

(2011) 09 DEL CK 0451

In the Delhi High Court

Case No : Writ Petition (C) 2890 of 2011

Union of India (UOI) and Another

APPELLANT

Vs

M.S. Tewari and Others

RESPONDENT

Date of Decision : 05-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2011) 09 DEL CK 0451

Hon'ble Judges : Dipak Misra, C.J.;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Anuj Aggarwal and Gaurav Khanna, for the Appellant; Ankur Chhibber, for Resp. 1 and 2 Naresh Kaushik, for R 3 and UPSC, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, C.J.—Invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the Petitioners have called in question the legal defensibility of the order dated 2nd December, 2010 passed by the Central Administrative Tribunal, Principal Bench New delhi (for short "the tribunal") in OA No. 2480/2009 whereby the tribunal has acceded to the prayer made by the Respondents No. 1 and 2, the applicants before it, by directing the Union of India and its functionaries to accord actual promotion by giving effect to the finding of the Departmental Promotion Committee (DPC) conducted in association with the Union Public Services commission (for short "the commission") and further to extend the consequential benefits of promotion and revised pensionary benefits along with arrears within a period of three months.

2. Shorn of unnecessary details, the facts which are essential to be stated are that the Respondent No. 1 got promotion to the rank of Assistant Director, Grade-II and superannuated on 30th April, 2005. The Respondent No. 2 was promoted to the said rank and retired on 31st January, 2005. The names of 20 eligible candidates were forwarded to the DPC for consideration against the vacancies

arising in 17 posts and the names of the two Respondents were included in the said list. The DPC could only be held on 27th December, 2005 and by that time the Respondents No. 1 and 2 along with five others had attained the age of superannuation and, therefore, their cases could not be considered for promotion.

3. Being grieved by the aforesaid action of the employer, the Respondents knocked at the doors of the tribunal. The tribunal placing reliance on the decisions in *Gopi Chand Vishnoi v. State of U.P. and Anr.* (2006) 9 SCC 694 and *Union of India and Anr. v. Hemraj Singh Chauhan and Ors.* 2010 (3) SCALE 272 expressed the view that if a promotion is denied in an erroneous manner to a government servant who retires on superannuation, the said benefit has to be extended with retrospective effect. The tribunal also expressed the view that the DPC has to be held at regular intervals but when the same is not done, the employee should not suffer. Being of this view, the tribunal opined that the employer has not acted in a fair and legal manner and issued the directions as has been stated hereinabove.

4. It is averred in the petition that the Respondents No. 1 and 2 were promoted to the higher grade, that is, the post of Assistant Director (Grade-II) prior to the date of retirement and the next promotional post is Assistant Director (Grade-I). It is contended that the delay in holding the DPC was due to certain bona fide reasons and that ADS (Grade-I) is the entry grade of the Indian Supply Services and the last DPC for promotion to the said grade was held in 1992. No. DPC could be held till 27th December, 2005 due to Cadre Review and re-structuring of the cadre. After the cadre review took place, the sanctioned strength in the grade of ADS (Grade-I) was reduced from 50 to 37 and after the cadre review, the Indian Supply Services Grade Service (Group-A) Rules, 1994 were notified on 9th September, 1994. In 1995 against the sanctioned strength of 37, the working strength was 50. The vacancies arose subsequently in the grade of ADS (Grade-I) and they were first adjusted against such review strength. After a series of discussions and deliberations, a report was finalized in 1999 and a study was made for restructuring of the cadre. With the implementation of the recommendations of the Fifth Central Pay Commission, DOP&T issued certain guidelines, which were required to be incorporated in the Recruitment Rules. The said guidelines / instructions read as:

(i) DOP's O M dated 25.05.1988 regarding incorporation of revised pay scales, modifications in the deputation clause and substitution of existing "vacancy based recruitment" by mpost based recruitment (ii) DOP and T's O M dated 27.03.1997 regarding substitution of the existing method namely selection by merit and selection-cum-seniority by selection;

(iii) " DOP and T's O M dated 12.01.1998 regarding reconstitution of the DPC by associating a nominee of DOP&T;

(iv) " DOP and T's O M dated 21.05.1999 to be incorporate that here shall be No. consultation with the UPS in case of confirmation of Group A officers; and

(v) DOP and T'''s O M dated 06.06.2000 prescribing higher payscale for Junior Administration Grade officers of the organized Central Group A. Engineering Services and a Selection Grade Non-functional for the Senior Time Scale posts and consequently, the eligibility services etc. for appointment to the JAG level posts and also grant of Non-functional Selection Grade to Senior Time Scale.

