

\$~12

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

+ **W.P. (C) 485/2009**

%

Date of Judgment: January 20, 2017

UNION OF INDIA & ANR.

..... Petitioners

Through : Mr. R.V. Sinha, Adv. with Mr. R.N.
Singh and Mr. A.S. Singh, Advs.

versus

SHRI H.N. SAINI & ANR.

..... Respondents

Through : Mr. Vivek Kr. Tandon, Adv. with Mr.
Manish Chauhan, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Rule DB was issued in this matter on 01.09.2010.
2. With the consent of the parties the writ petition is set down for final hearing and disposal.
3. The respondent no. 1 herein had approached the Central Administrative Tribunal (briefly the '*Tribunal*') by filing OA 97/2008, being aggrieved by denial of promotion to the post of 'Deputy Director (Administration.)'. The OA was allowed by the Tribunal by an order dated 20.08.2008, which has led to the filing of the present writ petition.
4. The necessary facts to be noticed are that the respondent no. 1 was at the relevant time was employed as a 'Steno-typist/Jr. Stenographer'

and was promoted to the post of 'Administrative Office' w.e.f. 06.04.1998. As per the relevant recruitment rules [Deputy Director (Administration) Field Operations Division, National Sample Survey Organisation Recruitment Rules, 1999] the next promotional post for Administrative Officers was that of Deputy Director (Admn.) subject to fulfilling the eligibility criteria of 8 years' regular service. At the point of time of promotion of the respondent no. 1, there were two sanctioned posts of Deputy Director (Admn.).

5. The first post of Deputy Director (Admn.) which fell vacant was on 01.10.2004, while the second post fell vacant on 05.03.2005. The proposal to fill up the vacancies was sent to the Union Public Service Commission ('UPSC')/ respondent no. 2 on 01.03.2005, which included the name of the respondent no. 1 herein. Consequently, on 28.08.2006, only one post of Deputy Director (Admn.) was filled up of one Sh. R.K. Kant; the respondent no. 1 was not promoted as he was not eligible at that time.
6. On 06.04.2006, the respondent no. 1 became eligible and, thereafter, repeatedly made representations to the petitioners for being promoted to the post of Deputy Director (Admn.) which had fallen vacant on 05.03.2005. Since no Departmental Promotional Committees ('DPCs') were held in the years 2006 and 2007, the respondent no. 1 could not be promoted. The respondent no. 1 finally superannuated on 31.03.2007.
7. Meanwhile, the Staff Inspection Unit ('SIU') carried out a study of the petitioners' office and submitted its report on 29.03.2004, *inter alia*, recommending the abolition of one post of Deputy Director (Admn.)

which the petitioners claim to have accepted/notified vide order dated 15.02.2006.

8. Since none of his representations of the respondent no. 1 were acceded to, the respondent no. 1 by a letter dated 14.09.2007 sought information under the Right to Information Act, 2005; which was provided by a Letter dated 16.11.2007 wherein he was informed that his requests were not acceded to owing to non-availability of any vacant post of Deputy Director (Admn.).
9. Aggrieved by that, the respondent no. 1 approached the Tribunal seeking the following reliefs:

“(i) That the Hon’ble Tribunal may graciously be pleased to pass an order declaring to the effect that the whole action of the respondents not considering and not promoting the applicant to the post of Deputy Director (Admn.) from due date along with other person is illegal, arbitrary, against the rules and consequently pass an order directing the respondents to consider the case of the applicant for his promotion to the post of Deputy Director (Admn) w.e.f. 28.8.2006 in with all the consequential benefits.

(ii) That the Hon’ble Tribunal may graciously be pleased to pass an order declaring to the effect that the whole action of the respondents not granting the pay and allowances to the post of Deputy Director(Admn) since 5.3.2005 till 31.3.2007 is illegal, arbitrary and consequently pass an order directing the respondents to grant the arrears of difference of pay and allowances to the applicant to the post of Deputy Director (Admn) w.e.f. 5.3.2005 till 31.3.2007 with all consequential benefits.”

10. The OA was allowed by the Tribunal by an order dated 20.08.2008, which has led to the filing of the present writ petition.

