

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 24009 of 2019
IA No. CAN 1 of 2020 (Old No. CAN 1577 of 2020)
CAN 2 of 2020 (Old No. CAN 2808 of 2020)

Dr. Tapas Kumar Mandal
Vs.
Union of India & Ors.

For the writ petitioner	:-	Mr. Kallol Basu, Adv. Mr. Nilanjan Pal, Adv.
For the respondent nos. 2 to 5	:-	Mr. Om Narayan Rai, Adv. Mr. Rajdeep Mantha, Adv.
For UOI	:-	Mr. A.K. Dasgupta, Adv.
Hearing concluded on	:-	01.03.2024
Judgment on	:-	19.03.2024

Amrita Sinha, J.:-

In the present writ petition the petitioner seeks for a direction upon the authority of Saha Institute of Nuclear Physics, 'the Institute' for short, to accept the recommendation made for promotion in his favour by the Departmental Promotion Committee, 'DPC' for short, with further direction to release all consequential benefits including pension, gratuity and leave encashment.

The petitioner was serving the Institute. He retired from service on attaining his normal age of superannuation on 30th June, 2010. Prior to

retirement the petitioner was considered for promotion from the post of Associate Professor grade E to the post of Professor grade F, but before the promotion being finalized, the petitioner got superannuated.

When the petitioner was in service disciplinary proceeding was initiated against him. The said proceeding continued well after his retirement. The petitioner approached this Court by filing writ petition which concluded by the order passed by the Hon'ble Division Bench on 29th June 2017. While disposing of the appeal the Hon'ble Division Bench directed the authority to drop the disciplinary proceeding which was initiated against the petitioner through the charge sheet dated 30th August 2005 and to grant admissible service benefits denied to the petitioner pursuant to the order of punishment dated 16th June 2011. The Division Bench was pleased to direct that in the event the Governing Council grants promotion to the petitioner, all arrears of salary arising therefrom shall be paid to him.

As promotion was not accorded to the petitioner, he filed an application for contempt alleging non-compliance of the direction passed by the Hon'ble Division Bench which stood disposed of on 21st June 2019. In the contempt application the petitioner pressed for promotion. The Hon'ble Court was pleased to observe that there was no categorical direction upon the authority to grant promotion to the petitioner. The Court took note of the fact that the authority rejected the prayer of the petitioner seeking promotion on the ground of poor performance. The Court observed that the decision not to recommend the petitioner for promotion gives rise to a fresh cause of action and the delay in convening the meeting of the Governing

Council does not appear to be deliberate. The contempt application stood disposed of by observing that dismissal of the contempt application shall not prevent the petitioner from challenging the order passed by the authority denying promotion to him before the appropriate forum.

The instant writ petition is primarily directed against the denial of promotion to the petitioner by the Institute.

The minutes of the meeting of the Governing Council of the Institute held on 3rd August 2018 clearly records the reasons for denying promotion to the petitioner. The Governing Council noticed that the name of the petitioner was considered for promotion by the DPC on earlier two occasions. The petitioner was serving as Associate Professor grade E when he was charge sheeted on 30th August 2005. After his retirement the disciplinary proceeding ended on 16th July 2011 imposing penalty. The recommendation of the DPC to promote the petitioner to the next higher post was kept in a sealed envelope.

The penalty was challenged by the petitioner before this Court. In compliance of the direction passed by the Court the Institute dropped the disciplinary proceeding and paid the admissible dues of the petitioner.

The issue of promotion was deliberated once again where the authority opined that promotion in the Institute is merit-based, assessed through academic and scientific achievements and progress and the same is not time bound. The academic sub-committee of the Governing Council examined the self assessment report of the petitioner and the earlier reports

of the screening committee and found that the petitioner had not made any significant academic contributions since his last promotion in 1999. The proposal of the petitioner for promotion was considered twice in 2006 and thereafter in 2007 but the committee did not recommend promotion on both occasions as the petitioner was found not suitable to be promoted.

It was found that the petitioner did not have many peer reviewed high-impact journal publications between 2000 and 2010, that is, between his last promotion and his superannuation. The number of publications was found to be less, as much more was expected from a faculty of his level. It was further noticed that for the period under consideration, the petitioner had not executed any projects of importance to the Institute and have not made any significant contribution to any institutional activity. He was found to be not very productive since his last promotion.

The Selection Committee in the year 2008 recommended promotion for the petitioner probably considering the fact that the petitioner completed ten years in the present grade since his last promotion. As promotion in the Institute is merit based and not time bound, the Committee did not find enough scientific progress that merits promotion for the petitioner from grade E to grade F. Due to poor academic performance, PRIS (Performance Related Incentive Scheme) was also not recommended.

