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

+ W.P.(C) 13887/2018

S.D KAUSHIK

..... Petitioner

Through: Mr. A.K.Srivastava, Advocate.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Dev P. Bhardwaj, CGSC for
UOI/R1 with Ms.Anubha Bhardwaj,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

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21.12.2018

1. The petitioner has preferred the present writ petition to assail the order dated 01.03.2017 passed by Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No.1070/2014. The Tribunal has rejected the O.A. preferred by the petitioner. At the outset, we may observe that this writ petition has been preferred after a lapse of nearly one year and nine months of the passing of the impugned order. No application to explain the delay and laches in filing the same has been filed by the petitioner. In any event, we have examined the matter and find no merit in the same.

2. The grievance of the petitioner was that though there were 108 vacancies referred to the Departmental Promotion Committee ('DPC') for making promotions from the rank of Deputy Secretary to

Director, only 48 Deputy Secretaries were recommended for regular promotions as Selection Grade Directors, and no decision was taken by the DPC in respect of 60 vacant slots. The petitioner's name figured at Serial No. 69 of the Eligibility List of Deputy Secretaries, and if the DPC had recommended the candidates for the remaining vacancies – even on ad hoc basis, he too would have got promoted as a Director before his retirement. The appointment order in respect of the Selection Grade Directors for the year 2013 was issued on 07.03.2014 and the petitioner retired from service as Deputy Secretary on 31.03.2014.

3. The Tribunal has not found merit in the Original Application preferred by the petitioner on the premise that no employee has a vested right to seek promotion, merely on account of existence of vacancies in the promotional post. The Tribunal has placed reliance on the judgment of the Supreme Court in ***Shankarsan Dash v. Union of India 1991 3 SCC 47*** in this regard. The Tribunal has held that the respondent had provided a valid justification for not filling up 60 vacancies in the post of Director. The reasoning adopted by the Tribunal is as follows:

“ 6. It is not in dispute that as against 108 vacancies referred to the DPC, only 48 have been recommended and 42 appointed. The entire case of the applicant is that he being in the eligibility list and 108 vacancies being available, he was entitled to be considered for promotion. The respondents have given reasons for not filling up the vacancies. It is settled law that the

Government is entitled not to fill up all the available vacancies for valid reasons. A Constitution Bench of the Apex Court in Shankarsan Dash v Union of India [(1991) 3 SCC 47] held as under:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons.....”

Thus, what emerges is that the

competent authority must record reasons for not making appointment against the available vacancies. In the present case, the respondents have filed additional affidavit dated 06.10.2016. In para 4.9 thereof reference is made to the Tribunal's judgment dated 09.05.2011 in Garima Singh's case (supra) and the directions contained therein. It is accordingly stated that if the said judgment is to be implemented as the same has not been stayed, 36 direct recruit Section Officers of 1995 and 1996 batches are to be interpolated in the provisional list of Under Secretaries of 2003 only for making ad hoc promotions to the grade of Deputy Secretary, and they would be accordingly required to be promoted as Deputy Secretaries. It is further stated that at the time of relaxation, 16 direct recruit Section Officers were also to be considered, out of which 13 were officiating as Deputy Secretaries on ad hoc basis.

7. The respondents have also placed on record notings on the file recording reasons for not filling up all the vacancies. Relevant extract of the notings reads as under:

“6. Any attempt to promote all the regular Deputy Secretaries of SLs 2009 & 2010 may have legal complications. We may, therefore, limit ourselves to the promotion of the Deputy Secretaries of SL 2009 and those Deputy Secretaries of SL 2010 who would not be affected by any outcome of the pending litigation. As mentioned in the preceding notes, 25 Deputy Secretaries of SL 2009 and prior years and 97 Deputy Secretaries of SL 2010 have been given relaxation for consideration for promotion to the grade of Director. Of the 122 Deputy Secretaries, the first 48 officers (25 of 2009 and prior years, 23 of SL 2010) are not affected by the final outcome of the court case. In view of this, decision is required to be taken for their regular promotion to the grade of Director, subject to the final

outcome of the pending litigation.”

8. On going through the aforesaid notings, we are of the considered opinion that there were valid reasons for not filling up all the available vacancies and the opinion of the Government in this regard cannot be faulted. In any case, while exercising power of judicial review, this Tribunal cannot go into the merits of the decision of the competent authority so long as the decision is rational and not mala fide. Mere inclusion of the name in the eligibility list does not confer any right upon the applicant. Otherwise also, the applicant figures at serial number 69 of the eligibility list. There were 21 candidates above the applicant in the list. They have a preferential right for seeking promotion. The applicant cannot claim any right of promotion under the given circumstances.

