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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

-- OA No.1055/2001

New Delhi, this the 14th day of January 2002

HON'BLE MR. JUSTICE ASHOK AGARWAL, CHAIRMAN
HON'BLE MR. GOVINDAN S. TAMPI, MEMBER (A)

Shri M. Venkataraman,
S/o Shri R.V. Mahadevan,
Aged about 62 years,
General Manager (Retd.)
Indian Ordnance Factory Services,
A-1, Uttarayan Enclave, University Road,
Pachpedi, Jabalpur-482 001.

... Applicant

(By Advocate: Shri M.K. Gupta)

V E R S U S

1. Union of India,
Through the Secretary,
Department of Defence Production & Supplies
Ministry of Defence,
Government of India,
South Block,
New Delhi-110001.
 2. The Chairman & DGOF
Ordnance Factory Board,
10-A, Shaheed Khudiram Bose Road,
Calcutta.
 3. Chairman
Union Public Service Commission,
Dholpur House, Shahjahan Road,
New Delhi-110011.
 4. Shri G. Gopakumar
'Sharanya' Temple Road,
Sasthamanglam,
Trivandrum, Kerala.
 5. Shri D. Rajagopal
Chairman & DGOF
Ordnance Factor Board,
Govt. of India, Ministry of Defence,
10-A, S.K. Bose Road,
Calcutta-700 001.
 6. Shri V. Palanipandi
Plot No.2, 2nd Floor, 47, 1st Avenue, Sheshi Nopar,
Adayar, Chennai-600020.
 7. Shri Samiran Mitra
Plot No.90, Block-A,
Road No.1, H.B. Town, P.O.Sodepur,
24, Parganas (North) Pin-742178.
 8. Shri N.R. Banerjee
3A, N.L. Goswaami Street,
P.O. Shrirampore, Dist: Hooghly, (W.B.),
Pin - 712201.
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9. Shri V.R. Shivkumar
No. 4, Narmada Road,
Jabalpur -482002.
10. Shri S.R. Sridharan
7/1 Shyam's Nest,
2nd Main Road, Annamalaipuram,
Chennai-600028.
11. Shri P.U. Bhavikatti
'Ashirwad' Building,
50/6, Palace Road,
Bangalore-560052.
12. Shri R.S. Mishra
8, Kartik Enclave,
Sikh Road, Secunderabad,
Pin. - 500009.
13. Shri K. Sampath
Add. DGOF/AV/Member/OFB
Armoured Vehicles HQrs.,
Govt. of India, Ministry of Defence,
Avadi, Chennai-600054.
14. Shri N.K. Banddopadhyay
Indrani Co-op Housing Society,
446, Keyatala Road,
Calcutta-700 029.
15. Shri R.N. Mehtani,
Member/WV&E,
Ordnance Factory Board,
Govt. of India, Ministry of Defence,
10-A, S.K. Bose Road,
Calcutta-700001.
16. Shri A.K. D Dave
Member/A&E & Plg.,
Ordnance Factory Board,
Govt. of India, Ministry of Defence,
10-A, S.K. Bose Road,
Calcutta-700001.
17. Shri M.L. Dutta
51, Ballygung Gardens,
(Ground Floor), Golpark,
Calcutta -700029.
18. Shri V.N. S. Mathur
Flat No.E-7, (1st Floor),
Ganga Park, Mundhwa,
Pune-411 036 (Maharaashtra).
19. Shri S. Ramaswamy
3RR Flats 9 Venkataraman Street,
T-Nagar, Chennai-600017.

... Respondents

(By Advocate: Shri V.S.R. Krishna)

ORDER (ORAL)

By Hon'ble Shri Govindan S. Tampi, Member (A) :

Heard S/Shri M.K. Gupta and V.S.R.Krishna, learned counsel for the applicant and the respondents respectively.

2. The applicant, Shri M. Venkataraman, retired from Indian Ordnance Factory Service, a recognised Group 'A' Engineering Service, as General Manager of Small Arms Factory (SAF), Kanpur on 31.10.1995. He had been working in that capacity in the Senior Administrative Grade (SAG) from 31.3.1986 and had put in more than 9-1/2 years of service in SAG on that date of his retirement. According to the applicant, after taking over the charge of SAF, Kanpur, he had improved the performance of the Factory in all production, maintenance and management, and had achieved all production targets without fail upwards year after year. He had also received accolades and appreciations from the Organisation for his excellent performance. The applicant had reached the maximum of the scale and had got two stagnation removal increments at the time of his superannuation. He waited in vain for his promotion to the next grade. of Sr. General Manager and retired on superannuation on 31.10.1995. However, in June, 1997, he came to know that Shri G Gopakumar, who was 14 steps junior to the applicant in the 1995 seniority list of IOFS Officers in the grade of SAG, had been promoted to the grade of Sr.GM in the scale of pay of Rs. 7300-7600/ with retrospective effect from 1.4.1995, in terms of Ordnance Factory Board's order No.381/9716/A/G dated