The petitioner is aggrieved by the same. He contends that there is no provision for review of the decision taken to recommend him to the next higher grade. The Selection Committee already recommended the case of the petitioner for promotion in the year 2008. The same could not have been

reviewed in the year 2018. Had the disciplinary proceeding not remained pending, the petitioner would have been promoted in the year 2008 itself.

Reliance has been placed on the norms and procedures for promotion of scientific and technical categories of employees of the Institute. The rationale behind the promotion scheme, as mentioned therein, is to recognize the merit of a deserving person who gets adequate incentive to carry on creative fundamental research/constructive development and work/routine fabrication, operation and maintenance work depending on the nature of the job assignment.

The basic principle as laid down in the norms mentions that the promotion scheme provides an opportunity for promotion of a meritorious person with commendable record after reasonable period of service in the grade. The promotion is to be implemented after due internal and external assessment of the employee's record and recommendation and approval of the specific promotion by the appropriate authority. Once approved, promotion is to be implemented.

For the purpose of processing the records of employees at various stages of promotion procedure, the Director is the authorized official. The Director, however, may appoint professors-in-charge to process the records of the employees in different ranks. Promotion procedure, in general, is to be carried out for a candidate who is physically present in the Institute. Any departure from this practice can be made only with the approval of the Governing Council.

The eligibility for processing promotion depends on two criteria; first, the duration of service rendered by an employee in the rank and second, grade scored by the employee in internal and external assessment. The external assessment and the final recommendation for promotion ought to be made by duly constituted Selection Committee.

The recommendation of the Selection Committee for promotion is to be placed before the Director for procedures to be adopted for implementation. The constitution of the Selection Committee for promotion in the rank grade E to grade F consists of the Director who is the Chairman of the Selection Committee, one academic member of the Governing Council, concerned professor-in-charge of promotion, head of the group, head of the division/section/central facility to which the candidate belongs and one external expert for each candidate.

The Selection Committee recommended the petitioner for promotion with effect from 1st February 2009. The recommendation mentions that the candidate is being recommended for promotion by the Committee after ten years in grade. The recommendation of the petitioner was thereafter placed before the Governing Council in its meeting held in September 2008 but as the disciplinary proceeding was continuing, as such, the petitioner's recommendation was kept in a sealed cover.

The petitioner raises the issue of discrimination. It has been submitted that for promotion from his grade, the recommendation is not required to be placed before the Governing Council. The same is only meant for grades higher than that of the petitioner. Recommendation of the

employee similarly placed as that of the petitioner has been accepted but the recommendation of the petitioner stood rejected.

The academic sub-committee is not permitted to review the original recommendation made in favour of the petitioner. Placing the recommendation of the petitioner before the academic sub-committee is contrary to the promotion policy of the Institute. According to the petitioner, there is no further scope for approval of the recommendation already made by the Selection Committee. The Institute, after the recommendation made, does not have any other choice but to promote the petitioner to the next higher grade. Refusal on the part of the authority to promote the petitioner in terms of the recommendation made is mere harassment, humiliation, institutional bias and a continuous wrong committed towards the petitioner.

Prayer has been made to allow the promotion in favour of the petitioner and for further consequential relief.

Learned advocate representing the Institute opposes the prayer of the petitioner. It has been submitted that the recommendation of the Selection Committee is not final. The recommendation is necessarily required to be placed before the Governing Council for approval. Only after the recommendation for promotion is approved by the Governing Council, promotion is made. Till the Governing Council approves the recommendation of the Selection Committee, the recommendation cannot be given effect to.

Reliance has been placed on the promotion norms, the rationale and the basic principles of promotion. It has been submitted that promotion can be made only if the candidate is present in the Institute. As the petitioner retired from service at the point when he was considered for promotion upon conclusion of the disciplinary proceeding, accordingly, he ought not to qualify for promotion.

It has been submitted that the Selection Committee recommended the petitioner for promotion in view of the fact that he completed ten years of service in his last grade. The Selection Committee was not certain as to whether or not the petitioner could be recommended for promotion but as the petitioner completed ten years of service, accordingly, his promotion was recommended. Keeping in mind all the procedures for promotion, the case of the petitioner cannot be recommended.

In support of the submission that mere recommendation is not enough and approval of recommendation is required to accord promotion, the respondents rely upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***Vijay S. Sathaye -versus- Indian Airlines Ltd. and others*** reported in **(2013) 10 SCC 253** paragraph 10 where the meaning of the word 'approval' is deliberated. The Court held that approval means confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. The very act of approval means, the act of passing judgment, the use of discretion, and determining as an adjudication therefrom unless limited by the context of the statute. If the statute provides for approval of the higher authority, the same cannot be given effect to

unless it is approved and the same remains inconsequential and unenforceable.

