



2024:DHC:7598-DB



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

+ **W.P.(C) 8100/2021**

A. K. VARSHNEY

.....Petitioner

Through: Mr. R.K. Kapoor, Mr. Rajat
Kapoor and Ms. Shambhavi Gaur, Advs.

versus

UNION OF INDIA & ANR.

.....Respondents

Through: Ms. Pratima N. Lakra, CGSC
with Mr. Chandan Prajapati Adv. for UOI

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

JUDGMENT (ORAL)

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26.09.2024

C. HARI SHANKAR, J.

1. This writ petition assails judgment dated 29 January 2021 passed by the Central Administrative Tribunal, Principal Bench¹ in OA 207/2021². By the impugned judgment, the learned Tribunal has dismissed the said OA, filed by the petitioner before it.

Facts

2. *Vide* Office Memorandum³ dated 9 November 1998, the Department of Personnel and Training⁴ modified the existing Flexible

¹ "the Tribunal", hereinafter

² **A K Varshney v UOI**

³ OM

⁴ DoPT



Complementing Scheme⁵ for scientists in various scientific departments of the Central Government, consequent on recommendations of the 5th Central Pay Commission.

3. According to the said OM,

- (i) the FCS was to be made applicable only to scientists and technologists holding scientific posts in scientific and technological Departments, engaged in scientific activities and services,
- (ii) assessment norms for promotion under the FCS were to be rigorous with due emphasis on evaluation of scientific and technical knowledge, so that only scientists having demonstrable achievements or higher level of technical merit were recommended for promotion under the FCS,
- (iii) the criteria for identifying institutions and organisations as scientific and technological institutions and for defining scientific activities and services, scientists and engineers and scientific posts would be as prescribed in Annexure-I to the OM,
- (iv) a revised assessment procedure, as prescribed in Annexure-II to the OM would be followed by all scientific ministries/departments for considering advancement under the FCS and
- (v) the officers would be assessed for advancement under the FCS every year.

⁵ "FCS", hereinafter



4. Annexure-II, which contained the criteria for considering FCS promotion, stipulated that all officers would be first screened on the basis of the grading in their Annual Confidential Reports (ACRs) which would, in turn, be assessed on a 10 point scale, with 10 marks being awarded for “outstanding”, 8 marks for “very good”, 6 marks for “good”, 4 marks for “average” and 0 for “poor”. All candidates who cleared the screening would be called for interview. Performance in the interview would also be graded on a 10 point scale with the same norms.

5. The petitioner joined as Senior Scientific Officer Grade-I⁶ in the Department of Non-Conventional Energy Sources, Ministry of New and Renewable Energy on 12 June 1989. On completion of five years in the Grade of SSO-I, the petitioner became eligible for consideration for promotion under the FCS to the next grade of Principal Scientific Officer⁷ on 11 June 1994.

6. The petitioner’s case was considered with the case of other officers who had become eligible for FCS promotion to the grade of PSO. While four other officers considered in the same DPC were promoted as PSO w.e.f. 20 February 1994 when they had become eligible for such promotion, the petitioner was promoted as PSO w.e.f. 2 September 1994.

7. The petitioner was considered for FCS promotion to the next

⁶ “SSO-I”, hereinafter

⁷ “PSO”, hereinafter



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Grade of Scientist F – with which we are concerned – by a DPC which was convened on 15 December 1999. The DPC considered officers who had become eligible on or before 1 July 1999 for FCS promotion to the grade of Scientist F. Seven officers were interviewed, including the petitioner. Two officers, who were junior to the petitioner, were selected.

8. Under the norms applicable to the FCS, a candidate who is not selected for FCS promotion to the next higher grade was eligible to be next considered for FCS promotion after a one year cooling period. The petitioner, therefore, became eligible for consideration for FCS promotion to the grade of Scientist F next on 1 July 2000. However, no DPC was convened in 2000 for considering officers who had become eligible for FCS promotion to Scientist F on or before 1 July 2000. The case of the petitioner was included for consideration under the next DPC which convened to consider cases of officers who had become eligible for FCS promotion on or before 1 January 2001. That DPC was convened on 1 March 2001.

