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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 14.8.2019

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W.P.(C.) No. 8772/2019

MONIKA WADHWA

..... Petitioner

Through Mr. Ankur Chhibber, Adv.

versus

HIGH COURT OF DELHI

..... Respondent

Through Ms. Meenal Duggal, Adv. for
Mr. Viraj R. Datar, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to assail the order dated 24.02.2018 passed by the respondent whereby the petitioner's representation dated 08.02.2017 has been rejected. The order dated 24.02.2018 passed by the respondent, in so far as it is relevant, reads as follows:

"I am desired to refer to your representation dated 08.02.2017 requesting to appoint you to the post of Private Secretary w.e.f. 12.09.2011 (the date on which the post of Private Secretary became vacant with all consequential benefits) instead of 20.12.2016 and to inform you that the same has been considered and rejected by the competent authority."

2. The petitioner also seeks direction to the respondent to convene a review DPC for her promotion to the post of Private Secretary with effect

from 12.09.2011, and to promote her to the said post with effect from 12.09.2011 i.e. the date on which the vacancy in the post of Private Secretary (to be filled from 25% promotion quota of Senior Personal Assistants) fell vacant.

3. The petitioner was initially appointed as a Personal Assistant in this Court on 06.01.2000. She was appointed as a Senior Personal Assistant under the direct recruitment quota on 28.07.2006. On 07.01.2012, the respondent issued an order whereby the petitioner was confirmed in the post of Senior Personal Assistant with effect from 23.12.2011. The case of the petitioner is that a vacancy in the promotional post of Private Secretary under the 25% promotion quota arose on 12.09.2011. Even though the petitioner was confirmed in the post of Senior Personal Assistant with effect from 23.12.2011, she was eligible to be considered for the said post of Private Secretary from July 2011. However, she was not considered, as no DPC was convened to consider promotion to the post of Private Secretary. She was informed-in answer to her representation dated 07.03.2014, on 02.07.2014, that Hon'ble the Chief Justice on the recommendations of the Committee constituted for the purpose, had ordered that the decision of this Court in W.P. (C) 2836/2010, titled ***V.K. Mittal and Ors. vs. Registrar General, Delhi High Court & Ors.*** be awaited, wherein erstwhile Rule 5A of the Delhi High Court Staff (Seniority) Rules, 1971 was under challenge for being declared *void ab-initio*. The further case of the petitioner is that though the promotions were not made to the post of Private Secretaries, promotions from the post of Private Secretary to the post of Assistant

Registrar continued to be made which led to three more vacancies arising in the post of private Secretary.

4. The case of *V.K. Mittal* (supra) was finally decided on 21.01.2016. On 3.11.2016, the respondent issued a provisional seniority list of Senior Personal Assistants, wherein the petitioner was shown at serial No.1. On 19.12.2016 the DPC was convened for promotion to the post of Private Secretaries. Since the petitioner was at serial No.1 in the seniority list of Senior Personal Assistants and she also was otherwise eligible, she was found fit for promotion. On 21.12.2016, the petitioner was promoted to the post of Private Secretary.

5. The petitioner represented that she ought to be promoted as Private Secretary with effect from 12.09.2011. She claimed that she had completed her probation successfully in the year 2008; gained experience of 5 years regular service from the date of appointment to the post of Senior Personal Assistant in the year 2011; and there was a clear vacancy which arose on 12.09.2011 in the post of Private Secretary-to be filled by promotion existing. Thus, she could not be denied retrospective promotion. The said representation having been rejected, the present writ petition has been preferred.

6. The submission of Mr. Chhibber is that for no fault of the petitioner her consideration to the post of Private Secretary by the DPC was delayed from the year 2011 onwards, even though she was eligible in the year 2011 itself and there was a clear vacancy in the post of Private Secretary. She was at serial No.1 in the seniority list of Senior Personal Assistants even in

the year 2011. Mr. Chhibber submits that merely because the respondent decided to await the decision in the case of *V.K. Mittal* (supra)-which decision was rendered in the year 2016, is no reason to deny ante-dated promotion to the petitioner from the date when the vacancy arose. He also submits that even though the respondent stated that they would not make promotions to the post of Private Secretary, they continued to make promotions from the post of Private Secretary to that of Assistant Registrar after 2011 without waiting for the decision in *V.K. Mittal* (supra). Mr. Chhibber further submits that it was only when the petitioner was promoted in the year 2016 prospectively, that she came to know that she would not be granted retrospective promotion. In support of his submission that retrospective promotion could be granted where the Government had consciously intended to make promotions, but had not undertaken the process of promotion, he places reliance on the decision of the Supreme Court in the case of *Major General H.M. Singh, VSM vs. Union of India & Anr.*, (2014) 3 SCC 670 and *B. Kumaravel v. Union of India & Ors*, 2018 SCC OnLine Del 9015.

