

(2002) 09 DEL CK 0052
In the Delhi High Court
Case No : CW 7073 of 2001

Union of India (UOI)

APPELLANT

Vs

Central Administrative Tribunal

RESPONDENT

Date of Decision : 25-09-2002

Acts Referred:

Citation : (2002) 09 DEL CK 0052

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Sanjay Jain, for the Appellant; Ashok Gurnani, for R 2-3 and K.N. Rai, for R4, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—By this writ petition, the petitioner, which is union of India, has challenged the validity of the order dated 31.1.2001 passed by the Central Administrative Tribunal, Principal Bench, New Delhi on O.A. 1033/2000. By means of that order O.A. filed by the respondent herein has been allowed. The main thrust of the petition is that by the impugned order a go-bye has been given to the rules and it has been tried to unsettle and disturb the existing seniority of persons, who have been working for a long period in certain posts and are relegated to the position junior to respondent 2 and 3.

2. During the period of 1968-70, respondent No.2 and 3 joined the Central Forensic Science Laboratory (CFSL, for short). They were promoted as SSO Grade I. from 9.8.1985. They became eligible for the next, promotion post as Principal Scientific Officer (PSO, for short) in 1990, as an officer with five years regular service as SSO becomes eligible for promotion to the next higher post of PSO. As no DPC was held for considering respondent 2 and 3 for this post, they filed OA 409.91. In this O.A. respondent 2 and 3 filed M.A. 1242/91 as well. This MA was disposed of on 24.4.1991 on the following terms:

"The respondents have not filed their counter affidavit. Shri M.L.Verma,

appearing on behalf of the respondents states that two persons who are senior to the applicants will be considered by the DPC for two vacancies which arose in 1988. The applicants before us were not eligible to be considered for appointment to PSO's for the 1988 vacancies. He further states that the case of the applicants will also be considered for promotion as PSOs and that action is being taken separately in this regard.

Having heard the learned counsel of both parties, we direct that the case of the applicants for promotion to the post of PSOs be considered expeditiously in accordance with the rules. The interim order already passed is modified on the above lines."

3. After this order DPC was held pursuant thereto and respondent No. 4 herein, who was also arrayed with respondent No. 4 in OA, and one another person were appointed as PSO for vacancy that had arisen in 1988.

4. OA 409/91 came up for hearing sometimes in the year 1995 and was disposed of vide order dated 6.6.95 by giving the following directions:

"We, Therefore, dispose of this OA with a direction to for the respondents to consider the case of the applicants for promotion to the post of PSO's strictly in accordance with the extant rules/instructions on the subject as already directed vide order dated 24.4.1991 within a period of four months from the date of receipt of a copy of this judgment."

5. Thereafter UPSC prepared a list of persons who were eligible between 1990 and 1996 reflecting their inter se seniority. A DPC was held and on its recommendations respondent No.2 and 3 were appointed as PSOs in CFSL on 12.7.1996 This order dated 12.7.96 was thereafter amended vide order dated 19.8.96 making their promotion as "provisional" and "subject to final outcome of the application- OA 2031/95 filed by Dr G.D. Gupta in the Central Administrative Tribunal"

6. However, this O.A. was ultimately dismissed vide order dated 22.2.2000. After their appointment/promotion as PSOs vide order dated 12.7.96, respondent No.2 made a representation dated 10.2.1997 for according to him seniority in the year of his eligibility i.e. 1990. This was, however, rejected vide order dated 28.2.1997. Thereafter a seniority list of PSOs was issued vide circular dated 3.6.99 showing the seniority position as on 1.1.1999. Respondents 2 and 3 who were assigned seniority from 1996, wanted their seniority from 1990 for which year they were empanelled as they were not responsible for delay in holding of DPC and further delay in implementing the decision of DPC. Therefore they filed OA 1033/2000 seeking this relief of assigning them 1990 as the year of seniority. By a detailed judgment dated 31.1.2001 this prayer of the respondents 2 and 3 has been allowed. While allowing this O.A. the contention of respondent No.2 and 3 was accepted observing that it is the petitioners who were required to hold DPC every year for promotion of the candidates after preparing a panel of that year and if delay was caused in holding DPC not because of the applicants i.e.

respondents 2 and 3 or any other justifiable reason like the stay order of competent Court, etc. the respondents 2 and 3 could not be made to suffer. The learned Tribunal also placed strong reliance on the judgment of the Apex Court in the case of Union of India and others Vs. N.R. Banerjee and others, and extracted the following portion of the said judgment for coming to its conclusion.