9. Five candidates, including the petitioner, were interviewed and two were selected, one of whom was junior to the petitioner.

10. The petitioner became again eligible for being considered for FCS promotion to as Scientist F on 1 January 2002, on completion of the one year cooling period. The DPC to consider the cases of officers who had become eligible on or before 1 January 2002 for FCS



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promotion to the grade of Scientist F was also delayed and was convened only on 15 December 2002.

11. Six candidates were interviewed, including the petitioner. Only one officer, senior to the petitioner, was promoted.

12. The petitioner contends that he had also obtained the requisite qualification for FCS promotion as Scientist F in the said interview but was illegally not promoted.

13. After completion of the one year cooling period, the petitioner became next eligible for FCS promotion to the Scientist F on 1 January 2003. The DPC to consider these cases was delayed by one year and ten months and was convened only on 9 November 2004. It is with this DPC that the petitioner is chiefly concerned.

14. This DPC recommended the case of the petitioner for FCS promotion as Scientist F. The petitioner was finally granted FCS promotion as Scientist F w.e.f. 22 November 2004.

15. Though the petitioner alleges several illegalities with respect to the DPCs which were convened prior thereto, the case as set up before the Tribunal was limited to ante-dating of the petitioner's FCS promotion as Scientist F w.e.f. 1 January 2003, which was the date on which he had become eligible for such promotion.



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16. Several representations were addressed by the petitioner to the respondents seeking ante-dating of his promotion as Scientist F w.e.f. 1 January 2003 when he became eligible for such promotion.

17. No response was received to the said representations, whereupon the petitioner approached the learned Tribunal by way of OA 3206/2012. The said OA was disposed of by the learned Tribunal by order dated 25 September 2012, whereby the respondents were directed to examine the case of the petitioner in the light of the judgment of the Supreme Court in *UOI v S.K Murti*⁸ and intimate the petitioner of the decision forthwith.

18. Though the respondents were directed to take the said decision within two months of the order passed by the learned Tribunal, the decision was ultimately taken only by way of a “speaking order” dated 2 August 2013.

19. Assailing the order dated 2 August 2013, the petitioner re-approached the learned Tribunal, by way of OA 3510/2014.

20. The petitioner contended, before the learned Tribunal, that he had become eligible for consideration for FCS promotion as Scientist G w.e.f. 1 January 2010. No DPC for consideration of candidates for such promotion was, however, held for nearly five years and it was only when the petitioner was in the verge of retirement that the DPC

⁸ 2011 SCC OnLine SC 1655



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was convened on 30 September 2014.

21. The said OA was disposed of by the learned Tribunal by order dated 10 October 2019, which set aside the speaking order dated 2 August 2013, observing that it had not taken into account the judgment of the Supreme Court in *S.K. Murti* and directed the respondents to pass a fresh reasoned and speaking order within two months, taking into account the said decision.

22. The respondents passed a fresh speaking order on 27 January 2020 again reiterating the contents of the speaking order dated 2 August 2013. The order rejected the petitioner's claims for ante-dating of FCS promotion granted to him as Scientist F.

23. The petitioner re-approached the learned Tribunal by way of OA 207/2021, assailing the speaking order dated 27 January 2020. Having brought the above facts to the notice of the learned Tribunal, the petitioner prayed that the petitioner's promotion from the grade of PSO to the grade of Scientist F under the FCS promotion be ante-dated, on 1 January 2003 and that, consequently, the petitioner be granted notional promotion to the grade of Scientist G under the Modified Assured Career Progression⁹ Scheme w.e.f. 1 January 2013 on completion of ten years under the grade of Scientist F, computed w.e.f. 1 January 2003.

