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

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Date of Decision: 11.09.2017

% **W.P.(C) 3113/2017 & C.M. Nos.13580-13582/2017**

UNION OF INDIA

..... Petitioner

Through: Ms.Bharathi Raju, Advocate.

versus

SHRI SAT PAL BUDHIRAJA

..... Respondent

Through: Mr. L.R. Khatana & Mr. Deepak
Verma, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. We have heard learned counsel for the parties at some length.
2. The petitioner UOI has assailed the order dated 20.12.2016 passed by the Central Administrative Tribunal (CAT/ Tribunal) in O.A. No.3646/2013. The Tribunal by the impugned order has directed the petitioner to promote the respondent applicant to the post of Under Secretary (US) on ad-hoc basis w.e.f. 30.10.2012 and grant him all consequential benefits.
3. The background in which the disputes arose may now be noted.
4. The respondent joined the Central Secretariat Service (CSS) as LDC

on 20.11.1975. He got his regular promotions and became Section Officer (SO), Group-B, Gazetted on 25.03.2004. The next promotional post is that of US. The respondent superannuated on 31.10.2012 in the substantive Grade of SO.

5. He approached the Tribunal claiming that his juniors Sh. Jasbir Singh and Sh. Nirbhai Singh - who were at serial Nos. 260 and 270 of the select list, wherein he stood at serial No.249, were granted promotions as US subsequently. Sh. Jasbir Singh had been granted ad-hoc promotion vide order dated 30.11.2012, whereas Sh. Nirbhai Singh was regularly promoted and granted counting of approved service in the grade of US from 01.07.2012 under Rule 2(c)(iii) of the CSS Rules.

6. So far as reliance on Sh. Nirbhai Singh was concerned, the Tribunal in paragraph 9 of the impugned order appears to have rejected the same by observing that *“the case of Sh. Nirbhai Singh is entirely different. He has been promoted on regular basis vide order dated 25.07.2014 after following the due process of DPC, etc.”*.

7. The Tribunal then considered the respondent's claim founded upon the ad-hoc promotion granted to Sh. Jasbir Singh. The stand taken by the petitioner herein was that Sh. Jasbir Singh was granted ad-hoc promotion on 30.11.2012, i.e. after the date of the respondent's superannuation on 31.10.2012. The further case was that vide order dated 30.10.2012, 257 SOs were granted ad-hoc promotion as USs, which included 237 general category candidates and 20 SC/ ST category candidates. Since the respondent stood at serial No.249 in the general category, he could not be

considered for ad-hoc promotion. Not only the respondent, but 11 other general category candidates senior to him could also not be considered due to non-availability of vacancies.

8. The premise on which the Tribunal allowed the Original Application was that the petitioner had filed a counter-affidavit in another Original Application being O.A. No.1083/2007 titled ***Sh. Sauranshu Sinha & Others Vs. Union of India & Others***, wherein they had, inter alia, stated in response to paragraph 14 as follows:

*“The approval of the competent authority has been obtained for adhoc promotion from SO to US grade **against 300 vacancies upto September 2012** and for additional 46 vacancies that would arise upto December 2012. Taking into account the large number of vacancies in the grade of US which is a crucial post for managing the Central Secretariat, it is very difficult to manage the functioning of the Govt. and therefore a decision was taken with the approval of MOS(P) to fill up these posts on ad-hoc basis till finalization of Select Lists. It is submitted that adhoc promotions are only a stop gap arrangement resorted to extreme necessities and do not confer any right for regular appointment.”* (emphasis supplied)

9. Thus, the Tribunal disbelieved the stand taken by the petitioner that there were only 237 general category vacancies in the grade of US as on 30.10.2012, since in their counter-affidavit filed in the aforesaid OA, it had been categorically stated that up to September 2012, there were 300 vacancies existing. The Tribunal held that Jasbir Singh had been dealt with favourably by the petitioner by granting him adhoc promotion to the grade of SO on the date of his superannuation, but the same consideration was not shown to the respondent. Consequently, the O.A. was allowed, as noted

above.

10. The submission of learned counsel for the petitioner is that the affidavit filed by the petitioner in O.A. No.1083/2007 was in a slightly different context. The purpose of filing the said affidavit was to indicate the total number of vacancies in the grade of US as on 31.12.2012.