5. In order to incorporate these instructions the amendment to 1994 Rules was initiated in August, 2000 and eventually the Indian Supply Services (Amendment) Rules could be finally notified on 23rd June, 2004.

6. In view of the aforesaid exercise, the government took a conscious decision to treat all the 17 posts belonging to Departmental Promotion Quota of ASD (Grade-I), which were available prior to amendment of recruitment rules on 23rd June, 2004 to fill up the post as per the amended recruitment rules and to treat the vacancies pertaining to the year 2004-2005.

7. After the said decision was taken, a DPC was held on 27th December, 2005 and the UPSC on 4th January, 2006 forwarded the names of 17 candidates. The Respondents No. 1 and 2 could not be promoted as they had already retired from government service. As assertion was made by the Respondents before the tribunal that In Accordance with the DOP and T'''s O M No 22011/4/98-Establishment.(D) dated 12th October, 1998, retired officials are not to be included in the panel as they have No. right to claim promotion.

8. The tribunal, considering the rivalised stand put forth before it, came to hold as follows:

7. It is trite law that whenever the vacancy accrues, the recruitment rules in vogue are to be applied even for promotion. Consideration for promotion and not the chances is a fundamental right guaranteed to the government servant. Mere non-holding of DPC, which has been explained by certain reasons by the Respondents, transpires that whatever has been done in the past had culminated into a finality in 2000 as well, yet the Respondents have not invoked the earlier recruitment rules to hold promotional process for considering the claim of the applicants despite the vacancies were available with them, though may be reduced from 57 to 37 and thereafter from 37 to 33. It is not the case of the Respondents that the applicants had not found their places in the zone of consideration for such a consideration. It is so, by non-holding the DPC, applicants have been wrongly denied their promotion, which now being denied to them ultimately by delayed process of the Respondents and retirement is the only defence put forth by the Respondents, which cannot be an impediment as per the decisions of the Apex Court (supra).

8. We are satisfied that the Respondents have not acted in a legal manner to consider the claim of the applicants and rather it is denied to them. Accordingly, OA is allowed and as the applicants deserve consideration for promotion, they be accorded the actual promotion by giving effect to the finding of the DPC conducted in association with the Union Public Service Commission. The

consequential benefits for promotion and revised pensionary benefits shall also be accorded to them, with arrears, within a period of three Monts from the date of receipt of a copy of this order

9. We have heard Mr. Anuj Aggarwal, learned Counsel appearing for the Petitioners and Mr. Ankur Chhibber, learned Counsel appearing for Respondent Nos. 1 and 2 and Mr. Naresh Kaushik, learned Counsel appearing for Respondent No. 3.

10. On a perusal of the material brought on record, it is quite vivid that there were 37 sanctioned posts in 1995 but the working strength was 50. Vacancies arose at a subsequent stage. The incumbents working in the working strength were adjusted against the reviewed strength. When the steps were being taken on the basis of the recommendations of the 5th Central Pay Commission, DOPT issued certain guidelines. Regard being had to the changed situation, the rules were amended and finalized in the year 2004. A conscious decision was taken to fill up the 17 posts. Thereafter, the decision was taken to fill up the posts. The tribunal has proceeded on the assumption that there was delay in holding the DPC and for that a retired employee should not be deprived of the benefit of promotion. As the facts would demonstrate, the working strength was more than the sanctioned strength; that there was subsequent review of the posts and the working strength was adjusted; and that a study was made for restructuring of the cadre and that steps were taken for amendment of the rules. In our considered opinion, not holding of the DPC was on valid and based on relevant consideration and it cannot be termed as arbitrary. A candidate does not have a vested right for being promoted. He has a right to be considered and as we perceive it is not a case where meetings of the DPC were arbitrarily or mala fide cancelled without any justification. A two-Judge Bench of the Apex Court in K. Madhavan and Another Vs. Union of India (UOI) and Others, has held thus:

