

(2012) 03 DEL CK 0019

In the Delhi High Court

Case No : Writ Petition (C) 1255 of 2012 and CM No. 2727 of 2012

Union of India and Others

APPELLANT

Vs

Brahma Deo

RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 14

Citation : (2012) 5 AD 452 : (2012) 188 DLT 475

Hon'ble Judges : V.K. Jain, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : R.V. Sinha, with Mr. A.S. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

V.K. Jain, J.—This writ petition is directed against the orders dated 05.08.2010 and 14.10.2011 passed in OA No. 1429/2010 and RA No. 202/2011 in OA No. 1429/2010 respectively. The facts giving rise to the filing of this writ petition can be summarized as follow:

The respondent before this Court joined PSS Grade "B" on 10.10.2002. Pursuant to the report of the Sixth Pay Commission, PS Grade "B" officers were granted upgradation of grade pay from Rs 4800 to Rs 5400 on completion of four years after due screening in regard to the vigilance clearance. The upgradation was to be granted on non-functional basis and was not linked to any vacancy. A chargesheet under Rule 14 of CCS(CCA) Rules, 1965 was issued to the respondent vide Memo dated 20.10.2008 and on account of the aforesaid chargesheet, the higher grade pay of Rs 5400 was not granted to him. OA No. 2649/2009 was filed by the petitioner seeking grant of higher grade pay. The OA was disposed of vide order dated 16.09.2009, thereby permitting the respondent before this Court to make a representation with respect to his grievance and the petitioners before this Court (the respondents in the OA) were directed to pass an appropriate order on the representation. A representation dated 22.10.2009 made by the respondent pursuant to the order of Tribunal is stated to have been

rejected vide speaking order dated 30.11.2009. The respondent filed OA No. 1429/2010 seeking grant of higher grade pay of Rs 5400. The OA was allowed vide impugned order dated 05.08.2010 and the petitioner was directed to accord grade pay of Rs 5400 to the respondent in the pay band of Rs 9300-34800 w.e.f. 10.10.2006.

2. The only contention raised by the learned counsel for the petitioner before us is that since grant of higher grade pay of Rs 5400 amounts to promotion and disciplinary proceedings are already pending against the respondent, the higher grade pay of Rs 5400/- cannot be paid to him during pendency of disciplinary proceedings and only a sealed cover with respect to grant of higher grade pay can be resorted by the petitioners.

3. The distinction between upgradation and promotion was examined by Supreme Court in *Bharat Sanchar Nigam Ltd. v. R. Santhakumari Velusamy & Ors.* 2011 STPL (Web) 781 SC. In that case, there were four grades of employees of Telecom Departments and promotions from one grade to higher grade were made on the basis of the seniority/departmental examination. "One Time-Bound Promotion" scheme (OTBP) was introduced in the year 1983-84 under which the employees who had completed 16 years of service in the grade were placed in the next higher grade. After some time, the Government decided to have a Biennial Cadre Review (BCR) under which a specified percentage of posts could be upgraded on the basis of functional justification. Under the said scheme, employees, who were in service on 01.01.1990 and who had completed 26 years of service in the basic cadre, were to be screened to assess their performance and determine their suitability for advancement and if found suitable, they were to be upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III. Vide Circular dated 11.03.1991, the Government issued some clarification regarding designations by another Circular dated 13.12.1995. The Government formulated a procedure for promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade, from amongst the officers in Grade III, subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 01.03.1996, the Government issued a clarification that promotion to Grade IV would be given from amongst officials in Grade III on the basis of their seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV. The Circular dated 01.03.1996 was challenged by All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. Ahmedabad Bench of the Tribunal held that the Department could not apply reservation rules while upgrading the post in the BCR Scheme. The writ petition filed by the Government was dismissed by Gujarat high Court. The Government then issued an order directing that review DPC be held and all ineligible officers, wrongly promoted to Grade IV by application of reservation roster, be reverted back and all eligible officers should be placed in Grade IV. As

a consequence, the contesting respondents were reverted from Grade IV to Grade III. Being aggrieved, they filed applications before Madras Bench of the Tribunal, challenging the validity of the order, whereby they were reverted. The Full Bench of the Madras High Court differed from the decision of its Ahmedabad Bench and held that the appointment was a non-promotional appointment and distinction between upgradation promotion based on the nomenclature only does not appear to be tenable. The Government was directed to restore the contesting respondents to their promoted posts. The writ petition filed by the Telecommunication Department was dismissed by Madras High Court. The order of the High Court was challenged before Supreme Court and it was contended that there was a clear distinction between upgradation and promotion. It was submitted that upgradation does not involve promotion to a higher position as the pedestal of the employees remains the same and he is only conferred some benefit by granting a higher pay scale to overcome stagnation. The appellants before the Supreme Court contended that since there was only upgradation of existing post with creation of additional post, principles of reservation would not apply. Supreme Court, after reviewing the case law on the subject, was of the view that even in cases where no additional posts were created, but, a process of selection was involved in the upgradation, the process has to be considered as a process of promotion and not as an upgradation simplicitor and, therefore, the principle of reservation would be attracted. The following principles were laid down by the Court, indicating the distinction between the promotion of upgradation:-

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term "promotion", does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change

of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.

As regards the case before it, Supreme Court noted that the BCR scheme did not involve creation of additional posts but merely restructured the existing posts, as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation and the purpose of screening was only to find out whether the service record of the employees contained any adverse entries or whether the employee had suffered punishment. It did not involve consideration of comparative merit or selection. The Court, therefore, held that BCR Scheme was an upgradation scheme to give relief against stagnation.

4. In the case before this Court, a perusal of the order dated 04.11.2008 issued by the Government of India, Ministry of Communications & IT, Department of Posts, whereby grant of upgradation of the grade pay from Rs 4800 to Rs 5400 on completion of four years service was notified, would show that no element of selection was involved in grant of the said upgradation and only screening limited

to vigilance clearance was to be done by the competent authority before granting the upgradation. It is also not in dispute that the upgradation was to be given to all those who had completed four years of service and were cleared from vigilance point of view. Admittedly, grant of the higher grade-pay does not involve movement from a lower position to a higher position nor is there any change in the duties and responsibilities of those who are granted the higher grade pay. The higher grade pay is, therefore, available to everyone who satisfies the eligibility conditions and no comparison of inter se merit of the eligible candidates is involved in the process. Thus, it cannot be disputed that grant of higher grade pay does not have element of selection and, therefore, is an upgradation simplicitor and that too only of the grade pay, not of the pay scale/pay band. Even if, upgradation is restricted to some of the post in the cadre, it would not constitute promotion unless an element of selection is involved in the selection and neither there is movement from lower position to a higher position nor any change in the duties and responsibilities. In the case before this Court, grant of higher grade pay is not even restricted to a specified percentage of cadre or to a specified number of employers. It is available to all those who have completed four years of service, subject, of course, to clearance from the vigilance angle. The view taken by the Supreme Court in *Bharat Sanchar Nigam Limited (supra)* was that even the screening to eliminate those employees whose service records contained adverse entries or who might have suffered punishment may not amount to a process of selection leading to promotion, the elimination in such a case being only a part of process of upgradation simplicitor. In the case before this Court even the screening is restricted clearance from vigilance angle and does not entail elimination of those whose service records contains adverse entries. The case before us is, therefore, consequently covered by the decision of the Supreme Court in *Bharat Sanchar Nigam Limited (supra)*.

We, therefore, find no reason to interfere with the impugned orders passed by the Tribunal. The writ petition is devoid of any merit and is, therefore, dismissed.