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

\+ W.P.(C) 5365/2018 & C.M.No.20807/2018 (stay)

UNION OF INDIA AND ANR. ..... Petitioner

Through Dr.Ashwani Bharadwaj, Adv.

versus

KARAN THAPAR AND ORS. ..... Respondent

Through None.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE REKHA PALLI

<u>O R D E R</u>

% **09.08.2018**

1. The petitioner/Union of India is aggrieved by the order dated 30.11.2016, passed by the Central Administrative Tribunal, Principal Bench, New Delhi allowing O.A. No.1415/2015 filed by five applicants, praying *inter alia*, to hold the decision of the DPC constituted by the respondents assessing them as '*unfit*' and not recommending their names for promotion to the grade of Deputy Commissioner, as illegal and arbitrary and as a consequence thereof, to promote them to the post of Deputy Commissioner Grade- V w.e.f. 18.07.2014, the date on which other officers of their batch were promoted, if otherwise found fit.

2. The factual matrix necessary for deciding the present case is that the respondents had appeared in the Civil Service Examination (CSE), 2008

conducted by the UPSC and had joined Customs and Central Excise Department in the Indian Revenue Service (Customs & Excise) 2009 batch, in the rank of Assistant Commissioner, Department of Revenue, Ministry of Finance. In the first month of their training, the respondents were informed that such of the probationers who were desirous of appearing in the following year's CSE to be held by the UPSC, may do so by availing extraordinary leave. They were also assured that the said extraordinary leave would not adversely affect their promotional and career prospects. Accordingly, the respondents being desirous of appearing in the CSE in the following year, applied for one year's extraordinary leave, which was sanctioned by the Competent Authority vide orders dated 22.01.2010 and 12.01.2010.

3. After availing the extraordinary leave, when the respondents re-joined duty between 01.01.2011 and 02.01.2011, they submitted their self-appraisal reports for purposes of their APARs which are recorded every financial year. For having worked for only 88 days during the reporting period i.e. from 01.04.2010 to 31.03.2011, which was short by two days of the minimum requirement of 90 days for writing APARs in terms of the O.M. dated 11.09.1980 issued by the DOP&T, the APARs of the respondents were not subjected to any review. However, for the subsequent period i.e. from the period between 01.04.2011 and 31.03.2012, the APARs of all the respondents were recorded and they were duly graded with the prescribed benchmark. Similarly, in the next financial year i.e. from 01.04.2012 to 31.03.2013, the respondents were able to attain the prescribed benchmark.

4. All the respondents completed four years of regular service in the Junior Time Scale (rank of Assistant Commissioner) in December, 2013. On 29.06.2014, a DPC was held for considering candidates for promotion to the grade of Deputy Commissioner of Customs and Central Excise on an *ad hoc* basis for the vacancy year 2014-15.

5. In the said DPC, the respondents were assessed as '*unfit*' on the ground of availability of only two completed APARs i.e. for the years 2011-12 and 2012-13, as against the requirement of three APARs, as their APARs for the period between 03.01.2011 to 31.03.2011, had not been reviewed on account of non completion of the mandatory period of 90 days. Aggrieved by the decision of the DPC to declare them unfit for promotion to the grade of Deputy Commissioner of Customs and Central Excise on an *ad hoc* basis, the respondents approached the Tribunal by filing the captioned O.A.

6. The said O.A. was opposed by the petitioners, who stated that the DPC was held on 29.06.2014, for examining the suitability of the officers of the 2009 batch for promotion to the said post on an *ad hoc* basis; that 250 eligible officers were assessed for promotion and vide order dated 18.07.2014, 174 officers were promoted to the subject post. However, 21 officers including the respondents herein were assessed as '*unfit*' by the DPC because they had not fulfilled the eligibility criteria as prescribed i.e. they did not possess three completed APARs. Subsequently, a review DPC was held on 26.06.2015 to review the original DPC held on 29.06.2014, in which the names of the respondents were considered alongwith the others and based on the recommendations of the said DPC, the respondents were

promoted to the subject post on an *ad hoc* basis, notionally w.e.f. 18.07.2014 i.e., the date from which their juniors had been promoted to the said grade. However, vide office order dated 11.09.2015, actual benefit was given to the respondents from the date they had assumed charge.

7. It was contended on behalf of the respondents before the Tribunal, that they were entitled to receive the actual benefits from the date, when they were promoted to the grade of Deputy Commissioner on an *ad hoc* basis i.e. w.e.f. 18.07.2014, which was the date on which their other batchmates had been promoted and not from 11.09.2015, the date when they had assumed charge.

8. After examining the arguments advanced by learned counsel for the parties, the Tribunal observed that the respondents had admittedly proceeded on sanctioned leave for making preparations for participating in the following year's CSE. While sanctioning leave to them, the respondents were also assured that if they took leave for participating in the following year's CSE, it would not affect their service benefits or promotional avenues. The Tribunal was, therefore, of the view that the respondents had not contributed to non-writing of their APARs for the year 2010-11, and that they had all rendered regular service for a period of four years, which is the minimum eligibility requirement prescribed in the Recruitment Rules. Thus the respondents were held entitled for being considered for promotion on the basis of the two available APARs for the years 2011-12 & 2012-13 as their APARs for the year 2010-11, were deemed to be '*no report period*' on account of their not completing the minimum period of 90 days.