11. Learned counsel submits that before the Tribunal, the petitioner had even produced the relevant file notings to show that, as a matter of fact, there were 234 vacancies in the grade of US as on 21.09.2012, when the note was prepared. On that day, it was anticipated that 66 vacancies will arise on account of proposed ad-hoc promotions to the grade of Deputy Secretary (DS) from the grade of US up to the end of September 2012. It was, consequently, estimated that by the end of September 2012, there would be 300 vacancies of US.

12. Learned counsel submits that the 66 anticipated vacancies, which were due to arise by the end of September 2012 in the grade of US, did not so arise since the ad-hoc promotions to the grade of DS actually did not take place till 12.11.2012, i.e. after the superannuation of the respondent. It is pointed out that while framing the counter-affidavit in O.A. No.1083/2007 even though the same was filed on 10.10.2012, the factual position was not accurately disclosed.

13. On this aspect, the respondent has nothing much to say since the same is a matter of record. The submission of Mr. Khatana is that the respondent should be bound down to its affidavit, and the same should take precedence

over the position as reflected from the record.

14. We cannot accept this submission. If there is a discrepancy between the record and the affidavit, so far as the factual matters are concerned, it is obvious that the Court would have to proceed on the basis of the record and not on the basis of the affidavit.

15. In view of the aforesaid, the impugned order insofar as it grants relief to the respondent on a factually wrong premise, cannot be sustained. The parity sought by the respondent with Sh. Jasbir Singh was, therefore, not justified.

16. The matter, however, does not end here. As noticed above before the Tribunal, the respondent had also cited the case of Sh. Nirbhai Singh, who was granted regular promotion in the grade of US vide OM dated 04.07.2014. However, the Tribunal did not consider the same to be of any relevance.

17. In this regard, when the matter was first taken up by this Court on 12.04.2017, the respondent had placed reliance on the notification dated 25.07.2014 granting retrospective promotion to 6 persons, including Sh. Nirbhai Singh w.e.f. 01.07.2012. Since the respondent was in service on the said date, and retired only on 30.10.2012, the claim of the respondent was that he too was entitled to grant of notional promotion and counting of service for the purpose of pension fixation at the time of his superannuation. The order dated 12.04.2017 reads as follows:

“ *The respondent retired from the post of Section Officer*

on 30.10.2012. One Jasbeer Singh, who is junior to the respondent and was due to retire on 30.11.2012, was promoted as Under Secretary ad hoc by granting relaxation. This was despite others including his seniors were not granted promotion.

2. The impugned order of the Tribunal dated 20th December, 2016 allows the O.A.No. 3646/2013 filed by the respondent for identical reasons and grounds. The respondent had retired on 30.10.2012 but in his case relaxation was not granted. Parity and equal treatment has to be and should be given.

3. The contention of the Government is that there was no vacancy in the cadre of Under Secretary on or before the date of retirement of the respondent.

4. Learned counsel for the respondent, who appears on advance notice, submits that this contention is incorrect. He submits that one Nirbhai Singh, whose name also figures in the impugned order, and several others were granted promotion vide the notification dated 25th July, 2014 w.e.f. 1.7.2012. This would, as per the respondent, indicate that there were vacancies in the cadre of Under Secretary as on 1.7.2012. The said Nirbhai Singh is also junior to the respondent.

5. Learned counsel for the petitioner prays for time to examine the said contention and answer the same.

Relist on 17th May, 2017. ”

18. To meet the said submission, learned counsel for the petitioner has tendered in Court the Office Memorandum dated 07.07.2017, which, inter alia, records as follows:

“2. Now it has come to the notice of this Department that Department of Revenue had issued notification No.A-50050/45/2013-Ad.I dated 25.07.2014 appointing therewith

officers of CSS as Under Secretary on regular basis with effect from 01.07.2012 instead of from 04.07.2014, which is not as per the provisions of para 7 of O.M. of even number dated 04.07.2014. It is, therefore, requested to immediately rescind this erroneous notification and issue a revised notification. It is also requested to fix responsibility for this erroneous notification.

3. *It is further stated that in case any notional pay fixation benefit has been granted to Under Secretaries on the basis of such erroneous notification, necessary steps may be taken in terms of DoPT's O.M. No.5/11/2011-CS.I(U) dated 27.02.2013 (copy enclosed)."*

19. She has also placed on record the notification dated 19.07.2017, which records the date of promotion of, inter alia, Sh. Nirbhai Singh as 04.07.2014 and further states in paragraph 2 as follows:

"2. However, in terms of Rule 2(c)(iii) if CSS Rules, approved service in the grade of Under Secretary in respect of above mentioned officers will count from 1st July, 2012.

