

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

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OA No. 3166/2002

New Delhi, this the th 13 day of October, 2003

Hon'ble Shri V. K. Majotra, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

Kedar Ram
c/o RZ-6, Palam Vihar,
New Delhi - 110 045.

...Applicant

(Shri G.K. Aggarwal, Advocate)

Versus

1. Union of India
through Secretary,
Ministry of Urban Development
and Poverty Alleviation,
Nirman Bhawan,
New Delhi - 110 011.
2. The Secretary,
Union Public Service Commission,
Shahjahan Road,
New Delhi - 110 011.
3. A.S. Arora (Mr.),
SE, Central Stores Circle,
New Delhi through
The Director General (Works)(EC-I)
CPWD, Nirman Bhawan,
New Delhi - 110 011. ...Respondents

(By Shri K.R. Sachdeva, Advocate for R-1
By Mrs. B. Rana, Advocate for R-2)

ORDER

Order delivered by Mr. Shanker Raju, Member (J)

Applicant challenges promotion of his juniors as Superintending Engineer (Electrical) in the Central Electrical and Mechanical Engineering Service Group-A and has also assailed respondents' order dated 17.10.2002 rejecting his request for reconsideration of promotion.

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2. Applicant who was regularly promoted as Executive Engineer (E) in CPWD on 25.02.1998, as per the seniority list as on 6.7.1999 being a SC candidate, has ranked senior to S/Shri Avtar Singh Arora, S.K.S.Deol, Prabhakar Singh, M.K. Verma, Pware Lal and Sarian Singh. A Departmental Promotion Committee was held to consider 30 regular senior-most EEs for promotion to the post of SE(C) and prepared a panel where the applicant stood at serial no. 14.

3. Vide promotion order dated 15.01.2002, 9 regular EEs were promoted wherein at serial no. 8 & 9 promotees were junior to the applicant. Further vide order dated 31.01.2002, two more juniors of the applicant have been promoted and this followed by two other orders dated 8.2.2002 and 11.03.2002 where one two more juniors have been promoted respectively.

4. Applicant represented to the respondents for his supersession which was rejected on 17.10.2002. A penalty of withdrawal of pay for two years was imposed upon the applicant on 19.10.2000 effect of which was over on 18.10.2002.

5. By an order dated 11.11.2002 passed in the case of V.Thirunavakkarasu vs. UOI & Ors. (OA No. 538/2002) where applicant, who was denied promotion as SE this court holding that the applicant's case should have been considered by the DPC held on 10.10.2000 as an SC candidate notwithstanding bench mark provided that he

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was not considered unfit for promotion. the consideration should have been within the zone of consideration and even if the applicant was beyond the zone of vacancies keeping in view the DOP&T OM dated 3.10.2000. directions have been issued to consider the promotion.

6. The aforesaid order has been challenged in CW 1734/03 before the High Court of Delhi. where by an order dated 19.5.2003. the operation of the impugned order has been stayed.

7. The matter was earlier heard on 11.09.2003 and was allowed by directing reasons to follow.

8. While recording reasons and before penning down the order. in view of para 6.3.2 of the DOP&T OM of 1999 which stipulates consideration of those who are in the panel within the zone of vacancies. clarifications have been sought from the parties by listing the case for 'Being Spoken'. Parties have been heard in pursuance thereof. Departmental record has been furnished by the respondents.

9. Learned counsel for the applicant Shri G.K. Aggarwal contends that once this court has taken a view that it is the zone of consideration which matters for promotion. a different stand should not be taken by the coordinate Bench and the proper course would be to refer the matter to a Larger Bench.

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10. It is contended by Shri G.K. Adgarwal, mere stay of the Tribunal's decision by the High Court would not amount to modification or cancellation of the order and the same is operative and be relied upon in this case.

11. As an alternate plea, it is contended, by referring to the seniority list, that Shri A.S. Arora, who had been promoted vide order dated 11.3.2002 was junior to the applicant in the seniority list and was promoted against 14th vacancy on account of retirement of one Shri R.L. Garg on 31.10.2001. the same is against the the instructions contained in DOP&T OM dated 9.4.1996 as in accordance with the said instructions while giving the extended panel, the DPC should consider for promotion those officers who were in regular panel and in the event they are not available only then to consider others. As the applicant being SC candidates has not been declared unfit, he is to be considered with relaxed standard as per DOP&T OM dated 3.10.2000 and accordingly the respondent no.3 is to be reverted back and the applicant's case is to be considered in a review DPC.

12. On the other hand UPSC's counsel Ms. B. Rana vehemently opposed the contentions and stated that DPC was held on 21.11.2001 to consider promotion against 13th vacancy pertaining to the year 2001-02. Applicant, who was at serial no. 14 of the eligibility list, was graded as 'Good' and as per para 6.3.2 of the DOP&T OM

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dated 10.04.1989 in case of promotion by selection-cum-seniority and selection by merit to the posts within group "A" service SC/ST officers who are senior enough in the zone of consideration for promotion has to be within the number of vacancies for which a select list has to be drawn up notwithstanding the prescription of bench mark be included in that list provided they are not considered unfit for promotion.

