
(2010) 01 DEL CK 0052

In the Delhi High Court

Case No : Writ Petition (C.) No. 5359 of 2008

Ram Krishna Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-01-2010

Acts Referred:

Citation : (2010) 166 DLT 706

Hon'ble Judges : Mool Chand Garg, J;Anil Kumar, J

Bench : Division Bench

Advocate : P. Kalra, for the Appellant; R.V. Sinha, for the Respondent

Judgement

Mool Chand Garg, J.—The petitioner has approached this Court by way of filing a writ petition aggrieved from the order passed by the Central Administrative Tribunal dated 23.5.2007 whereby the Central Administrative Tribunal dismissed the application of the petitioner being OA No. 623/2006 seeking direction to the second respondent to further promote the petitioner on notional basis as Director (Scientist D) and further direct payment of pay and allowances for the said post on the ground that he became eligible for promotion to the post of Director (Scientist D) in view of the decision of the Central Administrative Tribunal in OA No. 1958/2002 decided on 12th August, 2002 whereby he had been given seniority for the post of Meteorologist Grade I w.e.f. 1.10.1997 and which made him eligible for further promotion to the post of Director (Scientist D) in view of having completed four years in service in the said grade before his retirement. It was his case that his promotion for the post of Director (Scientist D) became due with effect from 1.10.1998 i.e. prior to the date of his retirement.

2. However, the Tribunal dismissed the application filed by the petitioner holding that since the promotion to the post of Director (Scientist D) as per Flexible Complementing Scheme (FCS) had to be prospective and the petitioner was no more in service, he was not entitled for further promotion though he was eligible for the said post.

3. Briefly stating, the facts giving rise to the filing of this petition are; that the petitioner was appointed as Professional Assistant in the office of second respondent with effect from 21.03.1983 against the Direct Recruitment quota and thereafter, was promoted as Assistant Meteorologist Gr.-I vide order dated 05.01.2001 with effect from 08.01.2001 & since then he had been working on the said post till the date of his retirement. His further promotion to the post of Meteorologist Gr.-I remained in dispute due to litigation between Direct recruits & Promotees, which was decided only after the retirement of the petitioner i.e. in October, 2003 after filing of OA No. 1958/2002 which was decided on 12.08.2002.

4. It has been submitted by the petitioner that delay in fixing his seniority by the respondents has affected his entitlement for promotion. The respondents superannuated him w.e.f. from 31.05.2003, for which the petitioner is not to be faulted with and thus, he is entitled to be given a notional promotion for the post of Director (Scientist D) in accordance with the FCS. In this regard, the petitioner has also relied upon the orders passed by the Central Administrative Tribunal in OA No. 623/2006 whereby one Mr. L.C. Jindal was directed to be promoted notionally after giving exemption for interview by an Assessment Board despite his retirement which judgment has also been upheld by this Court in CWP No. 11861/2005 later implemented by the respondents.

5. The respondents have opposed the petition on the ground that the petitioner had retired from service at the time when he became eligible for promotion. The FCS has prospective operations and, therefore, when the petitioner could not have been retained in service after 60 years i.e. date of superannuation he could not be considered for promotion. It is also submitted that the case of Mr. L.C. Jindal is not applicable to the case of the petitioner because in that case the relief was granted because of the promotion of a junior prior to the retirement of the incumbent, which is not the case of the petitioner. Moreover, the orders of this Court in the case of Union of India v. Rajendra Roy and Ors. W.P.(C) 20812/2005 decided on 12.01.2007 holds that merely because there was a delay in deciding the seniority of an employee, and only because DPC/ other Boards were not held by the authorities within time would not give any rights to the employee to be promoted to the post of Director (Scientist D) and, thus, it is submitted that the present writ petition deserves dismissal inasmuch as there is no infirmity in the order passed by the Tribunal.

6. It is the case of the petitioner that for the post of Director (Scientist D) an employee has to render 4 years of minimum service as Meteorologist Gr.I. The petitioner became due for his promotion with effect from 01.10.1998 i.e. prior to the date of his retirement. He has submitted representations on 21.06.2004 and 06.04.2005. As per FCS Rules the promotion to the next higher post for scientist is undertaken after prescribed period of service on the basis of merits and ability irrespective of a vacancy in the higher grade. However, the respondents neither disposed of his representation nor paid him pay and allowances for the aforesaid

promotion post. Hence, he prayed before the Central Administrative Tribunal to pass an order declaring that the entire action of the respondents in not considering his case for promotion w.e.f. 01.10.1998 to the post of Director as illegal, arbitrary and consequently, pass an order directing them to consider his case for promotion to the post of Director (Scientist D) w.e.f. 01.10.1998 with all consequential benefits.