In support of the submission that recommendation and approval are two different stages in the process of promotion and recommendation does not imply approval, learned advocate for the respondent authority relies upon the judgment delivered by a three-judge bench of the Hon'ble Supreme Court in the matter of ***Dr. H. Mukherjee -versus- Union of India and others*** reported in ***1994 Supp (1) SCC 250*** paragraph 7 wherein the Court pointed out that the selection by the Commission, however, is only a recommendation and the final authority for appointment is the Government who may accept the recommendation or may decline to do so. The Court held that the candidate does not have any right to be appointed pursuant to the recommendation made by the Commission.

Reference has also been made to the judgment delivered by the Hon'ble Supreme Court in the matter of ***Union of India and others - versus- N. P. Dhamania and others*** reported in ***1995 Supp (1) SCC 1*** where in connection to the scope of judicial review in service matter relating to promotion, the Court noticed the procedure contained in the Office Memorandum published by the Ministry of Home affairs, Union of India and held that recommendation of the DPC is advisory in nature. Such recommendations are not binding on the appointing authority and it is open for the appointing authority to differ from the recommendation in public interest.

Reliance has also been placed on the judgment delivered by the Hon'ble Supreme Court in the matter of ***Manohar -versus- State of Maharashtra and another*** reported in ***(2012) 13 SCC 14*** paragraph 22 where the Court explained the meaning of the word 'recommendation'. The Court held that recommendation is not a mandate. It must be seen in contradistinction with the word direction or mandate.

It has been submitted that no prejudice has been caused to the petitioner in placing the recommendation of the petitioner before the academic sub-committee for better assessment of his case for promotion. It has been submitted that the sub-committee is the expert body within the Governing Council.

In support of such submission the respondent authority relies upon a five judge bench decision of the Hon'ble Supreme Court in the matter of ***Pradyat Kumar Bose -versus- The Honourable Chief Justice of Calcutta High Court*** reported in ***(1955) 2 SCR 1331: AIR 1956 SC 285*** where the Court held that the authorities are at liberty to take assistance of the expert body to assess the efficiency of a candidate.

In support of the above the respondents further rely upon the decision of the Hon'ble Supreme Court in the matter of ***Chaitanya Ambalal Somani -versus- Pravinchandra D. Rana & Ors.*** reported in ***(2001) 10 SCC 276*** paragraph 6 wherein the Court held that in adjudging suitability of a technical person, it is always necessary to take the assistance of the person with knowledge in the subject so that the applicant's knowledge can be testified. In the absence of any statutory rule preventing taking

assistance of an expert by the Departmental Promotion Committee, no infirmity can be held on the part of the said Promotion Committee.

The sum and substance of the submission of the respondent authority is that the petitioner does not deserve in merit to be promoted to the next higher grade. Prayer has been made for dismissal of the writ petition.

I have heard and considered the submissions made on behalf of both the parties and also perused the materials on record.

Admitted facts of the case are that the petitioner was serving as the Associate Professor in grade E from 1999. A disciplinary proceeding was initiated against him and he was charge sheeted in the year 2005. The petitioner approached this Court in the year 2007 by filing writ petition. The DPC considered and recommended the petitioner for promotion in the year 2008. The petitioner retired on attaining his normal age of superannuation in 2010.

As the disciplinary proceeding against the petitioner remained inconclusive till his retirement, accordingly, neither the recommendation for promotion which was kept in a sealed cover could be finalised nor terminal benefits of the petitioner could be released. The disciplinary proceeding against the petitioner stood dropped in compliance of the judgment passed by this Court in the year 2017. Thereafter the terminal benefits of the petitioner were released but the promotion was refused on the ground that the petitioner was not found suitable for promotion.

The petitioner contends that promotion ought to be given to him on the basis of the recommendation made in the year 2008 and the review of the recommendation is bad in law and liable to be set aside. The norms for promotion lay down the rationale and the basic principles for promotion. The rationale is to recognise merit of a deserving candidate who can get adequate incentive to carry on creative fundamental research or constructive developmental work or fabrication, or operation and maintenance work. The expression 'carry on' suggests that the employee is still in service and he can carry on or continue with his work on being promoted to the next higher grade.

In the present case, the employee has retired from service and there is no scope for him to carry on with the creative work. It is with this view that promotion to an employee of the Institute is restricted to a candidate who is 'physically present in the Institute'. Here the candidate is no longer present in the Institute as he already retired from service nearly fourteen years back. If promotion is accorded to the petitioner the same will only inure to his personal financial benefit but the same will not be in the interest of the Institute. There is hardly any scope to use or utilize the expertise or experience of the petitioner in his next higher grade as he is no more in service.

