the Selection Committee/Assessment Board twice a year before 1st January and 1st July of every year and the Selection Committee/Assessment Board is required to make its recommendation on promotions keeping in view these crucial dates of 1st January and 1st July. The competent authority, which has to take a final view based on these recommendations, shall ensure that no promotion is granted with retrospective effect.”

10. WP (C) No.14263 of 2004 was favourably decided in favour of Dr.S.K. Murthy & Ors. by the judgment dated 5th October, 2003. It was held by this court that the Office Memorandum dated 17th July, 2002 mandates that the authorities are required to take effective steps whether in advance keeping in view the crucial dates of 1st January & 1st July wherefrom the in situ promotions under the flexible complementing scheme have to be effected. The operative part of the High Court judgment reads thus:-

“5. Suffice would it be to state that the memorandum requires Flexible Complementing Scheme in situ promotions to be effected each year and for which the circular mandates that the assessments should be made well in advance keeping in view the crucial dates being 1st January and 1st July with effect wherefrom the Flexible Complementing Scheme in suit promotions have to be effected.

6. The last sentence of para 20 is relied upon by the respondents to urge that the office memorandum clearly states that no promotion should be granted with retrospective effect. To this the answer by the petitioner is that the preceding two sentences makes it very clear that the Assessment Boards have to be constituted well in advance keeping in view the fact that 1st January and 1st April of each year are crucial dates to effect promotions.

7. Now, nobody can take advantage of his own wrong. Nothing has been shown to us by the respondents to justify not constituting the Assessment Board/Selection Committee in time.

8. That apart, instant case of promotion is not one where promotion has to be effected upon a vacancy arising. Subject to being found suitable the petitioner was entitled

to be promoted in situ. The situation would be akin to granting a selection scale to a person and the date of eligibility would be the date wherefrom the benefit has to be accorded.

9. Under the circumstances we hold in favour of the petitioner and direct that the benefit granted to the petitioner be reckoned with effect from 1.1.1999 instead of 19.9.2000. Arrears would be paid within 12 weeks from today but without any interest.”

11. The challenge by the authorities to the decision of this court by way of Special Leave to Appeal (CC) No.6864/2011) ***Union of India & Anr. Vs. S.K. Murti***, was rejected by the Supreme Court by a judgment dated 2nd May, 2011 wherein the court held thus:-

“We have heard Smt. Indira Swahney, learned counsel for the petitioners and Mr. Jitendra Mohan Sharma, learned counsel for the petitioners and Mr. Jitendra Mohan Sharma, learned counsel for the respondent, who has entered on caveat and carefully perused the record.

The respondent, who was working as Scientist Grade-D in the Botanical Survey of India became eligible for promotion under FCS with effect from 1.1.1999. However, on account of delayed convening of the Departmental Review Committee/Selection Committee, his promotion was delayed and by an order dated 20.10.2000, he was promoted with effect from 19.9.2000.

The respondent and 10 other Scientists of Botanical Survey of India filed Original Application No. 826/203 for directing the petitioners to promote them with effect from the date of eligibility , i.e. 1.1.1999. The Tribunal dismissed the original application and held that in view of the clarification given in O.M. Dated 10.11.1998, the applicants were not entitled to promotion with retrospective effect. The review petition filed by the respondent was dismissed by the Tribunal vide order dated 14.1.2004. However, Write Petition (C) No.

14263/2004 filed by the respondent was allowed by the Division Bench of the High Court and the petitioners were directed to give him all the benefits on the basis of deemed promotion with effect from 1.1.1999.

In our view, reasons assigned by the High Court for directing the petitioners to promote the respondent with effect from the date of acquiring the eligibility are legally correct and the impugned order does not suffer from any legal error warranting interference under Article 136 of the Constitution.