4. The submission of learned counsel for the petitioner is that the Competent Authority namely MOS (PP) had taken a decision on 07.02.2014 on the file that if, after promoting 48 officers, around 60 posts of Directors will remain unfilled, it would not be in the interest of the organization to leave these vacancies unfilled. The Competent Authority had, therefore, decided that the remaining vacancies may also be filled up by promoting the Deputy Secretaries from the 2010 Select List on ad-hoc basis, subject to the outcome of pending court

cases.

5. Learned counsel submits that once the Competent Authority has taken the said decision, it was not open to the respondents to disregard the same, and not to fill up the remaining 60 vacancies -even on ad-hoc basis. He has drawn the attention of the court to the Minutes of the Meeting of the Selection Committee held on 20.02.2014, to consider selection of the Deputy Secretary Officers of the Central Secretariat Services for promotion to Senior Selection grade (Director) wherein, the said Selection Committee had recorded as follows :

“5. In view of the above position, approval of MOS (PP) has been obtained for consideration of 48 Deputy Secretaries for regular promotion to the grade of Director and filling up of the remaining 60 slots by ad-hoc promotion of Deputy Secretaries from SL 2010, subject to final outcome of the ongoing litigation”.

6. Having heard learned counsel for the petitioner, we are of the view that there is no merit in the present writ petition. First and foremost, no employee has a vested right to be promoted, merely on account of existence of the vacancies in the promotional, post as held by the Supreme Court in ***Shankarsan Dash (supra)***. The decision of the Government not to fill up promotional posts, which is taken bonafidely and for disclosed reasons, cannot be faulted.

7. In the present case, it is evident that there are litigations pending in Tribunal and Courts in relation to *interse* seniority and promotion wherein the petitioner and other Deputy Secretaries who were not similarly

considered for promotion, are embroiled. The petitioner does not dispute the fact that apart from 48 officers who were recommended for promotion from the grade of Deputy Secretary to Director, the other eligible candidates, including the petitioner would be affected by the final outcome of the pending court cases. It is in this light that the respondent decided not to fill up the remaining 60 posts of Director. Government has taken this decision, so as to avoid escalation of litigation. The same cannot be faulted. The submission of the petitioner founded upon on the Office Noting made by MOS (PP) on 07.02.2014 is of no avail. File notings contained in Government Records reflect a process of loud thinking in the decision making process. One File Noting cannot be picked out in isolation, to claim that it reflects the final decision. The Governmental decision is reflected from the Government action of promoting only 42 officers. The same is also reflected from the stand taken by the Government in their reply filed before the Tribunal. It is settled position in law that a file noting, which is not communicated, does not tantamount to an “order” on which an action could be based or rights could be claimed. The final decision by the Government was to fill up only 48 vacancies, since the 48 officers recommended for promotion were not, in any way, affected by the ongoing litigations.

8. It is not the petitioner’s case that any officer in the hierarchy has disregarded the so called “decision” taken by the MOS (PP) on 07.02.2014 for any ulterior or other purposes. It is not the petitioner’s case that any action has been taken against any officer, on account of alleged non-compliance of the so called decision dated 07.02.2014 of the Competent Authority.

9. So far as the petitioner’s reliance on para 5 of the Minutes of the

Meeting of the Selection Committee is concerned, the same also does not reflect the complete position. The said Selection Committee records in para 7 of the same minutes as follows :

“7. After deliberation, the Committee was of the view that the promotion of officers should be restricted up to S.N.48 of Appendix-I to agenda note, beyond which the officers appointed as direct recruit Section Officers and currently working as ad-hoc Deputy Secretaries were likely to be interpolated. The promotion of the officers beyond S.N.48 should be considered only after a legal opinion is obtained with reference to the ongoing litigation.”

10. For the aforesaid reasons, we are of the view that the Government had sufficient justification not to select and appoint/ promote, inter alia, the petitioner to the post of Director and that decision of the Government cannot be faulted. The impugned order, therefore, does not call for interference.

11. Dismissed.

VIPIN SANGHI, J

A. K. CHAWLA, J

DECEMBER 21, 2018/j