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14.3.1997, based on the recommendations of the DPC held on 28th and 29th June, 1997 in pursuance of the judgement of this Tribunal (Jabalpur Bench) (OA-219/95 & OA-237/96) and upheld vide judgement of the Hon'ble Supreme Court on 16.12.1996. The applicant was startled to know this as he was very much in service on 1.4.1995 and was at a loss to know as to why his name was omitted in spite of his outstanding performance in the feeder cadre and also as Shri Gopakumar, junior to him both in the service and in the cadre of GM. Shri Gopakumar had been further promoted as Addl. DGOF also on the same day but retrospectively from 1.4.1996. The applicant made a number of detailed representations pointing out the injustice done to him and seeking redressal on 30.8.1997, 18.12.1997 and 19.11.1998. Finally, he was informed on 18.1.1999 that his name was not considered for promotion as he had already retired when the DPC met on 28th and 29th June, 1997 even though vacancies pertained to earlier period. In this connection, the applicant refers to OM No.22011/4/98-Estt(D) dated 12.10.1998 of the DOP&T which clearly and without any ambiguity stated that there has been no specific bar in considering retired people for promotion, if vacancies pertained to the period they were in service as per their earlier OM dated 14.10.1989 or any other related instructions of the DOP&T. The letter had also mentioned that according to legal opinion also, it would not be in order if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered while preparing year-wise zone of

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consideration/panel and consequently their juniors, who would not have been in the zone of consideration if the DPC had been held in time, are considered in their places. Further, representation dated 24.2.1999 by the applicant elicited a response that the position indicated on 18.1.1999 had not changed. The applicant states that the defence taken by the respondents that the applicant's case was not considered for promotion, as he had already retired from service when the DPC met, was baseless as two others, i.e., S/Shri Palanipandi and S.R. Sridharan, who had retired on 30.7.1995 and 31.12.1996 before the DPC, were considered and promoted with retrospective effect. Similarly, Shri M.L. Dutta, who had retired on 30.11.1995 was considered for promotion by the DPC which met on 28/29.1.1997 and was promoted as Member of Ordnance Factory Board retrospectively. It was thus clear that the applicant alone has been discriminated, vis-a-vis others. There was no justification whatsoever for the above, keeping in mind his eligibility and suitability as well as the fact that the relevant vacancies had arisen when he was still in service.

3. Shri M.K.Gupta, learned counsel appearing for the applicant forcefully reiterated the above and urged that as a patent error has been committed by the respondents, the same should be undone and justice rendered to the applicant by granting him also retrospective proforma promotion, if found fit by DPC along with resultant monetary benefits in pension. This was also in consonance with the directions of the Hon'ble Supreme

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Court in the case of Badrinath Versus Government of Tamil Nadu & Others, (2000) 8 SCC 395, who have held that under Article 16 of the Constitution right to be "considered" for promotion is a fundamental right. And that exactly is what has been denied to the applicant, which deserves to be rectified, argues Shri Gupta.

4. On the other hand Shri V.S.R. Krishna appearing for the respondents strongly argues that the respondents have acted correctly and in accordance with the instructions in force on the relevant dates. Shri Krishna does not contest the facts in the OA but only differs from the inference, which the applicant has drawn from them. It was true that the applicant was not considered by the DPC which met on 28/29.1.1997 for promotion to the post of Sr.GM, as he had already retired from service, though there were vacancies relating to the period, when he was still in service. Instructions in force during the period when the DPC was held, did not permit such a consideration by the DPC. There was no discrimination at all against the applicant, as alleged, but the extant instructions did not cover his case. Shri Krishna also disputed the averment of the applicant that Shri Gopakumar was not eligible for consideration for promotion as Sr.GM, as the ^{he} also, had completed the requisite period of three years' regular service in SAG having been promoted to that grade in 1987 itself. His promotion, therefore, cannot be challenged. Shri Krishna further states that the consideration and retrospective promotion of S/Shri Palanipandi and S.R. Sridharan were also justified as

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the same was only on the recommendation of the review DPC ordered following the Tribunal's decision and the first DPC had met while the concerned individuals were still in service. Further, according to him, the applicant cannot seek nor could have *been* granted the benefit, if any, arising from DOPT's OM dated 12.10.1998 as it was only prospective in nature while the impugned DPC had taken place much earlier in January, 1997. Besides, the DPC was held with UPSC, the highest constitutional and expert body associating with it, ^{and therefore} the applicant's charge of hostile discrimination would appear to be having no basis. OA, in the above circumstances, deserves to be dismissed, urges Shri Krishna.