9. Having achieved the prescribed benchmark for the APARs for the year 2011-12 and 2012-13, the Tribunal opined that the respondents could not have been declared unfit by the DPC held on 29.06.2014 and once they were declared fit in the review DPC held subsequently on 26.06.2015, they ought not to be denied the benefit of promotion from the date, when their batchmates have been promoted. To fortify the said view, the Tribunal relied on two decisions of the Supreme Court in the cases of ***State of Kerala & Ors. v. E.K.Bhaskaran Pillai*** reported at *(2007) 6 SCC 524* and ***Ramesh Kumar v. Union of India & Ors.*** *(2015) 14 SCC 335*, wherein it has been held that the principle of '*no work no pay*' would not be attracted where the Department was at fault in not considering the case of the employee for promotion and not allowing him to work on the post carrying a higher pay-scale.

10. Taking into consideration the aforesaid decisions, the Tribunal allowed the O.A. filed by the respondents and declared that non-availability of the APARs could not be attributed to them and once the respondents were found fit for being promoted to the subject post in the review DPC, they were entitled to grant of all the benefits of promotion from the date on which their batchmates had been promoted to the post of Deputy Commissioner of Customs and Central Excise.

11. Aggrieved by the said decision, the present petition has been filed by the Union of India. Dr.Bharadwaj, learned counsel for the petitioner/Union of India submits that while passing the impugned order, the Tribunal failed to appreciate that the DPC was conducted on 29.06.2014 for considering the suitability of the batch of officers of the year 2009 for making

promotion to the grade of Deputy Commissioner of Customs and Central Excise on an *ad hoc* basis in which the respondents had been assessed '*unfit*' by the DPC, as they were not fulfilling the eligibility criteria prescribed by the DPC, having not completed the three APARs. He contends that based on the subsequent recommendations of the review DPC conducted on 26.06.2015, the petitioners had already taken steps to promote the respondents to the subject grade on an *ad hoc* basis from the same date from which those who were junior to them, had been promoted to the said grade i.e. w.e.f. 18.07.2014 and but the actual benefit was rightly not granted to them till they assumed the charge of the promotional post i.e., w.e.f. 11.09.2015. He explains that the respondents having not performed their duties on the promotional post w.e.f. 18.07.2014, would not be entitled for any monetary benefit for the said period.

12. We have gone through the records and have also perused the impugned judgment and are inclined to concur with the findings returned by the Tribunal in the present case. The limited issue that arises here is whether the respondents are entitled to the monetary benefits for the post on which they have been promoted notionally w.e.f. 18.07.2014, though they had assumed charge of the post w.e.f. 11.09.2015. In the present case, it is not disputed before us that the petitioners had granted extraordinary leave for one year to the respondents in order to enable them to appear in the CSE 2009 and at that stage itself, they were informed that availing of such a leave shall not adversely affect their promotional and other career prospects.

13. This being the position, when the respondents exhausted the extraordinary leave and joined back on duty on 03.01.2011, they were, admittedly, short of two days of the minimum period of 90 days in the last quarter, for filling up the APARs as 1st and 2nd January of the year 2011, were Saturday and Sunday. It is also an undisputed position that subsequently, the respondents had completed the APARs for the year 2011-12 and 2012-13 and were eligible for being considered by the DPC convened for considering promotions to the grade of Deputy Commissioner of Customs and Central Excise on an *ad hoc* basis for the vacancy year 2014-2015. The only reason for assessing the respondents as '*unfit*" by the DPC was that they did not have three completed APARs, for which they could not be blamed in any manner, because the respondents had availed of the extraordinary leave only after the competent authority had sanctioned the same and with an assurance that their career prospects would not be adversely impacted in any manner. That this aspect was also appreciated by the petitioners themselves, is apparent from the fact that pursuant to the review DPC which was conducted on 26.06.2015, the respondents were granted promotion with effect from the date when their batchmates were promoted to the subject post.

14. We are of the opinion that, contemporaneously, the respondents should also have been granted the monetary benefits to which they would have became entitled with effect from the date from which they had been subsequently promoted. Instead, the petitioners issued the impugned office order dated 11.09.2015, stating *inter alia,* that the actual benefit on the promoted post would be available to the respondents only from the date of

assumption of charge which, in our opinion, is unacceptable, for the reason, that once the petitioners had themselves rectified their mistake by promoting the respondents w.e.f. 18.07.2014, then it was incumbent for them to have also given the respondents the financial benefit attached to the subject post.

15. In view of the aforesaid discussion, we do not find any infirmity in the impugned judgment that deserves interference in judicial review. The petition is accordingly, dismissed in *limine*, along with the pending application.

HIMA KOHLI, J

REKHA PALLI, J

AUGUST 09, 2018
sr/gm