13. By referring to the DOP&T OM dated 22.7.1997 providing for lower qualifying marks, it is stated that for Group "A" service there is no reservation but on the other hand by constitutional amendment and DOP&T OM dated 3.10.2000, relaxation/concession for SC/ST as withdrawn vide OM dated 22.7.1997 was restored and accordingly claim of the applicant, who could not come within the zone of vacancies, is rightly rejected. By referring to the decision of the Apex Court in Anil Katiyar vs. Union of India & Ors. 1997 (1) SLR 153, it is stated that it is not open in a judicial review for the Tribunal to go into the merits of the selection and to sit in judgement over the selection made by the DPC unless mala fides or arbitrariness is complained of.

14. Other respondents represented through Shri K.R. Sachdeva vehemently opposed the contentions and stated that applicant was considered by the DPC for promotion to the grade of SE(E) in the vacancies for the year 2001-02 and 2002-03 held in UPSC but on the basis

of service record he could not be recommended for promotion. Briefing the factual position, it is contended that in June 2001, respondents submitted a proposal to UPSC for holding a DPC for promotion to the grade of SE(E) in the vacancies for the year 200-2001 and 2001-2002. Pending amendment in the RRs, UPSC as a one time measure, decided in July, 2001 to fill up the existing vacancies by treating them as pertaining to the year 2001-2002 by promotion on selection by merit. As per the rules, SC/ST officers who are senior enough in the zone of consideration for promotion to be within the number of vacancies for which the select list has to be drawn up were to be recommended. Applicant belonging to SC category, was at serial no. 14 in the seniority list of 30 i.e. seniormost eligible officers. Though he was graded as 'Good' but was not recommended for promotion. However, it is stated that in the extended panel one Sh. R.L. Garg who had retired on 31.10.2001, at serial no. 7. Shri A.S. Arora was considered and promoted vide office order dated 11.3.2002.

15. We have carefully considered the rival contentions of the parties and perused the material on record.

16. In so far as contention of the applicant that his case is squarely covered by a decision of this Tribunal in OA No. 538/2002 is concerned, the aforesaid decision had not taken note of para 6.3.2 of the guidelines which had supplanted the recruitment rules



and the vires of which has already been upheld even by the Apex Court in several pronouncements being supplementing the rules and in consonance has force of law.

17. The aforesaid guidelines in so far as it restricts consideration within the zone of consideration for the vacancies is concerned, the observations made by the Tribunal in the decision that it is to be within the zone of consideration i.e. if a person falls in the panel beyond vacancies, his case is to be considered if he acquires the bench mark and is not declared unfit by DPC.

18. The aforesaid decision is to be treated as per incuriam of as per the settled position of statutory guidelines and in view of the decision of the Apex Court in Fuerst Day Lawson Ltd. vs. Jindal Exports Limited. (2001) 6 SCC 356 by following observations:

"A prior decision of the Supreme Court on identical facts and law binds the Court on the same points of law in a latter case. In exceptional instances, where by obvious inadvertence or oversight a judgement fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgement "per incuriam". It has to be shown that some part of the decision was based on a reasoning which was demonstrably wrong, for applying for principle of per incuriam (Para 23 and 19)"

19. Moreover, we find that the decision of the

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Tribunal has been stayed by the High Court in CWP 1734/2003 by an order dated 19.05.2003 as such the same is not a precedent and restricts to the facts of the said case. Accordingly the reliance of the applicant is misconceived and is liable to be rejected.

20. However, we find that earlier for 13 vacancies, against which a panel had been formed on account of retirement of Shri R.L. Garg, 14th vacancy was also considered in the ~ extended panel. As per the guidelines of DOP&T for extended panel in case of promotion, issued vide OM dated 9.4.1996, the extended panel is permissible when officers included in the panel are retiring within the same year and in that event while giving the extended panel, the DPC should consider that against the additional names promotion would be made only in the event of officers in regular panel not being available for promotion.

21. No such reasoning has been recorded by DPC which we have read and re-read in the DPC minutes and the record furnished to us by the respondents.

22. Admittedly in the extended panel when 14th vacancy was considered by the DPC applicant, who was earlier in the panel and slated at serial no. 14, was available being a SC candidate though no reservation is applicable in Group-A' service yet by virtue of DOP&T OM dated 3.10.2000 relaxed standards are to be adopted. In that event applicant who has not been declared unfit, if

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comes within the zone of consideration as to within the number of vacancies. has a preferential right to be considered over his juniors. Shri A.S. Arora, who is admittedly junior to the applicant in the seniority list, has been promoted without any reasoning either in the file or in the reply filed by the respondents. To our considered view such a procedure adopted is clearly against law and the instructions and is a hostile discrimination which cannot be countenanced in view of Articles 14 & 16 of the Constitution of India.

23. However, we find that despite being served, private respondent i.e. respondent no. 3 has not filed any reply as such the averments of the applicant are deemed to be admitted.

24. In the result, for the foregoing reasons, we set aside respondents' order dated 19.10.2000 as well as promotion order of respondent no. 3 dated 11.3.2002. Respondents are directed to convene a review DPC and consider the claim of the applicant for promotion as SE(E) against vacancies for the year 2001-02 and in the event the applicant is found fit as per instructions, he be accorded promotion with all consequential benefits. These directions shall be complied with within a period of three months from the date of receipt of a copy of this order. No costs. OA is accordingly allowed. ^k

S. Raju

(Shanker Raju)
Member (J)

V.K. Majotra

(V.K. Majotra)
Member (A)

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