7. The application was opposed by the respondents before the Tribunal on the ground that the petitioner had been promoted to the post of Meteorologist Gr.I only w.e.f. 01.10.1998 and he retired from the Government service from 31.05.2003 after attaining the age of superannuation. It was also submitted that even though the seniority of the petitioner was notionally revised w.e.f. 01.10.1997 vide orders dated 31.10.2003, the petitioner having already superannuated by then and no junior to the petitioner had been promoted to the post of Director (Scientist D), the petitioner is not entitled to promotion under FCS as the eligibility of an officer for promotion could have been made only on the basis of an interview to be held by the Assessment Board and that also from a prospective date and not retrospectively as provided for in the Flexible Complementing Scheme (FCS), which for the sake of reference is reproduced hereunder: Criteria for identifying institutions as Scientific & Technical for grant of Flexible complementing Scheme

1. It should be characterized by the pursuit of excellence.
2. They should be engaged in research, design, development or programme implementation (including review, analysis, promotion and aspects of science policy, etc.) which would cover a broad spectrum of pure and applied research, but this essential feature would be innovative character and spirit of enquiry that permeates their overall functioning.
3. The scientific culture is characterized by a few salient aspects i.e. persons are highly qualified and skilled technical personnel, involved in creative and innovative activity, willing to be judged on the basis of merit and competence rather than seniority and hierarchical structure.
4. The criteria could cover aims and objectives of the institutions, qualifications of personnel, qualitative requirements for performance of various activities.

Scientific Activities and Services Covered under Flexible Complementing Scheme

(i) Fundamental/Basis Research : Original investigation to gain new scientific knowledge, not necessarily directed towards any specific practical aim or application.

(ii) Applied Research : Original investigation to gain new scientific & technical knowledge directed towards a specific practical aim/objectives.

(iii) Experimental/Development : Use of scientific knowledge directed towards producing new or substantially improved material, devices, products, processes,

systems or services.

(iv) S&T activities which are directly linked to R&D in terms of promoting the scientific activities & services.

Scientists and Engineers covered under FCS

(i) Those who possess at least Masters Degree in Natural/Agriculture Science or Bachelors Degree in Engineering/Technology/Medicine.

(ii) Those who use or create scientific knowledge and Engineering & Technological principles, that is, persons with scientific and technological training who are engaged in professional work on S&T activities, high level administrators and personnel who plan, direct or co-ordinate the execution of S&T activities.

Scientific Post is the one, the incumbent of which is a scientist or engineer in a scientific institution declared as scientific department and is engaged in the generation, advancement, dissemination and application of S&T knowledge in the S&T activities.

In case of demand for FCS for any institution, the administrative ministry will satisfy itself that the institution is S&T institution and officers are scientists holding scientific post and recommend to DOS&T.

Pay Scales and Minimum Residency Period

All posts under FCS shall now carry uniform scales of pay, designation and minimum residency period linked to performance as below:

Sl. No.

Designation

Pay Scale (Rs.)

Minimum Residency Period (Years)

1.

Scientist B

8,000 - 13,500

3

2.

"C

10,000 - 15,200

4

3.

"D

12,000 - 16,500

4

4.

"E

14,300 - 18,300

5

5.

"F

16,400 - 20,000

5

6.

"G

18,400 - 22,400

-

The period spend on deputation /foreign service to another scientific post, which helps a scientist to acquire scientific experience in adverse set up and the necessary field experience now made mandatory for promotions to Sr. Scientific posts, as well as the period of Study Leave/any other leave taken for improving the academic accomplishments, shall could towards the minimum residency period necessarily required to be put in the lower grade for promotion to the next higher grade.

Earned leave for a maximum period of 180 days at a time, maternity leave and leave of maximum period of one year in continuation of maternity leave shall count towards residency period.

However, the period spent on deputation/foreign service to a non-scientific posts and the period of leave including the leave on medical grounds, EOI, etc. availed on personal grounds shall not count towards the minimum residency period.

Criteria for Promotion under FCS

(i) ACRs are assessed on 10 point scale giving 10 marks for outstanding, 8 marks for very good, 6 marks for good, 4 for average and 0 for poor.