7. On the other hand, learned counsel for the respondent, who appears on advance notice, has tendered in Court the minutes of the meeting of the Committee for appointment/selection of officers of High Court and District Courts held on 15.01.2018. A Committee of four Ld. Judges of this Court, in the said meeting, considered the representation of the petitioner for retrospective promotion with effect from 12.09.2011, and rejected by placing reliance on the decision of this Court in *Union of India & Anr. Vs. K.L. Taneja*, 2013 Lab IC 2108.

8. Having heard learned counsel for the respondent, we are of the view that there is no merit in this petition.

9. It is a well settled proposition of law that, in service jurisprudence – retrospective promotions are not recognized. Retrospective promotions could be granted only if a specific rule authorizing and empowering the executive to accord such retrospective promotion exists in the relevant service rules.

10. The submission of Mr. Chhibber is that the petitioner was in no way responsible for the delay in holding of the DPC for consideration of her case for promotion to the post of Private Secretary. The petitioner became eligible for promotion to the post of Private Secretary in the year 2011 itself, and there was a clear vacancy as well. The respondents gave the excuse for not holding the DPC as the pending challenge to Rule 5(A) of Delhi High Court Staff (Seniority) Rules, 1971 in the case of **V.K. Mittal** (supra). Mr. Chhibber has gone on to even state that the said decision had no bearing on the petitioner's case for consideration for promotion to the post of Private Secretary, and that the pending writ petition of V.K. Mittal could not have been used as a reason to not to hold the DPC.

11. As noticed, a Committee of four learned Judges of this Court, while rejecting the petitioner's claim for ante-dated seniority in the post of Private Secretary placed reliance on **K.L. Taneja** (supra). The Committee also rejected the petitioner's reliance on several other decisions. The relevant extract from the Minutes of the said meeting held on 15.01.2018 are pertinent, and read as follows:

“ In Union of India & Anr. Vs. K.L. Taneja and Anr. 2013 Lab IC 2108, after extensively examining the case law on the subject for grant of retrospective promotion [(1987) 4 SCC 566 K. Madhavan Vs. UOI; (1997) 9 SCC 287 UOI Vs. N.R. Banerjee; (2004) 1 SCC 245 P.N. Premchandaran Vs. State of Kerala; 1989 Supp. (2) SCC 625 Union of India Vs. K.K. Vadera; (1998) 7 SCC 44 Baij Nath Sharma Vs. Hon’ble Rajasthan High Court at Jodhpur; AIR 2004 SC 3460 Sanjay K. Sinha Vs. State of Bihar; 2006 (13) SCALE 246 State of Utaranchal Vs. Dinesh Kr. Sharma; (2008) 14 SCC 29 Nirmal Chandra Sinha Vs. UOI; (1995) 4 SCC 246 Vinod Kumar Sanghal Vs. UOI; and (2010) 4 SCC 290 UOI Vs. Hemraj Singh Chauhan], it has been held:

“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.”

In the present case promotion could not be given earlier because of administrative reasons. There is no allegation of mala fides and taint in exercise of power or an act done. It is not the case that any junior to the representationist was granted promotion.

Judgments relied upon by the representationists would not be applicable for the following reasons:

(i) Govt. of NCT of Delhi Vs. Rakesh Beniwal 213 (2014) DLT 748.

In this case there was delay in issue of appointment letter and juniors were appointed earlier and granted promotion. Facts were peculiar. This was also a case of notional promotion and juniors were getting higher pay scales, having been promoted earlier.

(ii) Union of India Vs. G.D. Goel ILR (2008) Supp. (1) Delhi 44.

This case is governed by paragraph 228 of the Indian Railways Establishment Manual. As there was specific provision, general principles laid down by the Supreme Court and High Courts recorded in K.L. Taneja and Anr. (supra) were not applicable. Hence, this decision is not applicable.

(iii) Ramesh Kumar Vs. Union of India & Ors. AIR 2015 SC 2904.

This case holds that denial of back wages and normal rule of 'no work no pay', even in the absence of statutory provision, need not be invoked and applied in "appropriate" cases.

(iv) Union of India Vs. Sant Ram

[W.P.(C) 1955/2015 decided on 22.07.2013]

This was again a case in which paragraphs 228 of the Indian Railways Establishment Manual; specific provision/ rule was applicable.

In view of the above, the Committee recommends rejection of the representations.” (emphasis supplied)

12. From the decision in ***K.L. Taneja*** (supra), it would be seen that *mala fides* is recognized as an exceptional ground for grant of retrospective promotion to do justice to the wronged person. In the present case, the petitioner has not alleged any *mala fides* against any officer of this Court.

