

\$~7

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

%

Judgment delivered on: 23.11.2022

+ W.P.(C) 3213/2019 & CM APPL. 44854/2021

NARESH C. DHAWAN AND ORS. Petitioners

versus

UNION OF INDIA AND ANR. Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. M.K. Bhardwaj, Mr. M.D. Jangir & Ms. Alisha Saini, Advocates.

For the Respondents : Mr. Vijay Joshi & Mr. Gurjas Singh Narula, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J. (ORAL)

1. Petitioners challenge order dated 30.10.2018 of the Central Administrative Tribunal (hereinafter referred to as 'the Tribunal') which had rejected their prayer seeking benefit of in-situ promotion in the scale of Rs. 37,400-67,000/- with Grade Pay of Rs. 10,000/- from the date of completion of three years of regular service at S-4 level of Scientist with consequential benefits.

2. Petitioners contend that respondents have wrongfully denied them the in-situ promotion from S-4 to S-5 Level Scientist in the Directorate

General of Health Services ('DGHS') on the ground that the petitioners had superannuated by the time the Departmental Assessment Board (hereinafter referred to as "DAB") was held. Petitioners rely upon the judgment of this Court titled "**Dr. Ashwani Kumar V. Union of India & Ors**", dated 13.03.2007, reported in MANU/DE/7397/2007.

3. Respondents on the other hand, submit that the cases of the petitioners for promotion to S-5 Level were considered by the Ministry for the year 2010 itself, by the DAB constituted by UPSC at its meeting held on 27.09.2011.

4. It is further submitted that the recommendation was made on the basis of the assessment which found them fit. However since the petitioners had superannuated by that time, they could not have been extended the benefit of such in-situ promotion. So far as, the case of "**Ashwani Kumar**" is concerned, upon which the counsel for the petitioner has relied, respondents submit that, that was not the case of Scientist conferred with the benefit of promotion with retrospective effect and therefore, the similarity between the two cases is not available for the petitioners to rely on.

5. We find that the in-situ promotion in respect of non-medical Scientists discharging their duties in the Directorate General of Health Services is covered by the Department of Health (Group-A, Gazetted, Non-medical Scientific and Technical Post) In-Situ-Promotion Rules, 1990. Ostensibly, these rules were framed in compliance with the directions of the Supreme Court in its judgment, titled "**O.Z. Hussain (Dr.) V. Union of India**", reported in 1990 Supp SCC 688.

6. Following the judgment of the Supreme Court in *O.Z. Hussain (Supra)*, the Union formulated the aforesaid rules and created five levels of Scientists with certain conditions for in-situ promotion, subject to clearance by the DAB. As per the rules, the DAB was to be constituted every year to consider various levels of Scientists to be conferred with in-situ promotions.

7. In the present case, the DAB was convened and held a meeting on 27.09.2011 whereby the present petitioners were found fit for being conferred with in-situ promotions. However, the orders of promotion were not be issued on the ground that the petitioners had retired from service much before the date on which the DAB met.

8. Mr. M.K. Bhardwaj, learned counsel for the petitioners referred to the judgment of the Hon'ble Supreme Court in *O.Z. Hussain (Supra)* to contend that the rules concerning in-situ promotion were formulated to ensure that there is no stagnation amongst the Scientists. He further submits that once the DAB found the petitioners fit for in-situ promotion, the prior superannuation of the petitioners would be irrelevant. He submits that petitioners ought to have been given in-situ promotion from the date when the DAB was to meet and as per Rules and found them fit for such in-situ promotions. The delayed holding of DAB would not deprive the petitioners from being conferred in-situ promotions retrospectively from the year in which DAB was to meet.

9. Mr. Vijay Joshi, learned counsel for the respondents submits that the in-situ promotion was a vacancy based promotion and once the petitioners had retired, such retrospective promotion could not have been

given against the eight sanctioned posts and he further submits that such promotion could have been effective only from the date of assumption of charge. He submits that the petitioners have never assumed charge as they had retired by that time.

10. Mr. Vijay Joshi, learned counsel for the respondents had relied upon order dated 12.05.2020 to buttress his argument that the in-situ promotions are vacancy based. The order dated 12.05.2020 is produced in Court. The same is taken on record. He further submits that the instructions contained in DoPT's OM No 22011/5/86-Estt.(D) dated 10.04.1989 provide that promotions will have only prospective effect even in cases where the vacancies relate to earlier year(s) and may be kept in view by the Ministry /Department while implementing the recommendations of the DPC. Thus, indicating that the in-situ promotions are vacancy based.

