IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 14.12.2023

DELIVERED ON: 12.01.2024

CORAM:

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

and

THE HON'BLE TMT.JUSTICE P.DHANABAL

W.P.No.31917 of 2019

R.Sekar .. Petitioner

Vs.

1.The Chairman,
CBEC / Ministry of Finance,
North Block, New Delhi-110 001.

2.The Joint Secretary (Admn.),
CBEC / Ministry of Finance,
North Block, New Delhi-110 001.

3.The Chief Commissioner of Customs,
Custom House, Chennai-600 001.

4.The Registrar,
Central Administrative Tribunal,
High Court Buildings, Chennai-104. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records relating to the impugned order passed by the 4th respondent in O.A.No.1008/2014 dated 12.07.2019 and quash the same and consequently, direct the respondents to grant Notional Promotion as Deputy Commissioner of Customs and Central Excise w.e.f. 2006 on par with his juniors with all service and monetary benefits.

For Petitioner : Mr.K.N.Ravi Kumar

For Respondents : Mr.A.P.Srinivas
Senior Panel Counsel for R1 to R3
R4- Tribunal

ORDER

D.KRISHNAKUMAR, J.

The writ petitioner is the applicant in O.A.No.1008 of 2014 on the file of the Central Administrative Tribunal, Madras Bench and aggrieved by the dismissal of the aforesaid original application filed by him seeking direction to the respondent to give notional promotion as Deputy Commissioner of Customs and Central Excise w.e.f. 2006 on par with his juniors with all other service and monetary benefits, the present writ petition has been filed.

2. The facts of the case, briefly narrated, are as follows:

2.1. The petitioner joined the Customs Department as a Ministerial Staff (Lower Division Clerk) during March, 1970. He was selected as a Preventive Officer by way of direct recruitment w.e.f. 18.11.1974. On completion of 20 years, he was promoted to the post of Superintendent of Customs (Preventive) w.e.f. 01.07.1994.

2.2. While so, during the year 2001, CBI registered a case against the petitioner along with others under C.C.No.21/2001 and after full fledged trial, he was acquitted in the said criminal case on 30.04.2008. Meanwhile, departmental proceedings were initiated against the petitioner on the very same allegations and a charge memo was issued against the petitioner on 25.03.2004, on his failure to supervise the goods from the bonded warehouse during the year 2003. The Enquiry Officer held that charges framed against the petitioner has not been established and in the meantime, the petitioner retired on attaining the age of superannuation on 31.08.2008.

2.3. According to the petitioner, the Ministry of Finance, Department of Revenue, vide proceedings dated 07.03.2011, has passed an order stating that the charges levelled against the petitioner is not established and that the additional charge emerging in the departmental enquiry is not grave enough to warrant action under Rule 9 of CCS(Pension) Rules, 1972 and thereby, the Hon'ble President closed the departmental proceedings instituted under Rule 14 of CCS(CCA) Rules, 1965.

2.4. According to the petitioner, after dropping the disciplinary proceedings, the respondents ought to have opened the sealed cover procedure in order to grant promotion of Assistant Commissioner and the consequential promotion of Deputy Commissioner of Customs on par with his juniors. Since no orders were passed, the petitioner earlier approached the Central Administrative Tribunal, Chennai in O.A.No.781/2013 seeking notional promotion as Assistant Commissioner of Customs w.e.f. 2002 and consequential promotion as Deputy Commissioner of Customs w.e.f. 2006 and vide orders passed by the Tribunal and subsequent filing of contempt petition, the respondent had partly complied with the orders of the Tribunal by giving notional promotion as Assistant Commissioner of Customs w.e.f. 10.12.2002 vide proceedings dated 17.12.2003.

2.5. Since the order of the Tribunal was partly complied with, the petitioner sent a representation dated 09.01.2014 seeking promotion as Deputy Commissioner of Customs and Central Excise w.e.f. 01.02.2006 on par with his juniors with all service and monetary benefits and since no order has been passed, the petitioner filed O.A.No.1008 of 2014 and the Tribunal dismissed the said original application, vide order dated 12.07.2019, against which the instant writ petition is filed.

3. Mr.K.N.Ravikumar, learned counsel for the petitioner contended that the Disciplinary Authority took almost 11 years to complete the disciplinary proceedings for no fault on the petitioner and because of pendency of disciplinary proceedings, the petitioner's promotion due was kept under sealed cover and no DPC review was conducted for all those years and even after closing/dropping the charges in the year 2011, the

petitioner was not given notional promotion as well as his consequential benefits. It is further contended that the rules contemplated under Rule 19 of CCA (CCS) Rules will not be applicable to the petitioner, since his promotion was kept under sealed cover till 2011 and therefore, the question of working in the feeder category for 4 years will not be applicable to the case of the petitioner. The learned counsel for the petitioner contended that the authority had taken their own time to frame charges i.e., 10 years after the alleged occurrence and disciplinary proceedings took 8 years to complete and in the meantime, his juniors were given promotions as Assistant Commissioner and Deputy Commissioners and his name was excluded in the panel due to the pendency of disciplinary proceedings till his retirement and therefore, if the disciplinary proceedings had come to the conclusion at an early stage itself, then the petitioner would have got his due promotions and other benefits while he was in service and prays for setting aside the impugned order of the Tribunal.