15. There be No. doubt that if the meeting of the DPC scheduled to be held is arbitrarily or mala fide cancelled without any reasonable justification therefore to the prejudice of an employee and he is not considered for promotion to a higher post, the Government in a suitable case can do justice to such an employee by granting him promotion or appointing him to the higher post for which the DPC was to be held, with retrospective effect so that he is not subjected to a lower position in the seniority list. But, if the cancellation or postponement of the meeting of the DPC is not arbitrary and is supported by good reasons, the employee concerned can have No. grievance and the Government will not be justified in appointing the employee to the higher post with retrospective effect. An employee may become eligible for a certain post, but surely he cannot claim appointment to such post as a matter of right

11. In the case at hand, as we have already stated hereinbefore that No. DPC was and by the time consideration took place the applicants before the tribunal had already attained the age of superannuation. It is not their case that the juniors were promoted at the time when they were in service and DPC was not

held or scheduled to be held was cancelled.

12. In this context, we may refer with profit to the decision in *Union of India and Others Vs. K.K. Vadera and others*, wherein their Lordships have stated thus:

..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

13. In *Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur and Anr.* 1998 SCC (L&S) 1754 their Lordships referred to the decision in *K.K.Vadera* (supra) and proceeded to state as follows:

8. It is regrettable because of the inaction on the part of the High Court that recruitment from the Bar could not be made in time which created an imbalance in the service and ultimately it were the Appellant and officers similarly placed who suffered. After having put in long years of service, it is the seniority and promotion which an officer looks forward to. He expects he is given due promotion in time. Non-promotion may be an incidence of any service. But here the Appellant has been deprived of his promotion without any fault of his. The High Court said that it might be a sad state of affairs that the name of the Appellant was not considered for promotion till he retired. The High Court may feel anguished but it gives No. comfort to the Appellant. At least for the future, such an unfortunate thing should not happen to any other officer similarly situated. This malaise which abysmally afflicts any service when there is recruitment from different sources crops up in one form or the other with great disadvantage to one or the other. But then the service is not constituted merely for the benefit of the officers in the service but with a certain purpose in view and in the present case, for dispensing justice to the public at large. It is not at all advisable to keep any post in the judiciary vacant for days when the courts are burdened with arrears and the litigants are the ones who suffer. We expect the High Courts to be vigilant and to fill up the posts in the direct quota in time and if the Bar quota cannot be filled for any reason for No. fault of the promote officers, their case for promotion should not be kept pending till some of them even superannuate. When the process for recruitment from the Bar begins and it is expected that posts for the direct quota will be filled up soon, during the intervening period, the officers in the subordinate service can be given ad hoc promotions without their right to claim seniority over direct recruits, who may join later. Functioning of the courts must not stop.

14. In *Union of India v. Rajendra Roy and Ors.* W.P. (C) No. 20812/2005 decided on 12.1.2007, a Division Bench of this Court was dealing with a petition filed by the Union of India wherein the challenge was to the order passed by the tribunal whereby it had given a direction to the Union of India to consider the Respondent for promotion to a promotional post from the date when the vacancy occurred on notional basis as his name figured in the recommended list as the vacancy had occurred prior to the date of superannuation of the employee. The Bench referred to the decisions in *K.K. Vadera (supra)* and *Baij Nath Sharma (supra)* and thereafter expressed the view as follows:

21. While as per the earlier part the superannuated employees are not to be placed in the zone of consideration / panel, contradicting the said statement, the later part states that names of the retired officials may also be included in the panel. The use of the expression "Actual Promotion" in the following sentence gives the impression that the same has been used in contradistinction with national promotion "it appears that the Tribunal was influenced by the latter portion of the said OM and, therefore, construed it in favour of the Respondent.

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 judgement of the Hon''ble Supreme Court in *K.K Vadera (Supra)* as well as *Baijnath sharma (supra)*

15. If the obtaining factual matrix is scrutinized on the touchstone of the aforesaid enunciation of law, we have No. trace of doubt that the tribunal has absolutely erred in its appreciation of facts as well as law by not taking note of the fact about the vacancy position, occurrence of vacancy, the restructuring of cadre and amendment of rules and also by expressing the view that the Respondents who were applicants before the tribunal were entitled to be considered promotion from the date of vacancy and thereafter issued the directions which we have already reproduced. In our considered view, such directions are not on the correct appreciation of facts and definitely on the erroneous and fallacious interpretation of law. Thus, the decision rendered by the tribunal is absolutely unsustainable.

16. Resultantly, the writ petition is allowed and the order passed by the tribunal is set aside. There shall be No. order as to costs.