"Preparing of action plan for consideration by the DPC of the respective claims of the officers within the zone and thereafter for setting in motion the process of preparation of panel on year- wise basis is elaborately laid down in the instructions issued by the Government of India, ministry of Personnel and Training. In case of failure on the part of the departmental authorities to do so, what further procedure is required to be followed is also indicated in these instructions. It manifests the intention of the rule maker that the Government should estimate the anticipated vacancies, regular vacancies and also vacancies arising thereafter due to various contingencies and get the ACRs prepared and approved. It has also been laid down in these instructions that the DPC should sit on regular basis to consider the case of the eligible candidates within the zone of consideration. The object is that the Government should keep the panel ready in advance so that the vacancies arising soon thereafter may be filled up from amongst the approved candidates whose names appear in the panel.

The departmental instructions prescribe one year as the life of the panel. It is Therefore essential that appointing authorities concerned should initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel by collecting relevant documents like ACRs, integrity certificates, seniority list etc for placing before the DPC.

The DPC is required to sit every year, regularly on or before 1st April or 1st May of the year to fill up the vacancies likely to arise in the year of being filed up. The required material should be collected in advance and merit list finalised by the appointing authorities and placed before the DPCs for consideration. The requirement can be dispensed with only after a certificate is issued by the appointing authority that there are no vacancies to be filled by promotion of that no officers are due for confirmation, during the year in question.

The instructions also specifically mention about the preparatory action to be taken for assessing the number of vacancies. The authorities are required to anticipate in advance the vacancies for promotion on regular basis including long term deputation posts and additional posts created and then to take action for finalising the ACRs, preparation of the selected list and place necessary material before the DPC for consideration of the candidates within the zone of consideration, as are found eligible for the relevant year/years.

It is true that the Government is under no obligation to fill up a vacancy and empanelment of a candidate does not create any right in his favor, yet the administrative instructions issued by the government of India clearly indicate the need for taking action for preparation of panel well in advance to fill up the clear

vacancies or anticipated vacancies. The preparation and finalisation of yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. If the annual panel can not be prepared for any justifiable reason, year- wise panel of all the eligible candidates within the zone of consideration for filling up of the vacancies each year should be prepared and appointments made in accordance therewith."

7. After quoting the aforesaid passage from the judgment, the Tribunal observed:

"It is clear from the aforesaid judgment that preparation of yearly panels is a mandatory requirement. UPSC's letter dated November 1, 1995 makes it clear that the applicants were found fit in the year of their eligibility for in situ promotion to the grade of PSO. Obviously, there were three vacancies for the year 1990. In our considered view basically there was no need for the UPSC to have given a separate consolidated panel. When they had recommended different panels for different years there was no need for consolidating them. The scheme for in situ promotion aims at accelerating promotions of the personnel. If they are not promoted as per their eligibility despite existence of vacancies, the objective behind the scheme of in situ promotion gets defeated. If the idea behind formulating one consolidated panel is not to accord in situ promotion to the applicants for respective years when they became eligible then there was no need to put the candidates in separate panels for separate years. All the vacancies could have been clubbed in 1995 and a single consolidated panel could have been recommended by the UPSC. In our view whereas the UPSC recommended separate panels for separate years they have unnecessarily panel is meaningless in our view. In the light of the ratio of N.R. Banerjee (supra) the applicants who were eligible and were empanelled for the year 1990 for in situ promotion to the grade of PSO have to be accorded in situ promotion with effecting from the year 1990."

8. Mr Sanjay Jain, learned counsel for the petitioner in this writ petition could not dispute the aforesaid legal position. However, his plank of attacking the impugned judgment was that by giving seniority to two applicants, namely, respondent No.2 and 3 w.e.f. 1990, the Tribunal upset the apple cart leading to incongruous and anomalous situation. He submitted that the year of eligibility of respondent No. 4 was 1988. However, he was promoted in the year 1991 and Therefore granting the seniority as on 1991 he was admittedly senior to respondents No.2 and 3. In fact, he had further been promoted to the next higher post of Director. However, by giving seniority to respondents No.2 and 3 in the year 1990, the Tribunal had made respondent No.4 junior to respondents No.2 and 3 although he was admittedly senior to them and was promoted as PSO much earlier i.e. in the year 1991 and in the meantime even promoted to the next post of Director. He also referred to office Memorandum dated 6.10.1999 regarding implementation of the revised FCS in the Scientific Departments and Ministries wherein certain clarifications were issued on various points raised and

submitted that point No. (vii) on which clarification was issued directly dealt with the question. This is as under:

Points Raised Comments/clarifications

(vii) A further question that perhaps could also be gone into is whether a one time relaxation (of retrospective promotion from the date the promotions became actually due) would be allowed to the scientists finally reviewed and found fit for promotion keeping in view the circumstances under which the new rules have come into force and the delay having taken place in getting the various aspects clarified and which cannot be attributed to the scientists in any way. (vii) Retrospective promotion is not permissible under FCS

9. He also referred to O.M. dated 17.7.2002 in respect of Flexible Complemental Scheme itself which in operation in Scientific Department for in situ promotion of scientist and technical personal. This is to the following effect.