11. Mr. Sinha, learned counsel for the petitioners, submits that the Tribunal has failed to consider that the post of Deputy Director (Admn.) fell vacant on 01.10.2004 when the respondent no. 1 was not eligible as he had not completed 8 years' regular service as an Administrative Officer. The position remained unchanged even when the second post fell vacant on 05.03.2005. Mr. Sinha submits that the Tribunal lost track of the fact that the SIU carried out a work study of the petitioners' office and, even before the respondent no. 1 became eligible for promotion, submitted its report on 29.03.2004, *inter alia*, recommending for abolition of one post of Deputy Director (Admn.) which report was principally accepted as is evident upon reading of order dated 15.02.2006.
12. Learned counsel submits that only Mr. R.K. Kant was promoted to the post of Deputy Director (Admn.) on 28.08.2006 for the reason that the SIU had abolished one post and Mr. R.K. Kant being senior to the respondent no. 1 was eligible for promotion. Counsel contends that by the time the respondent no. 1 became eligible on 06.04.2006, the report of the SIU had been received and the order dated 15.02.2006 had been passed and acted upon.
13. It is also contended by Mr. Sinha that the Tribunal as well as learned counsel for the respondent no. 1 have erred in highlighting the contents of letter dated 23.11.2007 to show that infact the report was accepted only on 23.11.2007 and the earlier order dated 15.02.2006 stood superseded.
14. The second limb of argument of Mr. Sinha is that assuming that one post was lying vacant since it was not filled up, it is deemed to have

been abolished. The final submission of Mr. Sinha, learned counsel for the petitioners, is that the respondent no. 1 has neither pleaded nor argued that DPC was not held due to *mala fide* reasons. He submits that the law is well settled that if for cogent and valid reasons a DPC is not held, which in the present case would be for the reasons that the report of the SIU and the subsequent order dated 15.02.2006, no benefit can accrue to the employees, which fact was completely ignored by the Tribunal.

15. Per contra, Mr. Tandon, learned counsel appearing on behalf of the respondent no. 1, submits that the petitioners cannot take any benefit of the order dated 15.02.2006. He submits that a mere study by itself cannot be a reason enough not to hold a DPC and to deprive the respondent from promotion, even if, he had superannuated on 31.03.2007.
16. Mr. Tandon has drawn the attention of the Court to paragraph 3 of the letter dated 15th February, 2006 to buttress his argument that the letter was contingent, which reads as under:

“3. Field Operation Division and Admn.III are, therefore, requested to take necessary action to revise Staff Strength of Field Operation Division accordingly after completing all the procedural formalities as envisages in the existing instructions of SIU, Ministry of Finance and DOPT. It is also requested that orders issued in connection with abolition/creation of posts due to revision of staff strength of FOD may invariably be forwarded to IWSU of the Ministry and Staff Inspection Unit of Ministry of Finance.”

(Emphasis Supplied)

17. He further relies upon the subsequent order dated 23.11.2007 to show

that it would leave no room for doubt that the intent of the petitioners was to apply the report of the SIU post 23.11.2007. He submits that opening sentences of the order would show that the petitioners had decided upon consultation with the Department of Expenditure, Ministry of Finance to implement the SIU report in supersession of the order dated 15.02.2006. Mr. Tandon submits that the intent of the petitioners is clear from the order dated 23.11.2007 that the post was to be abolished only thereafter.

18. Learned Counsel has also handed over in court today a reply dated 01.03.2011 received by the respondent no. 1 under the RTI Act wherein it has been mentioned that the necessary funds to pay the salary for both the posts of Deputy Director (Admn.) were available till 23.11.2007, i.e. the date of abolition of the post. In another reply under RTI Act dated 09.02.2011, the department has specifically stated that the order of abolition was issued on 23.11.2007 only. The relevant portion of the reply dated 09.02.2011 reads as under:

“I am to invite a reference to your application dated 19.12.2010 (received in FOD on 13.01.2011) under RTI Act 2005, on the subject cited above. The point-wise required information as available in this Division is as under:

...

3. Prior to Study of manpower in FOD during 2004 two posts at the level of DD (A) existed in FOD. SIU in their final report recommended to abolish one post at the level of DD (A) but order of abolition of DD(A) post was issued by MOS&PI on 23.11.2007.”

(Emphasis Supplied)

19. Mr. Tandon also relies upon the OM No. F.1(57)-E(Coord)/80 dated 20.11.1980 issued by the Ministry of Finance, Government of India in

respect of implementation of reports of SIU, to submit that when the SIU has recommended both creation and reduction of posts, both are to be carried out simultaneously. Mr. Tandon also relies on the proposal dated 01.03.2005 sent to UPSC to show that even at that stage the intent of the petitioners was to fill up two posts and not one, as has been submitted today.

