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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5570 OF 2012

The Chief Commissioner
Central Excise, Mumbai Zone-I
Cadre Controlling Authority,
115, M. K. Road, Central Excise Building
Churchgate, Mumbai 400 020
through the Commissioner of Central Excise & Customs
Aurangabad Commissionerate, Aurangabad

PETITIONER

VERSUS

Sh. Pravin Bapurao Visare
A/9, Sai Sona Complex,
Sarasnagar, Behind Market Yad,
Ahmednagar – 414 001

RESPONDENT

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Mr. D. S. Ladda, Advocate for the petitioner
Mr. Ajinkya Kale h/f Mr. S. B. Talekar, Advocate for respondent

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**[CORAM : SUNIL P. DESHMUKH &
P. R. BORA, J.J.]**

DATE : 12th FEBRUARY, 2018

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.):

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties finally with consent.
2. The petitioner, under this writ petition questions, propriety, validity and correctness of the order dated 31st March, 2010 passed by Chief Commissioner for Persons with Disabilities, New Delhi in case No.10212461.

3. After hearing learned advocates for the parties, it emerges that respondent in present writ petition had joined services in the department of the petitioner as Lower Division Clerk (LDC) on 31st May, 1993. Pursuant to prevailing recruitment rules of 1979, employees working in the grade of LDC were eligible for promotion to grade of Upper Divisional Clerk (UDC) after seven years service. Before completion of regular service of seven years required for promotion to grade of UDC by the respondent, concerned ministry had issued a letter dated 14th December, 1998 and had relaxed condition of seven years service for promotion to the grade of UDC by two years, limiting its operation for a period of one year from the date of issue of the letter. Factually, the respondent did not receive benefit of this letter within stipulated period of one year, although, he had been included in the zone of consideration in Departmental Promotion Committee (DPC) of 6th August, 1999 for promotion to the grade of UDC. Since he had been placed in extended zone and there had been lack of vacancy he had not been considered for promotion at that time. The respondent had been subsequently promoted to the grade of UDC with effect from 27th March, 2001 in the DPC held during the year 2001.

4. In the year 2001 pursuant to letter of ministry dated 19th

July, 2001, the department had carried out cadre restructuring exercise. Under the restructuring process, which had been approved by the ministry and the cabinet, there had been reduction in number of posts in the cadre of inspectors. UDCs with minimum five years regular service were considered for promotion to the grade of inspector along with other parameters. The ministry had given approval for filling up of 142 vacancies by promotion under letter dated 23rd January, 2003 in terms of one time relaxation according to its letter dated 19th July, 2001. Pursuant to the same, DPC had been conducted for filling up of vacancies. The respondent could not be considered him being not eligible as he did not have requisite qualifying service on the date of DPC despite invoking principle of extended service. While DPC had also been held on 3rd September, 2003, for promotion to forty seven vacancies in the grade of inspectors for the year 2003, crucial date for DPC was 1st January, 2002. According to 1979 recruitment rules the respondent had not been on that day, possessing qualifying service of five years in the grade of UDC and as such, had not been considered to be eligible.

5. Subsequently, in 2005, Andhra Pradesh High Court had passed an order in writ petition No. 2378 of 2005 to the effect

that the vacancies in the cadre of inspectors which had arisen prior to 7th December, 2002 be filled up in accordance with 1979 recruitment rules. The decision consequently resulted into revival of vacancies abolished during cadre restructuring exercise carried out, referred to above.

6. In view of aforesaid, a DPC had been held on 14th / 17th July, 2006 for filling up of these vacancies.

7. It appears that on 1st February, 2008, respondent had made an application to the Chief Commissioner for Persons with Disabilities, New Delhi for his promotion with retrospective effect as information solicited by him revealed that Pune-1 Cadre Control had not maintained roster for persons with disabilities.