11. However, para no.3 of the said order dated 12.05.2020 makes it clear that in-situ promotion has no relation with the vacancy. Para-3 of the said order reads as follows:

“ 3. The promotion from Scientist 4 level to Scientist 5 level on In-Situ basis is personal to the officers and the upgraded level of the post will revert to the original level on vacation by the officer so promoted in accordance with Rule-9 as ready with Rule 3(1) of the In-Situ Promotion Rules, 1990.”

Para no. 3 stipulates that the promotion from Level 4 to level 5 is personal to the officer and the upgraded level of the post would revert to the original level on vacation by the officer which shows that the level of the post remains the same and is upgraded only to grant an in-situ upgradation to the officer. Therefore, the contention that in-situ promotions are vacancy based is fallacious and is countered by the

para-3 above.

12. Further, the aforesaid issue is no more *res integra*, since this court in the W.P.(C) no. 5317/18 titled “*Union of India & Anr. V. Dr. Anjum N. Rizvi*” vide judgment dated 24th August, 2022, by relying upon the judgment dated 05.10.2010 passed by this Court in “*S.K. Murti Vs. Union of India*” reported in 2010 SCC OnLine Del 4779, Special Leave to Appeal (Civil) 13133/2011 whereof was dismissed by Supreme Court by its order dated 02.05.2011 and also “*Union of India Vs. Vinay Kumar*” in Civil Appeal No. 6359/2016, dated 25.08.2021 held that in-situ promotions as per the rules have to be considered by the Assessment Board every year and subject to the Scientist being found fit, the promotions ought to be made effective from the date and year, when the Assessment Board was supposed to meet. Such promotions could not have been delayed due to any other circumstances, or approval from any other authority. It was further held that in case, there is any delay, it would not come in the way of retrospective in-situ promotion relating to the date or year in which the meeting of the Assessment Board was to be held. The DAB in the present case is equivalent to the Assessment Board in that case.

13. For greater clarity, the following paragraphs of *Union of India vs. Anjum N. Rizvi (supra)* are extracted hereunder :

11. In *Dr. S.K. Murti (supra)*, the respondents therein had relied on an Office Memorandum (‘OM’) dated 17.07.2002, which had specifically provided that promotions are made effective from a prospective date after the Competent Authority has approved the same and the said principle is also applicable in case of in situ promotion under FCS as well.

12. Reliance was placed by the Department in that case on an OM,

which specifically provided that no promotion should be granted with retrospective effect. The co-ordinate Bench in Dr. S.K. Murti (supra) noticed that the Assessment Boards had to be constituted well in advance, keeping in view the fact that 1st January and 1st July of each year are crucial dates to effect promotions.

13. *The view taken by the co-ordinate Bench in Dr. S.K. Murti (supra) was that nobody can take advantage of its own wrong and no justification was shown for not constituting the Assessment Boards/ Selection Committee in time. Further, the co-ordinate Bench has noticed that the said case of promotion was not the one where promotion has to be effected upon a vacancy arising and subject to being found suitable, the petitioner therein was entitled to be promoted in situ and 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 awarded.*

14. *The facts in the present case are identical to the said case inasmuch as, it is mandatory as per the Recruitment Rules to constitute an Assessment Board/ Committee on 1st July and 1st January respectively. The respondents herein are also not to be promoted upon a vacancy arising. Subject to being found suitable they are entitled to be promoted in situ, which is akin, as noticed in Dr. S.K. Murti (supra) to granting a selection scale. Consequently, the respondents would be entitled from the date they become eligible.*

15. *As noticed hereinabove, the decision of the co-ordinate Bench in Dr. S.K. Murti (supra) was assailed before the Supreme Court and the Supreme Court by its order dated 02.05.2011 rejected the petition holding that the view taken by the co-ordinate Bench of this Court in directing the Department to promote the officer with effect from the date of acquiring the eligibility, is a legally correct view.*

Similar facts arise in the present petition too.

14. Having regard thereto, we are of the considered opinion that in the present case too, the action of the respondents in refusing retrospective in-situ promotions on the basis that the petitioner had superannuated by that time is without any merits and contrary to the aforesaid decisions and particularly, in view of the fact, that the juniors have been conferred with the in-situ promotions effective from dates prior to superannuation of the petitioners. Consequently, the impugned order dated 13.10.2018 is

quashed and set aside.

15. Thus the respondents are directed to grant to the petitioners, in-situ promotions from S-4 to S-5 level in the scale of Rs. 37400-67000 with grade pay of Rs. 10000 from the date, the DAB was supposed to convene and hold meeting in accordance with rules and in view of the above conclusions. Consequential benefits of such promotions will also be effected by respondents within three months of this order

16. In view thereof, the writ petition is allowed with no order as to cost. The pending application is disposed of.

TUSHAR RAO GEDELA, J

SANJEEV SACHDEVA, J

NOVEMBER 23, 2022/bsr