20. In his rejoinder, Mr. Sinha contends that the order of the Tribunal and the submission of Mr. Tandon that the order dated 15.02.2006 was a conditional order is without any force as a comprehensive reading of the said order would show that the report of SIU stood categorically accepted and it was a mere formality for the Department of Finance to grant its consent as it was a case of abolition of a post and not creation of a post having a financial implication. He further submits that by the order dated 15.02.2006, the number of posts of Deputy Director (Admn.) was reduced from two to one; however, the exercise of creation of posts was completed on 23.11.2007, which is also evident from the order dated 23.11.2007 as the words used are “deemed to have been abolished”.
21. We have heard the learned counsel for parties and considered their rival contentions.
22. The basic facts in the case as mentioned by us in the foregoing paragraphs are not in dispute.
23. The primary bone of contention pertains to the date of the abolition of one post of Deputy Director (Admn.). While the stand of the petitioners is that the recommendations of SIU to abolish one post was accepted and notified on 15.02.2006; by the order dated 23.11.2007

the recommendation of creation of posts was effected. Mr. Tandon has contended that the post was abolished on 23.11.2007 only and not prior thereto, therefore, the respondent no. 1 could not have been deprived of his promotion.

24. We do not deem it necessary to deal with this aspect as it is settled law that service jurisprudence does not recognize any retrospective promotion unless an express rule is shown. It is clear that the Tribunal has misled itself by holding that it is the fundamental right of an employee to be considered for promotion when vacancies are existing while allowing the OA filed by the respondent no. 1.
25. In ***UOI & another v. K.L. Taneja & Anr.***, 2013 (1) ADR 530, the petitioners were challenging an order of the Tribunal and seeking fixation of their date of promotion from the date the vacancies arose for the purposes of ascertaining qualifying service for further promotion. A coordinate bench of this Court dismissing the petition, held as under:

“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.

...

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.”

(Emphasis Supplied)

26. Another coordinate bench of this Court, of which one of us (G.S. Sistani J.) was a member, in ***Pradeep Kumar & Ors. v. Govt. of N.C.T. of Delhi & Ors.***, 2016 SCC OnLine Del 4599: MANU/DE/2120/2016 has after considering numerous pronouncements of the Supreme Court held that no right accrues to the employees upon occurrence of vacancies and the department may take a conscious decision to defer promotions provided the decision must not be tainted by arbitrariness or *mala fides*.
27. Further this bench in ***Union of India & Anr. v. The Defence Marine Engineering Technical Staff Welfare Association & Ors.***, 2016 SCC OnLine Del 6564 held that such reasons may be gathered from the background and circumstances in which the decision was taken.
28. Accordingly, present petition is to be decided upon the touchstone of the settled law. The respondent no. 1 was working as Administrative Officer and has sought promotion to the post of Deputy Director (Admn.), which was not acceded to. As per the erstwhile recruitment rules there were two posts of Deputy Director (Admn.), one post was recommended to be abolished by the SIU by its report dated 29.03.2004. Vacancies had arisen in the post on 01.10.2004 and 05.03.2005, for which, the proposal was sent to UPSC on 01.03.2005, in which only one post was filled. At the time, the respondent no. 1 was not considered as he did not fulfill the eligibility criteria of 8 years' service.

29. The respondent no. 1 became eligible on 06.04.2006, after the receipt of the report of the SIU on 29.03.2004 and the passing of the order dated 15.02.2006. In our view once the report of the SIU was received which was prior to the date when the respondent no. 1 became eligible, the petitioners consciously did not fill up the vacancy. Since no DPCs were held for the post of Deputy Director (Admn.) in the years 2006 and 2007, the respondent no. 1 was not promoted. It is clear that this was consequent to the report of the SIU recommending the abolition of one post. It has not been contended that the decision to defer DPCs was owing to *mala fides*, arbitrariness or administrative lapses nor has any rule been shown allowing retrospective promotion. The record clearly shows that the petitioners had accepted the report of the SIU and filled up only one post of Deputy Director (Admn.). Sh. R.K. Kant, who was admittedly senior to the respondent no. 1, was promoted on 28.08.2006 and held the post until his retirement on 30.04.2007, which is after the date of superannuation of the respondent no. 1, i.e. 31.03.2007.
30. Since the withholding of further promotions to the Deputy Director (Admn.) was not on account of arbitrariness or *mala fides* and further no rule has been shown allowing retrospective promotions from the date of vacancies, the order of the Tribunal cannot be sustained.
31. Resultantly, the petitioners must succeed. The impugned order of the Tribunal is set-aside.

32. The writ petition is disposed of. No costs.

G. S. SISTANI, J.

VINOD GOEL, J.

JANUARY 20, 2017

// Jitender