5. Replying for the applicant, Shri Gupta explains that OM dated 12.10.1998, was only a clarification on the earlier OM dated 10.4.1989 and should, therefore, be read along with the earlier OM. There was, in the circumstances, no reason at all for denying the applicant the benefit of the clarification and consideration for promotion in turn, if eligible, as such consideration was a fundamental right as his juniors had been given promotions from the period, when he was still in service, ignoring the rightful claim.

6. We have carefully deliberated on the rival contentions and have perused the evidence brought on record. What the applicant, a retired individual, in this OA, seeks is consideration for retrospective proforma promotion to the next higher post from the date

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when his junior was given retrospective promotion against a vacancy which was in existence when he was himself in service. Facts in this case are undisputed. The applicant, an officer of IOFS, had completed the requisite period of service in SAG and had become eligible for consideration for promotion as Sr.GM but could not be so considered till his retirement on superannuation on 31.10.1995, though the vacancies were present, as DPC meetings were not held as required. It is also on record that the applicant had a good record of performance, duly appreciated by the Organisation, while he was working as G.M. and that he was not adversely commented upon. At the same time, it is found that the respondents have considered for promotion and in fact promoted, another officer admittedly the junior to the applicant by several places, on the basis of DPC meeting held on 28/29.1.1997, but with retrospective effect from 1.4.1995, against a vacancy which existed when the applicant was still in service. The only reason adduced by the respondents in this case is that the applicant's case could not be considered for promotion, as he had retired on superannuation before the ^{date when the} relevant DPC was held and that the instructions did not cover his case. (Retrospective promotion of two or others, who had also retired, is sought to be explained by the respondents that the promotions were ordered on the basis of a review DPC meeting and the individuals concerned were in service when the DPC had met originally). In this context, the position as brought out in DOPT's OM No.22011/4/98-Estt. (D) dated

12.10.1998 is relevant, as the applicant seeks the protection of the same.

"OFFICE MEMORANDUM

Subject:- Procedure to be followed by the Departmental Promotion Committees (DPCs) in regard to retired employees.

The undersigned is directed to invite reference to the Department of Personnel and Training (DOP&T) Office Memorandum No.22011/5/86-Estt. (D) dated April 10, 1989 containing the consolidated instructions on DPCs. The provisions made in paragraph 6.4.1 of the aforesaid Office Memorandum lay down the following procedure for preparation of year-wise panel(s) where for reasons beyond control, DPC (s) could not be held for the year(s) even though vacancies arose during the year(s):-

- (i) Determine the actual number of regular vacancies that arose in each of the previous year(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.
- (ii) Consider in respect of each of the years those officers only who would be within the filed of choice with reference to the vacancies of each year starting with the earliest year onwards.
- (iii) Prepare a 'Select List' by placing the select list of the earlier year above the one for the next year and so on.

2. Doubts have been expressed in this regard as to the consideration of employees who have since retired but would also have been considered for promotion if the DPC(s) for the relevant year(s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs). It may be pointed out in this regard that there is no specific bar in the aforesaid Office Memorandum dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing year-wise panel(s), who were within the zone of consideration in the relevant year(s). According to legal opinion also it would not be in order if eligible employees, who were within the zone of consideration for the relevant year(s) but are

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not actually in service when the DPC is being held, are not considered while preparing year-wise zone of consideration/panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration if the DPC (s) had been held in time. This is considered imperative to identify the correct zone of consideration for relevant year (s). Names of the retired officials may also be included in the panel(s). Such retired officials would, however, have no right for actual promotion. The DPC (s), may, if need be, prepare extended panel(s) following the principles prescribed in the Department of Personnel and Training Office Memorandum No.22011/8/87-Estt.(D) dated April 9, 1996.

4. Ministries/Departments are requested to bring these instructions to the notice of all concerned including their attached and subordinate offices."