The basic principle of the promotion norms mention that promotion is to be implemented only after internal and external assessment of the employee's records and recommendation and approval of the specific promotion by the appropriate authority. The aforesaid means that after

recommendation, there is a provision for its approval. This further means that the recommendation is not final till the same is approved by the competent authority.

The promotion of the petitioner, though recommended, could not be acted upon as final approval was not given by the competent authority. Only after the promotion is approved, the same can be implemented and not prior thereto. It means that only recommendation is not enough for an employee to be promoted, the recommendation has to be followed by approval to make it effective. Recommendation is the first step and promotion takes effect only after recommendation is accepted and approval given. The petitioner's case stopped at the recommendation stage and did not move forward.

The submission of the petitioner that the recommendation is not liable to be placed before the Governing Council does not appear to be proper. From the minutes of the meeting of the Governing Council held on 23rd September 2008 it is apparent that, the case of promotion of the petitioner along with another employee of the same grade as that of the petitioner, was placed before the Governing Council. As the petitioner at that point of time was facing disciplinary proceeding, accordingly, his recommendation was kept in a sealed cover. Had approval not be necessary then the recommendation of the petitioner along with the similarly placed employee would not have been placed before the Governing Council. The matter could have been concluded at the recommendation stage itself.

The promotion procedure in the Institute is carried out twice a year according to laid down time schedule so that the successful candidates after the procedures can be promoted with effect from either February or August every year. In order to be included in the promotion procedure, the employee has to satisfy the relevant qualifying provisions including the duration of service in a particular grade and upon evaluation of the confidential reports. Grades scored by the employee in internal and external assessments form a very important criteria for processing promotion of an employee.

It is settled law that promotion is a normal incidence of service. A person has no right to be promoted but he certainly has a fundamental right to be considered for promotion. A promotional post usually carries more responsibilities than the feeder post. Promotion is given to provide incentive to an employee to excel in his work. Higher post implies higher pay. Promotion acts as an impetus so that the employee can deliver better in service.

In the present case, the petitioner is not in a position to deliver in his higher post as he has already retired from service. The case of the petitioner is considered for promotion nearly ten years after his retirement. It is true that grant of post retirement promotion is not a complete bar but as the promotional rules of the Institute requires promotion to be given to an employee when he is physically present in the Institute, accordingly, it can be inferred that the Institute does not grant promotion to retired employees.

The petitioner has not produced any instance where promotion has been granted to an employee long after his detachment from service.

The scope of judicial review of the decision taken by the employer either to promote or not to promote an employee is minimal. The decision may be interfered upon judicial review only when the Court is satisfied that the process of assessment is vitiated either on the ground of bias, mala fide or arbitrariness. If it appears that the DPC has proceeded in a fair, impartial and reasonable manner, the Court ought not to interfere with the decision of the employer.

The Court does not have the expertise to assess the merit of an employee. It is for the employer to assess the merit of an employee and if it commences to the employer that the employee may be promoted then the employer may proceed with the same. The same is under the exclusive jurisdiction of the employer, as such, it is not proper to substitute the view of the DPC and thrust upon the view of the Court therein.

Promotion is granted to give an incentive to the employee to improve his/her standard so that the experience of the employee may be utilized by the employer for betterment and advancement of the institution. Promotion is an impetus to an employee to perform and deliver up to his/her maximum limit.

Nowadays it has been an accepted position to withhold promotion on reasonable grounds including pendency of a disciplinary or criminal proceeding against the aspiring employee. In the instant case, the promotion of the petitioner got withheld due to legal complications. By the time the case of

promotion of the petitioner was reopened after conclusion of the legal proceeding and in compliance of the direction passed by the Court, the petitioner stood superannuated.

After superannuation there is no further scope to grant promotion to an employee. In such a situation the only mode in which an employee can be compensated is to provide him/her relief in monetary terms provided the employee is successful in proving that denial of his promotion is bad in law.

The employer who took the decision to deny promotion to the petitioner applied its mind and came to a conclusive finding that the petitioner was not eligible to be promoted. In forming such opinion, the authority took the advice of the experts to assess his credibility and there is no bar in the promotional policy of the Institute in doing so. Relying on such expert's advice the authority declined to grant promotion to the petitioner. It is always the sole and exclusive decision of the employer whether to promote an employee or not. The decision of the employer ought not to be interfered with in a casual manner. Afterall, the petitioner cannot assert promotion as a matter of right.

It does not appear that in the instant case there has been any illegality or arbitrariness, bias or mala fide on the part of the employer in declining promotion to the petitioner. For the same reason the Court does not find any error in not allowing PRIS either.

The precedents relied upon by the respondents are settled propositions of law and as such no deliberation is made thereon.

In view of the above, the Court refrains from exercising jurisdiction in the matter. The writ petition fails and is hereby dismissed. The connected applications stand disposed of.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)