4. Mr.A.P.Srinivas, learned Standing Counsel for the respondents

1 to 3 has drew the attention of this Court to the counter affidavit filed by the respondents 1 to 3 and would contend that the promotion of the petitioner as Assistant Commissioner of Customs is purely on adhoc basis and the same shall not confer any right on him to claim for regular promotion to the grade and the period of such service shall not count for seniority or as qualifying service for further promotion. It is further contended that since the petitioner has not been promoted as Assistant Commissioner of Customs and Central Excise on regular basis, his request for grant of promotion to the grade of Deputy Commissioner of Customs on notional basis does not merit consideration at this stage and therefore, prays for dismissal of the writ petition.

5. This Court has considered the rival submissions and also perused the materials available on record.

6. The core question involved in this writ petition is whether the petitioner is entitled for notional promotion to the post of Deputy Commissioner of Customs and Central Excise, with effect from 2006 on

par with his juniors?

7. The undisputed fact remains that the petitioner, who worked as Preventive Officer in the Customs Department from 18.11.1974, retired from service on attaining the age of superannuation on 31.08.2008. While the petitioner was in service, for his alleged failure to supervise the removal of goods from the Bonded Warehouse during the year 1993, a charge memo was issued on 25.03.2004. Since the charges levelled against the petitioner was not established, the disciplinary proceedings ended in his favour, vide proceedings of the Ministry of Finance, Department of Revenue dated 07.03.2011. Criminal case was also registered by CBI during 2011 for the very same set of charges against the petitioner and others in C.C.No.21/2011 and he was acquitted in the said criminal case on 30.04.2008.

8. The primordial contention of the petitioner is that on account of the delay on the part of the respondents in concluding the disciplinary proceedings after his retirement, his name was not considered during his tenure of service for promotion as Assistant Commissioner of Customs

and Central Excise and consequential promotion as Deputy Commissioner of Customs and whereas his juniors were granted such promotions. The claim of the petitioner was partly complied with by granting notional promotion as Assistant Commissioner of Customs and Central Excise w.e.f. 10.12.2002, in compliance of the order of the Central Administrative Tribunal, Chennai in O.A.No.781/2013 dated 14.06.2013.

9. The respondents have categorically denied the claim of the petitioner for promotion as Deputy Commissioner of Customs and Central Excise w.e.f. 2006, in the counter statement filed before the Tribunal in O.A.No.1008 of 2014, wherein it has been stated in compliance with Hon'ble Tribunal's order dated 20.01.2014 in Contempt Petition No.189/2013 filed by the Applicant in O.A.No.781/2013, the 'Sealed Cover' in respect of the applicant was opened and with the approval of the Hon'ble Finance Minister he was granted ad-hoc promotion to the grade of Assistant Commissioner of Customs and Central Excise with effect from 10.12.2002, vide Office Order

No.267/2013 dated 17th December, 2013. The said promotion was subject to the decision of the Competent Authority on regularization based on UPSC's recommendations. It was clearly brought out in the Office Order No.267/2013 dated 17.12.2013 that promotion of the applicant to the grade of Assistant Commissioner of Customs and Central Excise is purely on ad-hoc basis and shall not confer any right on the officer for any claim for regular promotion to the grade and the period of such service shall not count for seniority or as qualifying service for further promotion. Further, according to the respondents, promotions from feeder grades i.e., Superintendent of Central Excise, Superintendent of Customs (Preventive) and Customs Appraisers, Group "B" to the grade of Assistant Commissioner of Customs and Central Excise Group "A" has been made on regular basis for vacancy year 1997-97 to 2001-2002, vide office order No.202/2014 dated 13.11.2014. The name of the applicant does not figure in the said order. Shri R.N.Pathak and the petitioner appears at Sl.No.328 and Sl.No.615 respectively in the All India Seniority List of Superintendent of Customs (Prev) appointed / promoted upto 31.07.1994 and in view of the seniority position, it appears that the petitioner would be promoted as Assistant Commissioner on unlikely regular basis in the panel year 2002. Since the officer has not been promoted as Assistant Commissioner on regular basis till 30.03.2022, his claim for grant of promotion to the grade of Deputy Commissioner with effect from 2006 is premature and cannot be acceded to and he will be granted the promotion, if found fit, in his own turn."

10. It has been categorically stated by the respondents in the aforesaid counter affidavit that the petitioner is not entitled to be considered for promotion as Deputy Commissioner of Customs and Central Excise with effect from 2006, since his promotion to the post of Assistant Commissioner of Customs and Central Excise is purely on adhoc basis and it shall not confer any right on him to claim for regular promotion to the grade and the period of such service in the adhoc post shall not count for seniority or as qualifying service for further promotion and the adhoc promotion shall be subject to the decision of the competent authority on regularization based on UPSC's recommendation. The petitioner has not placed any sufficient materials to controvert the

aforesaid stand taken by the respondents.