7. The circumstances of the case would show that the applicant's case is covered by the above instructions. The respondents have, however, indicated that the above instructions of 12.10.1998 are only prospective and could not come to the rescue of the applicant as the relevant DPC had taken place prior to the ^{issue} of the OM. This has been controverted by the learned counsel for the ^{applicant} ~~respondents~~, who pointed out that as the OM dated 12.10.1998 itself makes it clear that the same has been issued to clarify the doubts which have been expressed regarding the earlier OM No.22001/5/86-Estt. (D) dated 10.4.1989, both the OMs would have to be read together. We find considerable force in the above plea of the ^{applicant} ~~respondents~~ as the same has the support of the decision of the Hon'ble Supreme Court in the case of S.S. Grewal Versus State of Punjab & Ors. (AIR 1994 SC 1232). The Hon'ble Supreme Court had held that the clarifications would not have an operation independent of the earlier instructions and both would have to be

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read together. The Hon'ble Apex Court has observed as under:-

"8. From a perusal of the letter dated April 8, 1980, we find that it gives clarifications on certain doubts that had been created by some Departments in the matter of implementation of the instructions contained in the earlier letter dated May 5, 1975. Since the said letter dated April 8, 1980 is only clarificatory in nature, there is no question of its having an operation independent of the instructions contained in the letter dated May 5, 1975 and the clarifications contained in the letter dated April 8, 1980 have to be read as a part of the instructions contained in the earlier letter dated May 5, 1975. In this context, it may be stated that according to the principles of statutory construction a statute which is explanatory or clarificatory of the earlier enactment is usually held to be retrospective. It must, therefore, be held that all appointments against vacancies reserved for Scheduled Caste made after May 5, 1975 (after May 14, 1977 in so far as the Service is concerned), have to be made in accordance with the instructions as contained in the letter dated May 5, 1975 as clarified by letter dated April 8, 1980..."

8.. In this view of the matter, it is clear that the applicant's case should have been considered for promotion by the DPC which met on 28/29.1.1997 and promoted on the basis of its recommendations. Another officer, who was admittedly junior to the applicant but w.e.f. 1.4.1995 when the applicant was very much in service and was eligible for being considered for promotion much ahead of the junior officer so considered and promoted. We are not recording any finding that the consideration for promotion and the actual promotion of the junior officer, who was also, according to the respondents, eligible for promotion as *irregular*. But we are only stating that the applicant's case should have been considered ahead of his junior as he was very much in service when the said vacancies arose and the

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junior officer had been given promotion with retrospective effect against one of those vacancies. This in fact was his right as pointed out by the learned counsel for the applicant by relying upon the decision of the Hon'ble Apex Court in the case of Badrinath Versus Govt. of Tamil Nadu & Ors. (supra). The relevant portion of the Hon'ble Apex Court's judgement in the said case reads as under:-

"Points 2 and 3

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Every officer has a right to be considered for promotion under Article 16 to a higher post subject to eligibility, provided he is within the zone of consideration. But the manner in which his case is to be considered is a matter of considerable importance in service jurisprudence as it deals with "fairness" in the matter of consideration for promotion under Article 16. In this connection, from the case-law, following principles can be deduced:

(1) Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.

(2) Courts will not interfere with assessment made by DPCs unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury principles or was mala fides."

9. We are convinced with the above observation of the Hon'ble Apex Court squarely covers the case of the applicant and endorses his claim for being considered for promotion from the date on which his junior was given retrospective promotion. It is also significant to note that what the applicant has sought a relief is the retrospective proforma promotion as he has already

retired from service and not for actual promotion. There is no way the same can be denied in law. Further granting him retrospective promotion would not at all come in the way or would not hurt to the interest of the junior persons promoted. What the applicant would get out of this OA would be the notional promotion as well as fixation of pay and allowances accordingly and monetary benefits for the purpose of pension. This does not at all call for any reversion or any adverse affect on the junior person, who has been promoted and who also incidentally retired on superannuation on a subsequent date.

10. In the above view of the matter, the application succeeds and is accordingly allowed. The respondents are directed to hold a review DPC to consider the case of the applicant for promotion from the date on which Shri Gopakumar, his junior, was considered for promotion and was promoted with retrospective effect and if he is found fit by the DPC to grant him the benefit of notional promotion with fixation of pay and allowances notionally and to grant him actual monetary benefits for the purposes of pension in accordance with rules and instructions. These directions shall be complied with by the respondents expeditiously and in any event within a period of three months from the date of receipt of a copy of this order. Needless to say these orders would not adversely affect the junior officer, who has been promoted earlier.

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11. The OA is allowed in the aforestated terms without any order as to costs.

(GOVINDAN S. TAMPI)
MEMBER(A)

Sunil/

(ASHOK AGARWAL)
CHAIRMAN