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

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Date of Decision: 27.04.2017

% **W.P.(C.) No. 90/2015**

MADHULIKA SHARMA

..... Petitioner

Through: Mr. Romy Chacko & Mr. Girijesh
Pandey, Advocates.

versus

GOVT. OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Gautam Narayan, ASC &
Mr.R.A. Iyer, Advocate for
respondent No.1/ GNCTD.
Mr. C. Mohan Rao, Mr. Lokesh
Kumar & Mr. Devender Kumar,
Advocates for respondent No.3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE DEEPA SHARMA

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to assail the order dated 22.08.2014 passed by the Central Administrative Tribunal (CAT/ Tribunal) in O.A. No.2631/2012. The Tribunal, by the impugned order, dismissed the petitioner's Original Application. The petitioner applicant had preferred the said Original Application to seek a declaration that her promotion to the post of Deputy Director in the FSL – which was

made on 24.05.2012 , having been made in respect of panel year 2008-09, should be made retrospective from 01.04.2008. She sought other consequential reliefs premised on the aforesaid primary relief. The Tribunal has held that the petitioner actually having been promoted on 24.05.2012, was not entitled to ante-dated promotion, since the facts of the case did not justify ante-dated promotion.

2. The claim for retrospective promotion is premised on the submission that ante-dated promotion can be granted in appropriate circumstances. In support of this submission, learned counsel has, firstly, relied upon ***K. Madhavan and Another Vs. Union of India and Others***, (1987) 4 SCC 566. In paragraph 15 of this decision, the Supreme Court has observed as follows:

“15. There can be no doubt that if the meeting of the DPC scheduled to be held is arbitrarily or mala fide cancelled without any reasonable justification therefor to the prejudice of an employee and he is not considered for promotion to a higher post, the government in a suitable case can do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held, with retrospective effect so that he is not subjected to a lower position in the seniority list. But, if the cancellation or postponement of the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have no grievance and the government will not be justified in appointing the employee to the higher post with retrospective effect. An employee may become eligible for a certain post, but surely he cannot claim appointment to such post as a matter of right.” (emphasis supplied)

3. Learned counsel for the petitioner has, secondly, placed reliance on the decision of a Division Bench of this Court in ***UOI & Anr. Vs. K.L. Taneja & Anr.***, W.P.(C.) No. 8102/2012 decided on 12.04.2013, and in

particular paragraph 21 of the said decision. This Court in *K.L. Taneja* (supra) has observed as follows:

“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)

4. Learned counsel for the petitioner has also placed reliance on *Union of India and Another Vs. Hemraj Singh Chauhan and Others*, (2010) 4 SCC 290, and in particular paragraph 42 of this decision, wherein the Supreme Court has observed:

“42. Concurring with the aforesaid interpretative exercise, we hold that the statutory duty which is cast on the State Government and the Central Government to undertake the cadre review exercise every five years is ordinarily mandatory subject to exceptions which may be justified in the facts of a

given case. Surely lethargy, inaction, an absence of a sense of responsibility cannot fall within the category of just exceptions.” (emphasis supplied)

5. The submission of learned counsel for the petitioner, premised on the aforesaid decisions, is that in the facts of the present case, the respondent authorities deliberately and carelessly delayed holding of the DPC for promotions to the post of Deputy Director for several years. Under the Recruitment Rules, for the post of Deputy Director, 5 years service of the grade of Assistant Director is essential for consideration for promotion to the said grade. The petitioner claims that she had become eligible in the year of 2008 for being considered for the post of Deputy Director, she was empanelled for and through the year 2008-09 and was actually promoted only on 24.05.2012.

6. At this stage, we may take note of a few relevant background facts.

7. The petitioner joined FSL on deputation basis as SSO (Chemistry) in November, 1997. The petitioner was absorbed permanently as SSO (Chemistry) on 29.04.2002. The petitioner was promoted to the post of Assistant Director, Chemistry in the FSL with notional seniority from July, 2004. It appears that one Dr. Rajender Kumar and few others, including respondent No.3 Smt. Deepa Verma, who were also the colleagues of the petitioners approached the Tribunal by filing O.A. No.1611/2005. In the said Original Application they sought the relief that the period spent by them while on deputation with the FSL, prior to their absorption in the FSL, should be considered as regular service for the purpose of promotion to the post of Assistant Director. The said Original Application was dismissed by

the Tribunal on 28.07.2005.