(ii) The officers who satisfy the minimum residency period linked to their performance as indicated below shall be screened in:

Number of years in the grade

3

4

5

6

7

8

Minimum percentage for eligibility

Scientist B to Scientist C

90%

80%

0%

65%

60%

-

Scientist C to Scientist D

-

90%

80%

75%

70%

60%

Scientist D to Scientist E

-

90%

80%

75%

70%

60%

Scientist E to Scientist F

-

-

90%

80%

75%

70%

Scientist F to Scientist G

- -

90%

80%

75%

70%

(iii) Exceptionally meritorious persons with outstanding gradings can be given relaxation in residency period: - not more than one year on each occasion; and - on maximum of two occasions in the entire career.

(iv) For the next 5 years, an external member from Department of Atomic Energy, Space of DRDO, having developed a fine tuned system of screening in meritorious scientist may be co-opted in the selection process. The situation will be reviewed thereafter.

(v) The screened-in-officers will be interviewed and the performance in interview will also be graded on a 10 point scale.

(vi) Field experience (2 years for promotion to Scientist "F" and 5 years to Scientist "G") in research and development and/or experience in implementation of such scientific projects is compulsory for promotion to higher grades under FCS. In case of meritorious candidates, this requirement may be relaxed during the transitional period.

8. The Central Administrative Tribunal vide impugned order dismissed the original application filed by the petitioner vide order dated 23.05.2007 on the ground that despite his eligibility for promotion, the petitioner having retired was not entitled to be promoted with retrospective effect. Relevant observations made in this regard are reproduced hereunder:

9. The only issue in this case is whether the applicant should get promotion retrospectively with effect from 01.10.1998 to the post of Director (Scientist D). The argument of the learned Counsel for the applicant is that under the FCS the applicant completed minimum residency period of four years on 01.10.1998.

10. The learned Counsel for the respondents has taken strong exception to misrepresentation of facts by the applicant. He has pointed out that the notional pre-

dating of the applicant's seniority as Meteorologist Grade-I was from 01.10.1997 and not from 01.10.1994. He has argued that by the time this notional pre-dating was done in October, 2003 the applicant had already retired on 31.05.2003. In terms of government rulings, applicable to all departments, even under FCS, the DOP&T OM No. AB-14017/32/02-Estt.(RR) dated 17.07.2002, all promotions can only be made from prospective effect. He has further argued that minimum residency period makes the officer only eligible for promotion but not entitled to the same. Promotion is made only after an Assessment Board has interviewed the candidates. Since the applicant had already retired in May 2003, none of this laid down procedure could have been followed.

11. In the rejoinder the applicant has merely reiterated his vehemence about his contentions but has not been able to overcome the fatal weakness in his case that although he was eligible he was not entitled to promotion prior to his retirement.

12. We find strength in the contentions raised by the learned Counsel for the respondents and are inclined to agree that the applicant could not have been promoted with retrospective effect.

13. The OA is accordingly dismissed. No costs.

9. The Central Administrative Tribunal in the case of Shri L.C. Jindal decided 20.01.2005 ordered Shri L.C. Jindal to be considered by a review DPC for the post of Director (Scientist) after his retirement from service and if he was found suitable to be notionally promoted from the date his junior was promoted. The said judgment of the Central Administrative Tribunal dated 20.01.2005 also came up for consideration before this Court vide CWP No. 11861/2005 whereby the order of the Tribunal was upheld. However, the reasons for upholding the said judgment was that after recasting the seniority of said Shri Jindal it was found that his junior had also been promoted and it was therefore held that the order passed by the Tribunal was justified.

10. The petitioner also relied upon another judgment delivered in the case of Union of India and Ors. v. Vipinchandra Hiralal Shah 1997 SCC (L&S) 41. In the said case, the appellants were held guilty of not preparing Select List on year to year basis and on account of their preparing a consolidated list in 1986 for the period 1980-1986 which was contrary to a mandatory requirement of Regulation 5 of the IAS (Appointment by Promotion) Regulations, following directions were given:

13. Therefore, while upholding the judgment of the Tribunal that the respondent is entitled to seek fresh consideration on the basis that the selection should be made for vacancies occurring in each year separately, but in substitution of the directions given by the Tribunal in that regard, the following directions are given:

(1) The number of vacancies falling in the quota prescribed for promotion of State Civil Service officers to the Service shall be determined separately for each

year in respect of the period from 1980 to 1986.

(2) The State Civil Service officers who have been appointed to the Service on the basis of the impugned Select List of December 1986/January 1987 and were senior to the respondent in the State Civil Service shall be adjusted against the vacancies so determined on yearwise basis.

(3) After such adjustment if all the vacancies in a particular year or years are filled by the officers referred to in para (2), no further action need be taken in respect of those vacancies for the said year/years.