13. Even if the petitioner was not at fault for the DPC not being convened for consideration of her case for promotion to the post of Private Secretary, so was the respondent, as the pendency of the writ petition of V.K. Mittal cannot be treated as a fault attributable to the respondents. If the submission of the petitioner is that the decision in ***V.K. Mittal*** (supra) would have had no bearing, and could not have been given as a reason to delay the holding of the DPC for consideration of her promotion to the post of Private Secretary, it was for the petitioner to assail the memorandum dated 02.07.2014 and to invite a decision of this Court on the said aspect.

14. However, the petitioner preferred the earlier petition i.e. W.P.(C.) No. 5700/2016 only in the year 2016, wherein no order was passed to the above effect.

15. Reliance placed by Mr. Chhibber on the decision of the Supreme Court in ***Major General H.M. Singh*** (supra) is completely misplaced. The facts of this case were that the appellant, at the relevant time, was the senior most serving Major General, eligible for promotion to the rank of Lieutenant General. A vacancy in the rank of Lieutenant General became available while the appellant was in service. He represented that he being eligible for

promotion against the existing vacancy of Lieutenant General, his case should be considered prior to the date of his retirement on attaining the age of 59 years i.e. 29.02.2008. If the appellant were to be promoted to the rank of Lieutenant General, his age of retirement would stand extended to 60 years and his date of retirement would be 28.02.2009. He requested the respondents to immediately constitute and convene a meeting of the Selection Board to consider his claim. Two days prior to the appellant's retirement on superannuation as Major General, on 27.02.2008, a meeting of the Selection Board for consideration for promotion to the rank of Lieutenant General was convened. The Selection Board cleared the appellant for promotion to the rank of Lieutenant General. The prescribed procedure required the clearance of the appellant's promotion by the Appointments Committee of the Cabinet. Since the same was likely to take time, the President issued an order on 29.02.2008, granting extension of service to the appellant by a period of three months. Since the Appointments Committee of the Cabinet could not finalise the matter even during the said extended tenure of three months, the President once again granted a further extension in service to the appellant by one month i.e. till 30.06.2008, or till the approval of the ACC, whichever was earlier. Eventually, the Secretary of the ACC communicated on 02.06.2008 that the ACC had not approved the promotion of the appellant to the rank of Lieutenant General. The appellant assailed the said decision and order dated 03.06.2008, retiring him from the rank of Major General with immediate effect before the High Court of Judicature of Madras. The Union of India, inter alia, contended that the appellant having attained the age of

superannuation on 29.02.2008, could not be promoted as Lieutenant General while he was on extension. The learned Single Judge dismissed the writ petition of the appellant. The Intra Court appeal preferred by the appellant was also rejected by the Division Bench of the High Court. The Supreme Court allowed the appeal preferred by the appellant. Learned counsel for the petitioner has placed reliance on paragraphs 28 and 29 of the said decision, which read as follows:

“28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the seniormost serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29-2-2008, and thereafter, by a further Presidential Order dated 30-5-2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to

enable him to acquire the honour of promotion to the rank of Lieutenant-General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary.

29. We are therefore of the view, firstly, that the order allowing extension in service of the appellant for a period of three months, dated 29-2-2008, and the order allowing further extension in service by one month to the appellant, dated 30-5-2008, so as to enable his claim to be considered for onward promotion to the rank of Lieutenant-General, cannot be held to be in violation of the statutory provisions. Rule 16-A of the Army Rules, postulates extension in service, if the exigencies of service so require. The said parameter must have been duly taken into consideration when the Presidential Orders dated 29-2-2008 and 30-5-2008 were passed. The respondents have neither revoked, nor sought revocation of the above orders. Therefore, it does not lie in the mouth of the respondents to question the veracity of the above orders. The above orders were passed to ensure due consideration of the appellant's claim for promotion to the rank of Lieutenant-General. Without rejecting the above claim on merits, the appellant was deprived of promotion to the rank of Lieutenant-General."

16. The aforesaid decision has to be read and understood in the context of the factual background taken note of hereinabove, which is starkly different from the factual background of the present case. In that case the Selection Board met before the appellant's superannuation; the Selection Board found the appellant fit for promotion as Lieutenant General; the President granted extension to the appellant on two occasions to await the approval of the

ACC; the refusal of approval by the ACC was premised on the fact that he was serving on extension. In that context the Supreme Court did not find the refusal of approval to be valid and, consequently, allowed the appeal. These peculiar facts make all the difference between the present case and **General H.M. Singh** (supra). From the aforesaid extract from **General H.M. Singh** (supra), we cannot discern any proposition that if a person, immediately upon becoming eligible for consideration for promotion is not so considered, despite existence of a clear vacancy in the promotional post, he would be entitled to claim promotion from the date on which he became so entitled for consideration, even if the DPC is held after a passage of some time. Thus, the decision in **General H.M. Singh** (supra) is of no avail to the petitioner.

