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

Reserved on: 07th January, 2019
Pronounced on: 24th January, 2019

+ W.P.(C) 6992/2002

AJAY KUMAR SHRIVASTAVA & ANR. Petitioners

Through: Mr. L.R. Khatana, Adv.

versus

UOI & ANR. Respondents

Through: Mr. R.V. Sinha & Mr. A.S. Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE PRATEEK JALAN

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1. The petitioners in this writ petition are aggrieved by orders of the Central Administrative Tribunal (hereinafter, "the Tribunal") dated 10.01.2002 and 04.04.2002 dismissing their Original Application (O.A. No. 620/2001) and their application for review (R.A. No. 83/2002).

2. The petitioners are officers of the Central Secretariat Service and were serving as Section Officers at the time of filing the application before the Tribunal. Although they completed the eligibility criteria of 8 years of service as Section Officers, qualifying them for promotion to the grade of Under Secretary, they had yet not

been granted such promotions. Their grievance before the Tribunal was that the benefit of an Office Memorandum dated 20.08.1999 (hereinafter, "O.M."), providing for upgradation of Section Officers/Desk Officers to the grade of Under Secretaries, has been given to their juniors by a misplaced application of the reservation policy. The petitioners consequently sought the benefit of upgradation from the date that such benefit was given to persons junior to them in the prevalent seniority list of Section Officers dated 03.12.1997. Their representations dated 22.02.1999, 27.08.2003 and 03.11.2000 having failed to elicit any response, they filed the application before the Tribunal on 12.03.2001.

3. The Tribunal has declined reliefs to the petitioners on merits, and has also held against them on the question of limitation and non-joinder of affected parties.

4. Mr. L.R. Khatana, learned counsel for the petitioner submitted that the said O.M. provides for upgradation of posts on account of acute stagnation in the grades of Section Officers and Desk Officers. He relied on the judgment of the Supreme Court in *Bharat Sanchar Nigam Limited v. R. Santhakumari Velusamy and Others* (2011) 9 SCC 510, to contend that the policy of reservation is not applicable to upgradation of posts. Mr. Khatana further argued that the Tribunal had misapplied the provisions of the Administrative Tribunals Act, 1985 relating to limitation and that, seen in the context of the reliefs sought by the petitioners before the Tribunal, the Tribunal's finding of non-joinder of parties was also erroneous.

5. Mr. Sinha, learned counsel for the respondent argued that the reservations were granted on the basis of the advice of the Law Ministry and that the Tribunal had rightly declined to interfere in a policy decision of the Government.
6. The contents of the said O.M. are set out below:

OFFICE MEMORANDUM

Sub.: Central Secretariat Service – Upgradations of Posts of Section Officers/Desk Officers to the level of Under Secretaries as personal to the incumbents – reg.

The undersigned is directed to refer to this Department's O.M. of even number dated the 28th September, 1998, upgrading a certain number of posts specified therein from the level of Desk Officers/Section Officers/Under Secretaries to that of Under Secretaries/Deputy Secretaries. The circumstances in which it became necessary to give personal upgradations to the officers, viz. non-preparation of the panels of Under Secretaries (due to litigation over the dispute relating to inter-se seniority of direct recruits and promotee Section Officers) still remain unchanged. Consequently, it has not yet been feasible to make regular promotions to the grades of Deputy secretary and Under Secretaries. It is also noted that even after the personal upgradations given to the Section Officers against 225 temporary upgraded posts of Under Secretaries in pursuance of the aforesaid O.M. dated 28.9.98, the level of stagnation continues to be acute in the grade. The matter has been considered further in this Department. After carefully considering the relevant aspect of the matter, it has been decided with the concurrence of the Department of Expenditure, to upgrade 'temporarily 690 posts of Desk Officers/Sector Officers to the grade of Under Secretaries, so as to give upgradation on personal/in-situ basis to allow the Desk Officer/section Officer included

in the select Lists for the year upto 1987 and also to the SC/ST offices included in the subsequent lists to make up the deficiency in their share as per post based roster. A list of such SC/ST officers is enclosed (Annexure). These upgradations will be subject to the following conditions:

- (i) The Section Officers/Desk Officers will be considered for upgradations on a 'personal/insitu basis against the aforesaid upgraded post of the order in which they appear in the common seniority, list of Section Officers issued on 3.12.97 in pursuance of the Supreme Court's Singh & Orissa. As the SSL is the subject matter of M.A. No. 640/1998 filed by Amrit Lal & Ors., and pending in the Cat, Principal Bench, New Delhi, the appointments will also be subject to the outcome of the Application.*
- (ii) Reservation will be provided to SC/ST officers an admissible in the promotions to the Under Secretaries' grade, as per the relevant instructions in force as on date. Accordingly, post-based roster will be followed. Further, only such of the SC/ST officers as have completed the minimum prescribed 8 years' approved service in the Section Officers' grade and satisfy other requirements laid down in the instructions will be considered for such 'personal' upgradations. This will, however, be filed on the subject matter by Shri C.D. Bhatia and others in the CAT and OA No. 146/98 filed by Shri M. Sreenivasa & another in the CAT.*
- (iii) The appointments against the upgraded posts will not entitle the officers to any claim for regular appointment as Under Secretary or seniority in the grade.*
- (iv) The appointments will be effective from the date of issue of this order*
- (v) The upgraded posts will automatically revert to their original level as and when the incumbents of*

such posts vacate them on their promotion against actual/regular vacancies in the higher grade or on their retirement, resignation, etc.

- (vi) The officers adjusted against the upgraded posts will be given the designation and the scale of pay of the post but will continue to perform the same duties/functions as they are doing at present, till they get adjusted against regular vacancies in the Under Secretary's grade. Some internal adjustment in regard to the level/system of submission of papers by the incumbents of the upgraded posts may be necessary, which may be made by the concerned Ministries/Departments internally.*
- (vii) The officers who are on leave shall be given the benefit on their return to duty from leave.*

2. The cadre authorities may consider the officers borne on their cadre and if found fit on the basis of the relevant records and from the vigilance angle, may issue orders after approval of the competent authority under intimation to this Department urgently. They will, no doubt, verify the correctness of community status of the officers from relevant records while processing their cases.

3. Officers who are on deputation shall have an option from reversion to get the benefit of appointment as Under Secretary on personal upgradation basis. Such officers may exercise an option for reversion from deputation or otherwise within one month of issue of this order by the Concerned Ministry/Department. An officer who exercises the option for reversion will be appointed against the available vacancies of section Officers in his cadre and on such appointment, he will get the benefit of appointment to the post of Under-Secretary on personal upgradation basis. In case an officer opts for reversion, he shall await further instructions from the concerned

Ministry/Department before actually reverting from deputation.

4. The position will be reviewed on receipt of the intimation regarding action taken by cadre authorities and further adjustments, if required, will be made.”

7. It is evident from above that the objective of the said O.M. was to deal with acute stagnation in the cadre of Section Officers and Desk Officers by temporary upgradation of 690 posts to the level of Under Secretaries. The officers were to be considered for upgradation in situ on a personal basis, in order of their position in the seniority list issued on 03.12.1997. The distinction between an “upgradation” of this nature and “promotion” have been examined in several judgments including *BSNL (supra)*, cited by Mr.Khatana. In that judgment, the Supreme Court has drawn up several of its earlier judgments, and the Full Bench Judgment of the Kerala High Court in *N.G. Prabhu vs. Kerala High Court (1973) Lab IC 1399 (Ker)* to enunciate the following principles, with regard to this distinction, as well as the consequent applicability of the reservations policy:

“(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to a higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both—that is, advancement to a higher position and advancement to a higher pay scale—are described by the common term “promotion”, does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense, that is, advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simpliciter. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simpliciter. Where the upgradation involves a process of selection criteria

similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simpliciter, there is no need to apply the rules of reservation. But where the upgradation involves a selection process and is therefore a promotion, the rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.”

Applying these principles, the Court held that a cadre review which did not involve additional creation of posts but placement of some posts in a higher grade to relieve stagnation did not involve any process of selection and thus did not invite the rules of reservation.

8. Two of the judgments cited in BSNL clarify the position further. In *All India Non SC/ST Employees vs Union of India* (2001) 10 SCC 165, the Court held as follows:-

“It appears from all the decisions so far that if as a result of reclassification or readjustment, there are no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable. It is on this basis that this Court on 19-11-1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts and Civil Appeal No. 1481 of 1996 and the connected matters were decided against the Union of India. The effect of this is that where the total number of posts remained unaltered,

though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs 550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation.”