8. In the meanwhile, one Smt. Sharmila Gupta, Stenographer who had joined the Mumbai Cadre Control on Inter Commissionerate Transfer (ICT) had lost earlier seniority and was placed at serial No. 56 of the seniority list of stenographers grade III as on 1st January, 2002. She had appeared at serial No. 501 of the zone of consideration to the grade of inspector, as she possessed requisite qualifying service of five years in the grade of stenographer. She had also passed departmental promotional examination and was fulfilling other parameters required for

being considered for promotion to the post of inspector. She had been considered eligible for promotion. Having regard to rule GSR 1248 under which if a junior person is considered for promotion on completion of prescribed qualifying period in that grade, all persons senior to him in the grade would also be considered for promotion notwithstanding rendition of qualifying period of service in the grade, with the rider that he ought to have completed successful period of probation.

9. In the circumstances, the respondent had been notionally promoted to the grade of UDC with effect from 23rd August, 1999 by Pune-1 Commissionerate and was placed at serial No.358A in the seniority list of UDCs as on 1st January, 2002.

10. The petitioner's department held review DPC on 13th January, 2009 reviewing the DPCs held on 14th/17th July, 2006, 17th October, 2007 and 16th May, 2008 as a consequence of judgment of the Andhra Pradesh High Court and had considered case of the respondent along with other officers and had given them promotion to the cadre of inspector on notional basis with effect from 6th December, 2002.

11. As proceedings were pending before the commissioner upon application by the respondent in February, 2008, aforesaid

development had been informed to the Chief Commissioner for Persons with Disabilities, New Delhi pointing out that the respondent along with six others had been notionally promoted to the cadre of Inspector with effect from 6th December, 2002 under EO No.09/2009 dated 28th January, 2009 and incidental benefits to them were extended.

12. However, all these aspects, according to learned advocate Mr. D. S. Ladda for the petitioner have not been considered by the Chief Commissioner for Persons with Disabilities, New Delhi and had passed the impugned order dated 31st March, 2010.

13. Learned advocate submits that while the respondent had been given benefit of promotion on notional basis, actual financial benefit to him from said date would not ensue for various reasons. It is submitted that even otherwise, the Chief Commissioner for Persons with Disabilities, New Delhi does not have power to directly entertain service matters of employees and has no jurisdiction to pass order like the impugned one. It is contended that the respondent had been fortunately able to receive benefit of notional promotion with effect from 6th December, 2002 as a result of decision by Andhra Pradesh High Court, which otherwise would not have come his way, having

regard to restructuring exercise that had been carried out by the department in 2003, wherein number of posts had gone down and the respondent in the circumstances, having regard to eligibility criteria for promotion to the grade of inspector from UDC and it would not have been possible to be given pursuant to the prevailing recruitment rules. He submits that actual financial benefits could not be paid to the respondent as he has not actually worked on said post during that period on the principle of "*no work, no pay*". He submits that had the Andhra Pradesh High Court's judgment been not implemented, there would not have been revival of vacancies pursuant to 1979 recruitment rules and the number of vacancies would have gone down and the respondent seldom could have a chance to be promoted in the cadre of inspector on the basis of eligibility criteria for said post. He submits that as referred to in the petition, the respondent had been placed at serial No. 358A in the seniority list of UDC as on 1st January, 2002 and had appeared at serial No. 498A in the consideration zone. Initially, he neither had requisite qualifying regular service of five years in the grade of UDC nor had he passed the departmental examination. He submits that it ought to be considered that the respondent had been placed in the zone of consideration for promotion on

account of letters dated 8th October, 2003 and 8th January, 2008 by the Ministry directing to consider cases of ministerial officers, who had passed departmental promotion test for promotion to the cadre of inspector, wherein relaxation of two years in qualifying service as one time measure had been granted. He submits that the respondent has in fact received benefit of GSR 1248 referred to above, since Smt. Sharmila Gupta had been considered eligible for promotion and has been given benefit accordingly. He submits that in view of GSR 1248 the respondent and six others were included in the zone of consideration and were held eligible to be promoted to the cadre of inspector and accordingly review DPC had been held on 13th January, 2009 for promoting the respondent and six others to the cadre of inspectors on notional basis with effect from 6th December, 2002. He submits that it ought to have been considered by the Chief Commissioner for Persons with Disabilities, New Delhi that the notional benefit received by the respondent would not have been possible to be given in the absence of GSR 1248 and since person / officer junior to him was being given promotion as such, respondent fortuitously had been given notional benefit, who otherwise had not been eligible for consideration for promotion.