"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 shortcoming/inadequacies in the scheme had been examined some time back and this Department in OM No. 2/41/97-IPC 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.

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."

Reliance by the petitioner on O.M. dated 6.10.99 and 17.7.2002 would be of no avail. In fact, while stating that promotions are not to be granted with retrospective effect, Memo dated 17.7.2002 proceeds on the basis that it is provided in the rules for scientific posts that the assessing board shall meet once a year for in situ promotion.

10. As a matter of fact no occasion requiring application of promotion with retrospective effect should arise as it is provided in the rules for scientific posts that assessment board shall meet once a year to consider the case of in-city promotion., when the department fails in its duty to hold assessment board which are to meet every year, it cannot take advantage of its own wrong. Respondents No. 2 and 3, in instant case became eligible for promotion to the next higher post of director after rendering ten years as PSO although they became eligible as PSO in 1990 and although as per the government's own directive assessment board should have met that very year, the DPC was held in 1996. If 1996 is granted as the year of seniority, respondents No. 2 and 3 are bound to suffer. On the other hand, had they been granted promotion in 1990 they would have become eligible. It is this hardship which is taken care of by the Supreme Court in N.R. Bannerjee's case (supra) while holding that in such cases the order of eligibility should be treated as seniority.

11. On the other hand, learned counsel appearing for the respondent submitted that although in the order dated 24.4.1991 passed in M.A. in O.A. No. 409/91, the Tribunal had noted the contention of the Counsel for the Department that the case of respondents No.2 and 3 would also be considered for promotion as PSO and action was being taken separately in that regard, the Department did not proceed to consider the case of respondents No. 2 and 3, who had become eligible for promotion in 1990. This position remained till 1995 when the Tribunal passed the final order dated 6.6.95 in OA 409/91. it is only thereafter that action was initiated. Even then argued the learned counsel, the UPSC prepared a consolidated list of persons who became eligible between 1990 and 1996 and although the Tribunal had directed the petitioner to consider the case of respondents No. 2 and 3 for promotion to the post of PSO strictly in accordance with the extant rules/instructions. He further submitted that in view of the Government's own directions a yearwise eligibility panel has to be prepared and hold DPC every year. If the petitioner slept over for six years, the respondents cannot be made to suffer and the Tribunal has rightly given a direction in this regard. His further submission was that if respondent No.4 who was eligible in 1988 and was promoted in 1991 and given seniority in 1991 and he did not challenge his year of allotment by claiming 1988 as the year of seniority, he was to suffer consequences Therefore for which respondent 2 and 3 could not be held responsible.

12. Mr. K.N. Rai, learned counsel appearing for respondent No.4 supported the case of the petitioner and submitted that he could not be rendered junior to respondents No. 2 and 3 by the impugned judgment when he was admittedly senior to them throughout.

13. We have considered the rival contentions. As far as the legal position is concerned, the same is irrefutable. The judgment of the Apex Court in N.R. Bannerjee's case (supra) would cover the issue at hand and the ratio thereof was correctly applied by the learned Tribunal to the present case.

14. Having examined the legal position, the respondent is entitled to seniority in the year 1990. We have to ensure that it should not lead to incongruous result. After all, respondent No.4 was senior to respondents No.2 and 3. He remained senior all these years. Ever since his appointment as PSO in 1991 he has even been promoted as Director, whereas respondents No.2 and 3 are still PSOs. He cannot be rendered junior to respondents No.2 and 3 with the implementation of the impugned judgment. After all, if the principle of seniority is to be applied in the case of respondents No. 2 and 3, on the same principle, respondent No.4 would get his seniority as in 1988. Therefore, ends of justice would be met by giving respondent No. 4 the year of seniority of 1988 so that he remains senior to respondents No. 2 and 3. With the aforesaid directions to the petitioner, according to respondent No. 4 seniority in the year 1988, this petition is dismissed.