8. Dr. Rajender Kumar & Others, including respondent No.3 then preferred W.P.(C.) No. 14097-140100/2005 in this Court assailing the order passed by the Tribunal in O.A. No.1611/2015. This Court allowed the said writ petition on 11.10.2006.

9. Thus, by virtue of the decision in W.P. (C.) No. 14097-140100/2005, respondent No.3 and the other petitioners in the said writ petition became entitled for counting their service on deputation for the purpose of fixing their seniority in the cadre of Assistant Director.

10. Consequently, the seniority of respondent No.3 in the cadre of SSO had to be counted from 01.08.1996. So far as the petitioner is concerned, she joined the FSL, Delhi on deputation in the year 1997 in the cadre of SSO. She was absorbed permanently as SSO at FSL, Delhi on 29.04.2002.

11. The Government did not accept the judgment of this Court in W.P.(C.) No. 14097-140100/2005 and preferred an appeal to the Supreme Court vide Civil Appeal No.1753/2007.

12. While the said appeal was pending, Dr. Rajender Kumar & Others, including respondent No.3 initiated contempt proceedings on account of non-compliance of the judgment in W.P.(C.) No. 14097-140100/2005. On account of initiation of the contempt proceedings, the Government moved an application before the Supreme Court to seek stay of the judgment of this Court in W.P.(C.) No. 14097-140100/2005. On 19.10.2009, the Supreme Court dismissed the said application for stay filed by the Government. At

the same time, the Supreme Court observed that “*any appointment made would be subject to the outcome of this appeal*”. The contempt proceedings initiated before this Court in W.P.(C.) No. 14097-140100/2005 were also stayed by the Supreme Court on 26.03.2007.

13. It appears that, in the meantime, a seniority list was prepared by the Government, which was assailed by Dr. Rajender Kumar & Others vide O.A. No.2822/2009 on the ground that it was contrary to the decision of this Court in W.P.(C.) No. 14097-140100/2005. The hearing in the said Original Application was adjourned sine die on 27.07.2010 on account of pendency of the appeal before the Supreme Court.

14. The Civil Appeal No.1753/2007 filed by the Government was dismissed by the Supreme Court on 13.10.2011. Consequently, the seniority of Dr. Rajender Kumar & other petitioners in W.P.(C.) No. 14097-140100/2005, including respondent No.3, had to be determined from the date of their appointment on deputation in FSL, Delhi.

15. The petitioner preferred O.A. No.881/2011 before the Tribunal for a direction that the Departmental Promotion Committee (DPC) should be held by the Government for making promotions to the post of Deputy Director. The grievance of the petitioner was that the DPC was not being held by the Government despite there being no stay in that respect from any Court. The said Original Application was disposed of by the Tribunal on 19.07.2011 while directing the respondent Government to convene the DPC for holding promotions to the post of Deputy Director by drawing panels for the years 2008-09, 2009-10, 2010-11 & 2011-12 and to consider the petitioner’s case

for promotion in respect of the years for which she was eligible.

16. The DPC was held on 03.05.2012 and the petitioner was found eligible for promotion to the post of Deputy Director in respect of panel year 2008-09. As noticed above, she was actually promoted on 24.05.2012.

17. In this background, the submission of learned counsel for the petitioner is that since there was no stay of the process for holding promotions, and the Supreme Court had, in fact, held that any appointment made would be subject to outcome of the appeal, the respondent Government had no reason or justification to not hold the DPC for about four years. The submission is that this inaction of the respondent Government was deliberate with a view to deny promotion to the petitioner and it was also on account of the casual and careless approach of the Government. Learned counsel submits that in view of the aforesaid decisions, such conduct on the part of the Government cannot be countenanced and the petitioner cannot be made to suffer.