14. The respondent had been promoted as only 502

officers were eligible for promotion for 808 vacancies and as such, granting of benefit of physically handicapped category was not required to be applied. All the officers, who have been promoted under implementation of judgment of the Andhra Pradesh High Court, who are 495 till the date had been given notional promotion with effect from 6th December, 2002, which is the date up to which recruitment rules of 1979 had been enforced. All these officers / promotees were entitled to draw salary in the applicable scale only from the date on which they had assumed charge as inspector and no officer had been granted financial benefit from the notional date of promotion.

15. On the other hand, learned advocate Mr. Ajinkya Kale holding for Mr. S. B. Talekar for the respondent contends that the respondent had been appointed as LDC from physically handicapped category on 31st May, 1993. He had been promoted to the grade of UDC on 23rd August, 1999. He had become eligible to appear for promotion examination to the post of inspector in 2001. The petitioner, however, did not consider him eligible for promotion to the post in terms of letters of ministry dated 19th April, 1996. Posts of inspector have been identified for persons with disabilities pointing out that three officers were promoted under physically handicapped quota by the

Commissioner, Central Excise. He had not been allowed to appear at promotional test of inspectors in 2003. He was allowed to appear in examination in October, 2004 and had been declared successful. From February, 2003 to 2006, three hundred thirty ministerial officers were promoted as inspectors and only six persons with disabilities were promoted during said period. He, therefore, submits that the respondent had been entitled for promotion to the cadre of inspector with effect from DPC held in February, 2003 against 3 % reserved quota for physically handicapped persons and under extended zone of consideration of five times number of vacancies.

16. Perusal of the impugned judgment shows that it had been adverted to that Additional Commissioner, Customs and Central Excise and Service, Pune had reiterated statements on either side and had referred to a copy of judgment of the Supreme Court dated 25th April, 1990 in the case of *“Virendra Kumar V/s Avinash Chandra Chaddha”* in support of the contention that the respondent cannot be paid for period of notional promotion. The order refers to that the persons with disabilities namely P. J. Talekar, Jairaj Chitte and V. K. Kakhandki were promoted as inspectors under order dated 9th January, 2004 issued by the Commissioner of Central Excise and thus considered that the

respondent had been prevented from working on the higher post in the absence of his promotion to the post of inspector, despite being eligible to the same. A decision of the Supreme Court in the matter of “*Food Corporation of India V/s S. N. Nagarkar*” in Appeal No. 2489 of 2000 had also been referred to wherein it had been considered that for no fault of a person, he had been deprived of promotional benefits.

17. After referring to the contentions on either side, the Tribunal has observed in paragraph No. 5 as under :

“ 5. From the facts and circumstances of the case, it is observed that the complainant was indeed ignored for promotion to the post of inspector despite the fact that the post was identified for his category of disability and the respondent organization had promoted four persons with disabilities against the reserved vacancies for them. There appears to be no valid reason for not considering the complainant atleast after he requested the Joint Commissioner (P&V), Central Excise and Customs vide his letter dated 24.08.2004 for his promotion and brought to his notice that four persons with disabilities had been promoted. He had also mentioned therein that if he was not permitted to appear in the examination, he would lose his chance of promotion. Yet he was not promoted. Therefore, it will be in the interest of justice that the complainant is allowed all the consequential benefits including the financial benefit from the date of his notional promotion. The matter is disposed of. ”

18. The respondent had joined duty as LDC on 31st May, 1993 while 1979 recruitment rules required seven years service for

next promotion to the grade of UDC, in ordinary course. The respondent would have been under the rules, eligible for consideration to the grade of UDC in 2000, on completion of seven years. He had been given benefit of relaxation of two years and with effect from 23rd August, 1999 had been given promotion to the grade of UDC. Pursuant to relevant rules, for promotion to next cadre, in the present case cadre of inspectors, qualifying service required in the cadre of UDC is five years. As such, taking such a deemed date of promotion to the grade of UDC of respondent of 1999, he would have been in ordinary course eligible to be considered for next promotion to the cadre of inspector in August, 2004.