3. *This Department's earlier notification no. 48/2014 dated 24.07.2014 (issued from F.No.A-50050/45/2013-Ad.I) is hereby cancelled in pursuance to Department of Personnel & Training's Office Memorandum No. 5/6/2013-CS.I(U) dated 07.07.2017."*

20. The submission of learned counsel for the petitioner is that the Office Memorandum dated 27.02.2013 issued by the DOP&T on the subject of Notional fixation of pay to officers included in USSSL 2009 and 2010, inter alia, states that:

"4. Accordingly, notional fixation of pay in respect of officers included in USSSL-2009 and 2010, w.e.f. 1st July of the

Select List year is not consistent with extant rules/ instructions on the subject and is not, therefore, allowed. All the Ministries/Departments are, therefore, requested to review the cases of fixation of pay of officers included in USSLS 2009 & 2010 and take steps to rectify the pay fixation in all those case where the benefit of notional fixation of pay has been incorrectly extended.”

21. Learned counsel for the petitioner submits that, thus, Sh. Nirbhai Singh has not been granted notional pay fixation w.e.f. 01.07.2012 in view of the aforesaid Office Memorandum and under Rule 2(c)(iii) of the CCS Rules, only the approved service in the grade of US will be counted from 01.07.2012.

22. On the other hand, Mr. Khatana has submitted that the Office Memorandum dated 27.02.2013 is in the teeth of several decisions, including two decisions of this Court in ***Union of India & Another Vs. P.G. George***, W.P.(C.) No.4864/2010 decided on 23.07.2010; and in ***C.B. Singh Vs. The Secretary, Ministry of Agriculture and Others***, W.P.(C.) No. 7937/2011 decided on 24.09.2012. In these decisions, this Court has repeatedly emphasized that - to include the names of retired personnel within the zone of consideration, and then not to grant them the benefits of promotions, namely notional pay fixation, would be completely unfair.

23. Mr. Khatana has also submitted that in several other similar cases, the petitioner has actually granted notional pay fixation to the retired personnel on application of Rule 2(c)(iii) of the CSS Rules. The above issues have not been examined by the Tribunal – presumably because the thrust of the respondents claim was for grant of adhoc promotion on 30.10.2012 (on the

basis that sufficient vacancies existed in the grade of US as on that date, against which he could have been granted adhoc promotion).

24. Since the aforesaid issues have not been addressed by the Tribunal even though the respondent had placed reliance on the case of Sh. Nirbhai Singh, and considering the fact that this Court examines the orders of the Tribunal in judicial review, we are of the view that the said issues should be examined by the Tribunal in the first instance.

25. Accordingly, while setting aside the impugned order and holding that the respondent is not entitled to adhoc promotion as US on 30.10.2012 on the ground of parity with the case of Sh. Jasbir Singh, we remand the case back to the Tribunal for consideration of the respondent's claim for notional pay fixation in the grade of US from 01.07.2012, and consequential revision of pensionary benefits.

26. We may also observe that in the Original Application, the respondent had sought notional pay fixation in the grade of US w.e.f. 31.10.2012 and not from 01.07.2012. The Office Memorandum dated 27.02.2013 was also not specifically challenged. It shall be open to the respondent to amend the Original Application to incorporate the said challenge, and also to appropriately amend the prayer made in the Original Application. In case the respondent wishes to amend the Original Application, he may do so within the next two weeks. The response to the amended petition, if any, be filed within two weeks thereafter. The parties shall appear before the Tribunal on 16.10.2017.

27. Considering the fact that the respondent superannuated in 2012, we request the Tribunal to take up the matter for consideration on an early date. The Tribunal may endeavour to dispose of the Original Application after the remand within the next eight weeks.

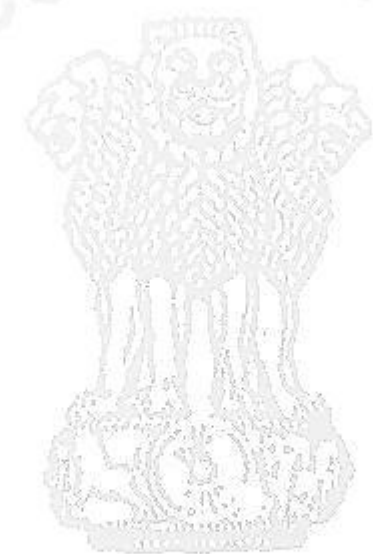
28. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J.

REKHA PALLI, J.

SEPTEMBER 11, 2017

B.S. Rohella



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