⁹ "MACP", hereinafter



24. The learned Tribunal, by judgment dated 29 January 2021, dismissed OA 207/2021. In doing so, the learned Tribunal relied on the judgment of the Supreme court in *UOI v K.K. Vadera*¹⁰. Paras 7 and 8 of the judgment of the learned Tribunal may be reproduced thus:

“7. The issue in this behalf is no longer res integra. The mere fact that there existed a vacancy or that the incumbent acquired eligibility, would not be a ground to treat the promotion with reference to those dates. It is only on being cleared by the Selection Committee or DPC, that an occasion for promoting an individual arises. In *Union of India & Ors. vs. K. K. Vadera & Ors.*, the Hon'ble Supreme Court held that ante-dating any promotion earlier to the one on which the DPC met, would amount to extending the benefit even before he is evaluated. The relevant paragraph reads as under:

“There is no statutory provision that the promotion to the post of Scientist 'B' should take effect from 1st July of the year in which the promotion is granted. It may be that, rightly or wrongly, for some reason or other, the promotions were granted from 1st July, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientists 'B' should be with effect from the date of the creation of these promotional posts. We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal.”

¹⁰ 1989 SCC Supl (2) 625



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Therefore, the question of ante-dating the promotion of the applicant to the post of Director earlier to 22.11.2004 does not arise.

8. The second grievance of the applicant is about the alleged failure of the respondents in convening the DPC between 2009 and 2014. Assuming that the DPC was not convened during that period for promotion to the post of Scientist G, the Tribunal cannot grant any relief at this stage. The applicant ought to have approached the Tribunal at the relevant point of time, in which case the facts could have been verified and necessary directions could have been issued. It is fairly well settled that the right of an employee is only to be considered for promotion, and that, naturally would take place as and when the DPC meets. If there was delay in convening the DPC, it would not be factor to promote an official, without the assessment by DPC.”

25. The petitioner, thereafter, filed RA 25/2021 seeking review of the judgment dated 29 January 2021 of the learned Tribunal. Observing that all contentions advanced by the petitioner had been taken into account in the judgment dated 29 January 2021, the learned Tribunal dismissed RA 25/2021 by order dated 12 July 2021.

26. By the present writ petition, the petitioner assails both the above orders passed by the learned Tribunal on 29 January 2021 in OA 207/2021 and 12 July 2021 in RA 25/2021.

27. We have heard Mr. R.K. Kapoor, learned counsel for the petitioner and Ms. Pratima N. Lakra, learned CGSC for the respondents.

28. Mr. Kapoor’s contention is that the issue in controversy is covered by the order passed by the Supreme Court in *S.K. Murti* as



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well as the subsequent judgment in *UOI v Vinay Kumar*¹¹.

29. The respondents, *per contra*, rely on the judgment of the Supreme Court in *UOI v Manpreet Singh Poonam*¹². Ms. Lakra also relies upon the judgment of the Supreme Court in *Bihar State Electricity Board v Dharamdeo Das*¹³.

30. Both sides have also filed written submissions.

31. Having heard learned Counsel for both sides, we are of the opinion that the issue in controversy is squarely covered by the judgments of the Supreme Court in *S.K. Murti* and *Vinay Kumar*, which specifically deal with the promotions under the FCS.

32. The decision of the Supreme Court in *S.K. Murti* arose out of a judgment of the Division Bench of this Court in *S.K. Murti v UOI*¹⁴ which, in turn, challenged a judgment of the learned Tribunal delivered in OA 820/2003 on 3 December 2003.

33. The facts of that case are practically identical to those of the present. S.K. Murti had become eligible for promotion to the Grade of Scientist E under the FCS on 1 January 1999. He was, however, granted FCS promotion as Scientist E w.e.f. 19 September 2000, consequent on a DPC which met for the said purpose. S K Murti,

¹¹ 2021 SCC OnLine SC 3634

¹² (2022) 6 SCC 105

¹³ 2024 SCC OnLine SC 1768

¹⁴ 2011 SCC OnLine Del 4779



therefore, prayed that his FCS promotion as Scientist E be ante-dated to 1 January 1999.