18. The further submission of learned counsel for the petitioner is that the DPC was deliberately held in May 2012, and not in March 2012, since the date of superannuation of the petitioner is 31.07.2017. The submission, therefore, is that as early as in 2012, it was contrived by the respondent Government to delay holding of the DPC keeping in view the fact that five years later, the petitioner would superannuate.

19. On the other hand, the submission of Mr. Rao, learned counsel for the respondent No.3 is that there is no merit in the petitioner's pleas. Mr. Rao submits that, in fact, it is respondent No.3 who has suffered on account of

the DPC not being held. Respondent No. 3 ranked higher in seniority to the petitioner after the judgment of this Court in W.P. (C). 14097-140100/2005 which was not stayed by the Supreme Court. Thus, holding of the DPC was more detrimental to the Respondent No. 3 and others who ranked higher in seniority to the petitioner than the petitioner. The seniority list prepared by the department was also under challenge in O.A. No. 2882/2009. He submits that the DPC was not held on account of the fact that the issue of seniority remained unfinalised as the decision of this Court in W.P.(C.) No. 14097-140100/2005 was carried in appeal to the Supreme Court and the said appeal was disposed of only on 13.10.2011.

20. Learned counsel for the respondent No.1 submits that there is no question of the holding of the DPC being deliberately withheld, or being delayed on account of a casual or cavalier approach.

21. Having heard learned counsel, we are of the view that there is no merit in this petition. No doubt, in certain circumstances, grant of retrospective promotion has been recognized by the Courts as held in **K. Madhavan** (supra) and **K.L. Taneja** (supra). However, that is an exception and not the rule. In **K. Madhavan** (supra), the Supreme Court observed that if the scheduled DPC is cancelled or postponed without any justification, then such arbitrary action would not deprive the employee of back dated seniority. At the same time, if the cancellation or postponement of the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have no grievance and the Government will not be justified in appointing the employee on the higher post with retrospective effect. The employee may become eligible for the promotional post but,

surely, he cannot claim appointment to such post as a matter of right. Presently, the petitioner has not relied on any statutory rule to claim seniority from the retrospective date i.e. the beginning of the panel year against which a candidate may be promoted. No statutory rule has been placed before the Court which mandated the convening of the DPC in a time bound manner.

22. We may observe that in the facts of the present case, the petitioner has not alleged any personal mala fide against any particular officer or superior. In *K.L. Taneja* (supra), this Court has held that promotion from a retrospective date can be granted, if delay in promotion is found attributable to a mala fide act, i.e. deliberately delaying the holding of DPC, thereby depriving the candidates the right to be promoted. At the same time, the Division Bench held that if due to administrative reasons, the DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.

23. In the present case, as noticed hereinabove, the issue with regard to seniority in the cadre of Assistant Director was fluid and not settled, since the decision in W.P.(C.) No. 14097-140100/2005 had been carried in appeal to the Supreme Court in Civil Appeal No.1753/2007. That issue attained finality only when the said appeal was dismissed by the Supreme Court on 13.10.2011. Even though there was no stay of the promotion process, at the same time, the effect of the pendency of the Civil Appeal before the Supreme Court was that even if promotions had been made, the same would have been subject to outcome of the said appeal. In these circumstances, if the respondent Government decided to await decision of the Supreme Court,

in our view, it cannot be said that the said decision of the Government was mala fide or arbitrary. It cannot be said that the Government acted in a casual manner since the Government was not sure as to how to determine inter se seniority of all the eligible candidates in the cadre of Assistant Director. The seniority list prepared by the Government was also pending challenge in O.A. No. 2882/2009. Merely because the petitioner may have been promoted against the vacancy in the panel year 2008-09, it does not entitle her to claim retrospective promotion from 01.04.2008.

24. So far as the submission that the holding of the DPC was deliberately delayed to May, 2012 and it was not held in March, 2012, only because the petitioner's date of superannuation is 31.07.2017 is concerned, the same has no basis. The petitioner has not produced any material on record, and not made any specific averments that some particular officer(s) within the organization had contrived and planned five years in advance of the petitioner's superannuation date, to ensure that the petitioner's career progression is adversely affected.

25. In these circumstances, we find no merit in the present petition and dismiss the same leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

DEEPA SHARMA, J

APRIL 27, 2017

B.S. Rohella