In Union of India vs. Pushpa Rani (2008) 9 SCC 242, the Court held that the restructuring involved in that case was not an upgradation simpliciter and therefore attracted the policy of reservations. While doing so, it distinguished several order of the Tribunal (some of which had been unsuccessfully challenged before the Supreme Court), and held:-

“An analysis of orders passed by the Tribunals and this Court shows that all cases except that of K. Manickaraj case involved upgradation of large number of posts which could be filled by placing the existing incumbents in the higher grade without subjecting them to the process of selection. Different Benches of the Tribunal referred to the policy decision taken by the Railway Board that reservation policy for Scheduled Castes and Scheduled Tribes is not applicable where cadre restructuring results in mass upgradation of posts and held that the administration was required to make appointment/placement against the upgraded posts without reserving posts for Scheduled Castes and Scheduled Tribes. This Court repeatedly emphasized that

the restructuring exercise did not result in creation of new posts/additional posts which could be filled by promotion by following the procedure of selection."

9. Applying these judgments to the facts of the present case, we find that the said O.M. clearly does not provide for any process of selection to avail of the upgradation or for creation of any new posts. In fact, in the counter affidavit filed by the respondent before the Tribunal, as well in this Court, it was admitted that, "*Strictly speaking, upgradation of posts on a 'personal' basis does not involve promotion as such.*" However, the reservation was sought to be justified on the basis that upgradation can be construed as a temporary increase in the strength of the higher grade, and that the upgraded officers are to continue until they are promoted against regular vacancies. The respondent also cited legal opinions obtained, and instances of prior practice wherein such reservations had apparently been applied.

10. The respondent's contention that the upgradation leads to an increase in the strength of the higher grade is in our view a misunderstanding of the nature of upgradation as elucidated by the Supreme Court in the judgments quoted above. Similarly, the duration of continuance in the upgraded post cannot alter the character of an upgradation, and convert it into a promotion, in the absence of a selection process or creation of any new posts.

11. We therefore find that, on merits, the petitioners were entitled to the reliefs sought i.e. the benefits of upgradation under the said O.M. from the post of Section Officer held by them, to the level of Under Secretary, from the dates granted to their respective juniors.

12. Coming now to the question of non-joinder of parties, the Tribunal has non-suited the petitioners on the ground that they had not impleaded those juniors who had been upgraded under the said O.M., and who may be reverted if relief was granted to the petitioners. In our view, here too, the Tribunal failed to appreciate that the upgradations in question were intended to be personal and in situ, which would hold until the officer was promoted in the regular course. The question of reversion of any junior officer by reason of granting the relief sought to the petitioners therefore did not arise.

13. On the question of limitation also, the Tribunal has failed to apply the law correctly. Section 21(1) of the Administrative Tribunal Act, 1985 provides as follows:-

“21. Limitation.—(1) A Tribunal shall not admit an application,—

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.”

14. The said O.M. was issued on 20.08.1999 and the petitioners' first representation against the same was submitted on 22.09.1999. There was no response to this representation. Section 21(1) (b), in such a situation, provides a limitation period of one year after the

lapse of six months from the date of the representation. The petitioner's original application filed 12.03.2001 was within the period of 18 months from 22.09.1999 and thus within the period prescribed. The Tribunal has miscalculated the period by applying the provisions of Section 21 (1) (a) on the basis that the O.M. dated 20.08.1999 was the “final order” under challenge. On a plain reading of the Section, it is evident that Section 21(1) (a) applies only when a representation made under Section 20 has been disposed of, which is not the case in the present facts.

15. For the reasons aforesaid, the petitioners are entitled to be granted the benefit of the said O.M. dated 20.08.1999 from the date their respective juniors were promoted. The respondents are directed to issue the necessary orders, compute the consequential benefits (including fixation of pay scales and later, pension, as well as granting benefits pursuant to recommendation of the Fifth, Sixth and Seventh Central Pay Commission, respectively) which enure to the petitioners and to disburse the same to them within a period of three months from the date of receipt of this judgment.

16. The writ petition is allowed in the above terms.

Dasti.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

JANUARY 24, 2019

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