(4) But, if after such adjustment vacancy/vacancies remain in a particular year/years during the period from 1980 to 1986, notional Select List/Lists shall be prepared separately for that year/years on a consideration of all eligible officers falling within the zone of consideration determined on the basis of the vacancies of the particular year.

(5) If the name of the respondent is included in the notional Select List/Lists prepared for any particular year/years during the period 1980 to 1986 and if he is so placed in the order of merit so as to have been entitled to be appointed against a vacancy of that particular year, he be appointed to the Service against that vacancy of that year with all consequential benefits.

(6) The vacancy against which the respondent is so appointed would be adjusted against the subsequent vacancies falling in the promotion quota prescribed for the State Civil Service officers.

(7) Such appointment of the respondent would not affect the appointments that have already been made on the basis of the impugned Select List of December 1986/January 1987.

11. The reasoning given for the aforesaid directions is contained in para-11 of the judgment which reads as under:

11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfil the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in Clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year. If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and fell within the zone of consideration for selection in that year.

12. For the reasons, as stated above, it is apparent that the ratio of the aforesaid judgment is not applicable to the facts of this case as in the judgment relied specific rules were applicable.

13. It may be observed here that a Division Bench of this Court in the case of UOI v. Rajendra Roy (Supra) considered as to whether in that case the respondent who had superannuated before the consideration of his case for promotion by the DPC, could be granted promotion on a notional basis, by requiring his case to be considered by the DPC, as and when it is held, and in the event of his being empanelled by the DPC, from the date the vacancy against which he could be promoted becomes available. 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 Union of India and Others Vs. K.K. Vadera and others, as well as in the case of Baijnath Sharma v. Hon''ble Rajasthan High Court at Jodhpur and 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).

24. It is also contended by the respondent that similar directions have been given by the Hon''ble Supreme Court in Karam Singh (supra). We cannot accept this contention of the respondent for the simple reason that the short order passed by the Supreme Court in Karam Singh does not deal with this issue. It appears that no such issue was raised before the Hon''ble Supreme Court in that case and no arguments were advanced in this regard. The Hon''ble Supreme Court also did not consider the legal issue while issuing the said direction. It cannot be cited as an authority on the propositions under consideration. The other case relied upon by the respondent i.e. Hamesh Mahajan (supra) is not applicable to the facts of the present case. In that case on a subsequent revision of seniority the petitioner ranked senior to one Mr. Ramesh Chand Sehgal, who had apparently been promoted. In these circumstances, the High Court rejected the defence of the respondents that the petitioner could not be granted benefits of selection grade and notional promotion with retrospective effect since he had

already retired on 31.5.1999. As noticed hereinabove, the respondent has not made out a case of his being superseded by any of his juniors. He had claimed that Ms. Monideepa Bannerjee had superseded him. However, that claim is not correct since Monideepa Bannerjee ranked higher to the respondent in the senior grade of IIS Group "A".

25. Coming to the charge of discrimination against him by the petitioner, on the basis of that, the petitioner had promoted a large number of Sr. Grade officers of IIS Group "A" to JAG notionally w.e.f 10.7.2002 and on actual basis w.e.f. from the date of the taking over a charge, many of whom in the meantime had retired. We find even this claim to be misplaced. He claims that four of his colleagues, who retired like him in the Sr. Grade of IIS Group "A" have been given notional promotion to Junior Administrative Grade from retrospective date i.e. 7.2.2002. However, what is being missed by the respondent is that all the persons promoted retrospectively notionally w.e.f. 10.7.2002 to the Junior Administrative Grade of the service were senior to the respondent as per the revised seniority list as on 31.3.2000. Had a junior of the respondent been promoted to the Junior Administrative Grade, certainly the respondent would have had a valid and enforcement claim to seek notional promotion from retrospective date i.e. from the date on which the junior was promoted. But this is not his case.

26. In view of the aforesaid, we set aside the impugned order passed by the Tribunal in OA No. 192/2005 dated 8.7.2005 and allow the present writ petition leaving the parties to bear their respective costs.

14. The aforesaid judgment is squarely applicable in the case of the petitioner and justifies the judgment delivered by the Tribunal. 15. In view of the aforesaid, we do not find any infirmity in the order of the Tribunal and dismiss the writ petition for the following reasons:

- i. the petitioner had approached Central Administrative Tribunal after two years of retirement;
- ii. the promotion to the post of Director Scientist had to be prospective; and,
- iii. in view of ratio in the decision of this Court in the case of Union of India v. Rajendra Roy and Ors.(Supra),

16. Considering the circumstances, the parties are, however, left to bear their own costs.