34. This Court, *vide* its judgment dated 5 October 2010, allowed S.K. Murti's writ petition, observing thus:

“5. It is not in dispute that the entitlement of the petitioner for being promoted enured with effect from 1.1.1999; but promotion was delayed on account of the fact that Departmental Review Committee was constituted late.

6. Office memorandum dated 17.7.2002 on which both parties rely, reads as under:—

“The recommendations made by the Fifth Central Pay Commission for modifying the Flexible Complementing Scheme (FCS) in operation in scientific and technological departments for in situ promotion of scientific technical personnel with a view to removing the shortcomings/inadequacies in the scheme had been examined some time back and this Department in O.M. No. 2/41/97-PIC dated 9.11.1998 had issued detailed guidelines modifying the then existing FCS. From a number of references received in this Department, it appears that an element of confusion exists in some scientific departments on the date from which in situ promotions under FCS are to be given effect. Promotions are made effective from a prospective date after the competent authority has approved the same. This is the general principle followed in promotions and this principle is applicable in the case of in situ promotions under FCS as well.

2. As a matter of fact, no occasion requiring application of promotion with retrospective effect should arise in FCS cases, as it is provided in the rules for scientific posts that the Assessment Boards shall meet at least once a year to consider cases of in situ promotions. Rules notified for scientific posts also contain a provision for review of promotion by the Selection Committee/Assessment Board twice a year - before 1st January and 1st July of every year-and the Selection Committee/Assessment Board is required to make its recommendation on promotions keeping in view these crucial dates of 1st January and 1st July. The competent authority, which has to take a final view based on these



recommendations, shall ensure that no promotion is granted with retrospective effect.

3. Hindi version will follow.”

7. Suffice would it be to state that the memorandum requires Flexible Complementing Scheme in situ promotions to be effected each year and for which the circular mandates that the assessments should be made well in advance keeping in view the crucial dates being 1st January and 1st July with effect wherefrom the Flexible Complementing Scheme in suit promotions have to be effected.

8. The last sentence of para 20 is relied upon by the respondents to urge that the office memorandum clearly states that no promotion should be granted with retrospective effect. To this the answer by the petitioner is that the preceding two sentences makes it very clear that the Assessment Boards have to be constituted well in advance keeping in view the fact that 1st January and 1st April of each year are crucial dates to effect promotions.

9. Now, nobody can take advantage of his own wrong. Nothing has been shown to us by the respondents to justify not constituting the Assessment Board/Selection Committee in time.

10. That apart, *instant case of promotion is not one where promotion has to be effected upon a vacancy arising. Subject to being found suitable the petitioner was entitled to be promoted in situ. The situation would be akin to granting a selection scale to a person and the date of eligibility would be the date wherefrom the benefit has to be accorded.*

11. Under the circumstances we hold in favour of the petitioner and direct that the benefit granted to the petitioner be reckoned with effect from 1.1.1999 instead of 19.9.2000. Arrears would be paid within 12 weeks from today but without any interest.”

(Emphasis supplied)

35. The above judgment of this Court was challenged by Union of India by way of SLP (C) 6864/2011.

36. The Supreme Court, by its judgment, dismissed the SLP, holding thus:



“3. We have heard Smt. Indira Sawhney, learned counsel for the petitioners and Mr. Jitendra Mohan Sharma, learned counsel for the respondent, who has entered on caveat and carefully perused the record. The respondent, who was working as Scientist Grade-D in the Botanical Survey of India became eligible for promotion under FCS with effect from 1.1.1999. However, on account of delayed convening of the Departmental Review Committee/Selection Committee, his promotion was delayed and by an order dated 20.10.2000, he was promoted with effect from 19.9.2000.