It is not in dispute that vacancies existing when the Departmental Review Committee considered the case of the respondent and other similarly situated persons for promotion. It is also not in dispute that in terms of paragraph 51.25 of the Vth Pay Commission Recommendations, the Departmental Review Committee/Assessment Board was required to meet every six months, i.e. in January and July and the promotions were to be made effective from the date of eligibility. Therefore, it is not possible to find any flaw in the direction given by the High Court.

The special leave petition is accordingly dismissed.”

12. Before us, the petitioner has placed reliance on the very same Office Memorandum dated 17th July, 2002 which sets out the FCS Scheme.

13. We may note that so far as the present petitions are concerned, the formal order with regard to their promotions was passed by the petitioner on 29th October, 2010. The principles laid down by this court by its judgment dated 5th October, 2010 on the construction of the scheme dated 17th July, 2002 would squarely apply to the respondents. The challenge to the judgment was also rejected as back as on 2nd May, 2011.

14. Before us, Mr. Mishra, learned counsel for the petitioner has placed reliance on an Office Memorandum dated 21st September, 2012 which is really in the nature of a clarification of the earlier Office Memorandum dated 17th July, 2002. A reading of the same would show that the same only reiterates what is stipulated in the office memorandum of 2002 and emphasises the need for the petitioners to act with expedition and urgency so far as promotions of personnel is concerned. It is to be noted that this office memorandum is subsequent to the date from which the respondents are claiming rights. So far as the present consideration is concerned, we are bound by the pronouncement of the Supreme Court and the prior adjudication and construction of the manner in which the petitioner is required to discharge their duties. This has also been expounded in the judgment dated 5th October, 2010.

15. Our attention has been drawn to an order dated 17th November, 2008 which was annexed with the original application filed by the respondents before the Tribunal. By this order, the very relief which was claimed by the present respondents in its original applications stand granted to several other identically placed personnel of the petitioner organization. There is no explanation at all on the record for not granting the same benefit to the respondents as has been granted to other similarly placed persons by the petitioners.

16. Before us, it has been vehemently contended on behalf of the

petitioner that the directions made by the Tribunal in the impugned judgment dated 15th March, 2012 tantamounts to granting pay to the respondents for work which they have not done. We fail to see how the principle of 'no work no pay' at all applies to the instant case. It is an admitted position that the respondents have been granted 'in situ promotion' which would mean that they were discharging the very functions which they were required to discharge upon their promotion. From the very expression in situ, it is also apparent that there is no change in either the place or the position in which they are working. Therefore, it cannot be contended that the respondents are being paid any amount for work they have not discharged.

17. Learned counsel for the petitioner has also placed reliance on a pronouncement of the Supreme Court dated 21st September, 2006 in Civil Appeal No.4222 of 2006 ***Union of India & Anr. Vs. Tarsen Lal & Ors.*** In this case, the Supreme Court was considering directions under the Indian Railways Establishment Manual. The respondents had actually not performed duties and responsibilities of the higher posts. In these circumstances, it was held that no arrears on account of an administrative error in making his promotion could be granted. It is not so in the present case.

18. Learned counsel for the respondents has also pointed out that this very judgement was distinguished by the Supreme Court in a latter

pronouncement reported at **2007 (6) SCC 254 State of Kerala & Anr. Vs. E. Bhaskaran Pillai**. After consideration of several judgments (including the judgment in **Union of India Vs. Tarsem Lal (Supra)**), the Supreme Court has held thus:-

“We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenge the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle “no work no pay” cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also.”

19. It is also noteworthy that the impugned judgment was passed as back as on 15th March, 2013. The respondents have been constrained to move the Central Administrative Tribunal by prior proceedings under the Contempt of Courts Act against the petitioner. It is the filing of the

contempt petition which has motivated the instant writ petitions.

20. For all the foregoing reasons, we find no merit in these petitions and applications which are hereby dismissed with costs which are quantified at Rs.2,000/- per respondent. The costs shall be paid to the respondents within a period of four weeks from today.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

JANUARY 23, 2014

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