17. Mr. Chhibber has also sought to place reliance on a Division Bench judgment of this Court in **B. Kumaravel** (supra). A perusal of this decision also shows that the same is also rendered in a completely different context. In fact, this decision goes against the petitioner. This was a case where the petitioner who was an Assistant Architect, became eligible for consideration for promotion to the post of Architect, and though the respondent No. 2 had initiated the promotion process in March 2003, no DPC was convened. The Recruitment Rules were superseded by new Rules notified on 24.02.2004. The issue that was considered by the Division Bench was whether the action of the respondents in holding the DPC in August, 2005 as per the Rules of 2004 for filling up the existing vacancies in the post of Architect as on 01.04.2003, was justified. This Court relied upon the decision of the Supreme Court, inter alia, on **Y.V. Rangaiah & Ors vs J. Sreenivasa Rao &**

Ors., (1983) 3 SCC 284. After considering the decisions relied upon by either of the sides, the Division Bench observed as follows:

“27. Thus what emerges from the decisions relied upon by the learned counsels for the parties is that an eligible candidate does not have a right to insist that the vacancies must be filled as soon as they arise, but once there is a prescribed time frame laid down for completing the selection process and filling of vacancies, the said timeline has to be followed unless it is a case where pending amendment of Recruitment Rules, a conscious decision is taken by the department not to fill the vacancies, as per the then existing Rules.” (emphasis supplied)

18. The petitioner has not pointed out any statutory or binding rule which mandates or lays down a time limit for filling up of the existing vacancies in the post of Private Secretary. Thus, the later part of the finding recorded-as above extracted, is not attracted in the present case.

19. In the facts of that case, the Division Bench also observed that the respondents had not provided any justification for not holding the DPC in a timely manner. As opposed to that, in the present case the respondents took a conscious decision to withhold promotions, till the decision of the Court in *V.K. Mittal* (supra).

20. The Division Bench held that the petitioner was entitled to be considered for promotion to the post of Architect in the year 2003 itself, and that too on the basis of the 1989 Rules. The direction issued by the Division Bench, inter alia, was as follows:

*31. For all the aforesaid reasons, the present writ petition is allowed and the impugned order is set aside. **However, instead of directing the promotion of the petitioner to the***

post of Architect w.e.f. 01.04.2003, we deem it appropriate to direct the respondents to reconsider the petitioner for promotion as an Architect against the vacancy as existing on 01.04.2003 in accordance with the Central Architects Service Group 'A' Rules, 1989. The said exercise be carried out within 12 weeks from today. In case, the petitioner is found 'fit' for promotion, his seniority shall be filed accordingly in the grade of "Architect" within six weeks thereafter. However, he would not be entitled to claim any arrears of monetary benefit-actual or notional on the basis of refixation of his seniority, if any. (Emphasis Supplied)

21. Thus, the aforesaid decision in **B. Kumaravel** (supra) is also of no avail to the petitioner. The real issue that came before the Division Bench and decided by it was whether the unamended Rules of 1989 were required to be followed in respect of vacancies which arose prior to the amendment of the Rules in the year 2004 in view of the time limits prescribed for holding the process of promotion in that case. The respondent was directed to re-consider the petitioner's case for promotion as an Architect against the vacancy as existed on 01.04.2003 in accordance with the Rules of 1989 and, if he was found fit for promotion, his seniority was liable to be fixed accordingly.

22. Pertinently, in the aforesaid decision the Division Bench also took note of the decision of this Court in **Pradeep Kumar v. Govt. of NCT of Delhi**, W.P.(C) Nos. 19087-91/2006, wherein the Division Bench had held:

"28. In view of the foregoing, it is clear that law in this regard is no longer res integra. The general rule is that vacancies occurring should be filled up as per the prevalent recruitment rules. The same is subject to two exceptions, i.e. when the rules are under consideration for amendment or revision and the authority has taken a conscious decision to

*defer further promotions until the changes are carried out or that the proposed new rules are to be made applicable retrospectively. Further, the decision to defer promotions should not be actuated by mala fides and must be based on proper reasons. Such a reason may be gathered from the background and circumstances in which the decision was taken. **The right of an employee to be considered for promotion accrues only on the date of consideration of eligible candidates by the department and not before or if the rules provide for a particular time-frame in which the selection process is to be concluded. No right accrues to the candidates upon the occurrence of vacancies.***

(emphasis supplied)

23. In the light of the aforesaid discussion, we do not find any merit in this petition. Dismissed.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

AUGUST 14, 2019

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