19. In the meanwhile, there appears to be some restructuring exercise carried out by the department under which promotional posts were reduced in 2003 and in the prevailing circumstances, it would have been difficult for the respondent to be considered eligible for promotion to the cadre of inspector. The respondent purportedly had requested for promotion in 2004. However, the respondent did not make any grievance in respect of reduction in posts on restructuring exercise as it may appear. It was only in 2008, by which time Andhra Pradesh High Court had given a decision reviving promotional posts as were subsisting prior to

6th January, 2000, the respondent purportedly moved proceedings.

20. The three persons, namely, Talekar, Chitte and Kakhandki are admittedly senior to the respondent in cadre. They have been appointed as LDCs before the respondent had been appointed. Shri. Talekar had joined service in 1984 as LDC, he was promoted as UDC in the year 1989 and as Tax Assistant in 1993. Shri. Chitte had been promoted in the grade of UDC in 1993 and as Tax Assistant in 1999. Shri Kakhandki had joined the department in 1988 and had been promoted as UDC in 1993 and as Tax Assistant in 2000. All these officers were senior to the respondent and were eligible to be considered for promotion in the cadre of inspectors in DPC held on 20th / 21st January, 2003 as they possessed requisite qualifying service.

21. In the meanwhile, it appears, some concession had been given in qualifying service for promotion to higher posts and accordingly, the respondent had appeared and had passed the same.

22. Thus, the situation emerges, grievance had been made by the respondent that three senior officers had been given benefit of promotion in 2004 and not him. Said officers have been given

benefit of notional date and have not been given actual financial benefit from the date of their notional promotion.

23. The three persons Mr. Talekar, Mr. Chitte and Mr. Kakhandki are stated to have been promoted by the department without applying reservation extended to persons with disabilities. There does not appear to be any particular dispute over this and as such, discrimination on this count is hardly liable to be alleged and considered. These persons have not received actual financial benefit with effect from the notional date of promotion.

24. Paragraph No. 5 which is the only reasoning portion of the impugned order, referred to above, falls far too short to depict application of mind to these aspects involved while considering the request of the respondent. The tribunal does not appear to have considered that while claim had been made by the respondent, in ordinary course, while it is his case that in 2001 he had been promoted to the grade of UDC, he would have been eligible to be considered for next promotional post of inspector in 2006 and the Tribunal has not further considered that grievance was being made only in 2008 and during pendency of proceedings the department had in fact informed to the Chief Commissioner for Persons with Disabilities, New Delhi about

development taking place.

25. Going by case of the respondent, although he would be considered eligible for promotion in 2004, yet there had been reduction in posts and there was bleak possibility of his promotion. It is not a case where there is deliberation to keep him away.

26. Respondent has been given notional promotion from 2002. The respondent pursuant to the notional promotion, has joined on the promotional post and since then he has been receiving all the consequential, ancillary and incidental benefits arising from the date of notional promotion on 6th December, 2002 as in the case of other persons.

27. It does not appear in the facts of the case, that the respondent has been ignored for promotion or for that matter there had been no reason for not giving promotion to the respondent, as observed by the tribunal. The tribunal appears to be oblivious of prevailing facts and circumstances from time to time, as have been referred to by the petitioner. The tribunal's order does not take into account all these aspects which would have bearing in the matter.

28. Request of the petitioner, eventually stands acceded to along with others with notional date of promotion in accordance with rules and prevailing circumstances. Having regard to the attending circumstances, *inter-alia*, the others to whom also notional date of promotion is given, financial benefits are not given from such a date. We are, in view of facts and circumstances, not inclined to accede to the request being made by the respondent about payment of back wages. There is no discrimination in this respect.

29. In the circumstances, we do not see that the impugned decision rendered by the Chief Commissioner for Persons with Disabilities, New Delhi is sustainable on facts and in the circumstances and the position as would be obtaining from the developments taking place from time to time. The petition, therefore, is allowed. The impugned order dated 31st March, 2010 passed by Chief Commissioner for Persons with Disabilities, New Delhi in case No.10212461 is set aside.

30. Rule made absolute in aforesaid terms.

[P. R. BORA, J.]

[SUNIL P. DESHMUKH, J.]