4. The respondent and 10 other Scientists of Botanical Survey of India filed Original Application No. 826/203 for directing the petitioners to promote them with effect from the date of eligibility, i.e. 1.1.1999. The Tribunal dismissed the original application and held that in view of the clarification given in O.M. Dated 10.11.1998, the applicants were not entitled to promotion with retrospective effect. The review petition filed by the respondent was dismissed by the Tribunal vide order dated 14.1.2004. However, Writ Petition (C) No. 14263/2004 filed by the respondent was allowed by the Division Bench of the High Court and the petitioners were directed to give him all the benefits on the basis of deemed promotion with effect from 1.1.1999.

5. *In our view, reasons assigned by the High Court for directing the petitioners to promote the respondent with effect from the date of acquiring the eligibility are legally correct and the impugned order does not suffer from any legal error warranting interference under Article 136 of the Constitution.*

6. *It is not in dispute that vacancies existed when the Departmental Review Committee considered the case of the respondent and other similarly situated persons for promotion. It is also not in dispute that in terms of paragraph 51.25 of the Vth Pay Commission Recommendations, the Departmental Review Committee/Assessment Board was required to meet every six months, i.e. in January and July and the promotions were to be made effective from the date of eligibility. Therefore, it is not possible to find any flaw in the direction given by the High Court.*

7. The special leave petition is accordingly dismissed.”
(Emphasis supplied)

37. Vinay Kumar was an identical case, in which Vinay Kumar was



eligible for promotion as Scientist D under the FCS scheme on 1 January 2003, but was considered for such promotion only by a DPC which met in December 2003. Vinay Kumar, therefore, prayed that his promotion as Scientist D be ante-dated to 1 January 2003.

38. The Supreme Court noted that the case was nearly identical to *S.K. Murti*.

39. Following the decision in *S.K. Murti*, the Supreme Court held that Vinay Kumar was also eligible for reckoning of his promotion as Scientist D w.e.f. 1 January 2003 when he was eligible for such promotion.

40. Clearly, therefore, the principles that apply to *in situ* promotions under the Flexible Complementing Scheme are unique and distinct from those which apply to promotions in the normal course. While, in the normal course, the principle is that non-convening of a DPC in time does not result in a vested right in the employee concerned to have his promotion by the DPC, as and when convened, ante-dated to the date when he became eligible for such promotion, such a right is available under the FCS. The decisions in *S.K. Murti* and *Vinay Kumar* are clear on the point.

41. The judgments in *Manpreet Singh Poonam* and *Dharamdeo Das* were rendered in the context of normal promotions and not in the context of promotions under the FCS and are, therefore, not applicable



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to the present case.

42. The learned Tribunal, therefore, was clearly in error in applying, to a case which arose under the FCS, the principles which apply to normal promotions.

43. The impugned judgment of the learned Tribunal, inasmuch as it does not take into account the peculiarities of promotion under the FCS, cannot sustain.

44. Though, before the learned Tribunal, the petitioner also prayed for promotion as Scientist G under the FCS, w.e.f. 2008, in the present writ petition, the said prayer has not been advanced. Instead, the petitioner has only prayed that he be granted the benefits of MACP on completion of ten years' residency period in Scientist F grade.

Conclusion

45. In view of the aforesaid, the speaking order dated 27 January 2020, passed by the respondents, as also the impugned judgment dated 29 January 2021 and the subsequent order dated 12 July 2021 passed by the learned Tribunal in OA 207/2021 and RA 25/2021 are quashed and aside.

46. The petitioner is entitled to ante-dating of his promotion as Scientist F w.e.f. 1 January 2003. The petitioner would also be entitled to consideration of his case for grant of MACP on completion of ten



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years' residency period in the grade of Scientist F, computed w.e.f. 1 January 2003.

47. The respondents would, therefore, take a decision on the petitioner's entitlement to grant of MACP in accordance with the present judgment within a period of four weeks from today.

48. The writ petition is allowed accordingly, with no orders as to costs.

C. HARI SHANKAR, J

DR. SUDHIR KUMAR JAIN, J

SEPTEMBER 26, 2024/aky/dsn

Click here to check corrigendum, if any