11. It is the normal rule of law that nobody can be promoted with retrospective effect except the exception is that when there exists facts which necessitates so or there is a rule which permits so. One of us (D.Krishnakumar, J.) had an occasion to deal with a similar matter in the decision in ***V.Vijayakumarasamy v. Government of Tamil Nadu and Others reported in 2020-2-WLR-321***, wherein various decisions of the Hon'ble Supreme Court on the similar issue has been taken into consideration and it is relevant to extract the same:

> "16. In the decision reported in ***(2007) 1 SCC 683 in the case of State of Uttaranchal & Another Vs. Dinesh Kumar Sharma,*** wherein the Hon'ble Supreme Court has held that the grant of promotion pay is for the service after the date of the promotion and not from the date of vacancy arose in the recruitment year...
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> ...
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> 17. The Hon'ble Supreme Court while deciding the Case of ***S.B. Bhattacharjee Vs.S.D.Majumdar, in Appeal (Civil) No. 2527 of 2007 dated 15.05.2007*** has held that the promotion is not a fundamental right of a person and it is a condition of service. The relevant portion is extracted below;
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> ***"13. Although a person has no fundamental right of promotion in terms of Article 16 of the Constitution of India, he has a fundamental right to be considered therefor. An effective and meaningful consideration is postulated thereby. The terms and conditions of service of an employee including his right to be considered for promotion indisputably are***

governed by the rules framed under the proviso appended to Article 309 of the Constitution of India."

18. It is also relevant to mention here the judgment of the High Court of Delhi in ***WP (c) 5359 of 2009 in the case of Ram Krishna Sharma Vs.Union of India & Others***, wherein, the High Court of Delhi had dismissed the writ petition filed by the petitioner therein challenging the order of tribunal rejecting the notional promotion sought for by the petitioner after superannuation. The aforesaid writ petition was dismissed by the Delhi High Court by referring the case of *Baijnath Sharma Vs. Hon'ble Rajasthan High Court of Jodhpur & another, reported in 1988 SCC (L&S)*. The relevant portion of the judgment is extracted below;

"The Tribunal answered this question in favour of the petitioner. Union of India came before this Court when it was held that the decision of the Tribunal was erroneous & was contrary to the judgment of the Supreme Court in UOI & Ors Vs. K.K. Vadhera 1989 Supp. (2) SCC 625 as well as in the case of Baijnath Sharma Vs. Hon'ble Rajasthan High Court at Jodhpur & Anr. 1988 SCC (L&S) 1754 discussed in that order. It was held:

> *22. We feel that the Tribunal erred on this count as well.The thrust of the OM, which was issued soon after the decision of the Hon'ble Supreme Court in Baijnath Sharma (supra) is to clarify that the superannuated employees should not be considered for promotion where the DPC is being held after their superannuation. The later part of the OM, which is contradictory to the dictum of the Hon'ble Supreme Court in Baijnath Sharma (supra) obviously cannot be given effect to. Pertinently even the said OM does not in clear terms say that the retired/superannuated employees, if considered and recommended by the DPC would be granted notional promotion from a back date. However, the Tribunal has read this aspect into the OM which, in any event, it could not have done.*

23. In view of the aforesaid, we find that the decision of the Tribunal is erroneous and the directions given therein are contrary to the judgments of the Hon'ble Supreme Court in K.K.Vadera (supra) as well as Baijnath Sharma (supra)."

12. In the case on hand, the applicant was not in regular service while granting notional promotion as Assistant Commissioner of Customs and Central Excise w.e.f. 10.12.2002, since he had retired from service during the year 2008 and he has not been in regular service as Assistant Commissioner of Customs for 4 years, to be considered for promotion as Deputy Commissioner of Customs, as contemplated under Rule 19 of Indian Revenue Service (Customs & Central Excise) Recruitment Rules, 1987. Notional promotion to the post of Assistant Commissioner of Customs was considered to the petitioner, on the basis of the sealed cover kept by the DPC for promotion and the same was granted only on adhoc basis and it is specifically made clear in the said order that he will not get any seniority or service benefits on the basis of the said order.

13. Though the petitioner alleges delay on the part of the respondents authority in concluding the disciplinary proceedings as the

disciplinary proceedings proceeded from the years 2003 till 2011, the fact remains that the petitioner did not make any challenge for such delay in concluding the disciplinary proceedings while in service and he retired from service during the year 2008 and only after conclusion of the disciplinary proceedings in the year 2011, the petitioner seeks for notional promotion after his retirement. In the absence of any specific challenge made to the delay in concluding the disciplinary proceedings, the claim of the petitioner seeking notional promotion cannot be considered. In the light of the above discussions and the decisions cited supra, this Court finds no reason to interfere with the order of the Tribunal and finds no merit in the writ petition.

14. In fine, the Writ Petition stands dismissed. No costs.

[D.K.K., J.,] [P.D.B., J.]
12.01.2024

Index:yes/no
Internet:yes
Jvm

To

1.The Chairman,
CBEC / Ministry of Finance,
North Block, New Delhi-110 001.

D.KRISHNAKUMAR, J.,
&

P.DHANABAL, J.

Jvm

2.The Joint Secretary (Admn.),
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