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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

OA No. 128/99

New Delhi, this the 12th day of May, 1999

Hon'ble Shri T.N. Bhat, Member (J)
Hon'ble Shri S.P. Biswas, Member (A)

Shri K.B.Rajoria son of late Sh.B.B.Mathur,
Resident of C-II/132, Moti Bagh-I,
New Delhi- 110 021.Applicant

(By Advocate: Shri M.Ganesh, Senior counsel
(Dr. M.P. Raju with him)

Versus

Union of India through

1. Secretary,
Ministry of Urban Affairs & Employment,
Nirman Bhawan,
New Delhi.
2. The Secretary,
Ministry of Personnel, Public Grievances
& Pensions, Deptt. of Personnel & Training,
North Block,
New Delhi.
3. Union Public Service Commission through
Secretary,
Dholpur House,
Shahjahan Road,
New Delhi.
4. Shri N.Krishnamoorthy,
Director General (Works),
C.P.W.D., Nirman Bhawan,
New Delhi.Respondents

(By Advocate: Shri Madhav Panikar for R-1 to R-3
Shri G.K. Aggarwal, for R-4)

JUDGEMENT

Hon'ble Shri T.N.Bhat, Member (J):

In this OA the applicant challenges the act of the respondents in not considering the applicant for the post of Additional Director General in C.P.W.D. when the post fell vacant on 1.5.1995 and the consequent act of not holding the departmental promotion committee meeting during the year 1995-96 taking the vacancy as belonging to

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1.5.1995. According to the applicant if the DPC had been held in the year 1995-96 for filling up the vacancy of Additional Director General (Works) as on 1.5.1995 and the applicant had been selected then he would have been eligible for promotion to the post of Director General on 1.0.1997, as the requisite qualification for the post of Director General is two years regular service as Additional Director General. The applicant is aggrieved by the fact that he is not being considered for promotion to the post of Director General and is thus being discriminated against, while R-4 who was promoted along with the applicant on 15.6.1998 as Additional Director General is being considered for promotion to the higher post of Director General.

2. It appears that while granting promotion to R-4 by the order dated 15.6.1998 the respondents gave the said respondent the benefit of some provisions contained in the DOP&T's Office Memorandum dated 10.4.1989 as amended from time to time. Para 3 of the order of promotion dated 15.6.1998 reads as under:-

"3. Since Shri N.Krishnamoorti has been empanelled by the Review DPC for the vacancies of the year 1994-95 against which Shri S.R. Goyal, an officer junior to him was promoted w.e.f. 22.2.1995, it is hereby ordered that the pay of Shri N.Krishnamoorti in the grade of ADG (Works) shall be fixed notionally w.e.f. 22.2.1995 in terms of



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instructions contained in the DFT's O.M. No. 22011/5/86-Estt.D, dated 10th April, 1989 as amended from time to time"

3. In the aforesaid O.M. issued by the DOP&T there are two provisions which are assailed by the applicant as being ultra-vires and unconstitutional. The first provision is contained in para 6.4.4 which provides that while promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier year(s). The other provision by which the applicant appears to be aggrieved is the one contained in para 18.4.3, which read as under:-

"18.4.3. If the officers placed junior to the officer concerned have been promoted, he should be promoted immediately and if there is no vacancy the juniormost person officiating in the higher grade should be reverted to accommodate him. On promotion, his pay should be fixed under F.R. _____ at the stage it would have reached, had he been promoted from the date the officer immediately below him was promoted but no arrears would be admissible. The seniority of the officer would be determined in the order in which his name, on review, has been placed in the select list by DPC. If in any such case a minimum period of qualifying service is prescribed for promotion to higher grade, the period from which an officer



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placed below the officer concerned in the select list was promoted to the higher grade, should be reckoned towards the qualifying period of service for the purpose of determining his eligibility for promotion to the next higher grade." (emphasis supplied).

4. Stated in brief, the case of the applicant is, firstly, that the vacancies of the post of Additional Director General having arisen in 1995 it was incumbent on the respondents to have held the DPC in that very year or latest by the next year and that had this been done the applicant would have been selected and promoted and as a consequence he would have ~~been~~ ^{been} become eligible for consideration for promotion to the post of Director General in the year 1997. Secondly, it is averred that under the recruitment rules it is only regular service for two years that makes an Additional Director General eligible for consideration for further promotion to the post of Director General. In the instant case, as already mentioned, respondent no. 4 seems to have been given notional promotion from 22.2.1995 when his junior, namely, Sh. S.R. Goel had been promoted. The contention of the applicant appears to be that if respondent no. 4 could be given the benefit of notional promotion from the back date the applicant also should have been given some benefit by relating back his promotion to the year 1995 when the vacancies actually arose.

5. Interestingly, when the learned senior counsel for the applicant was making his submissions and we asked him whether the applicant was challenging the

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eligibility of R-4 the learned senior counsel replied in the negative and stated that the applicant was seeking the consideration of his own case along with that of R-4 for the higher post of Director General. The learned counsel has a good reason for stating so. If the applicant assails the eligibility of R-4 without claiming any relief for himself this litigation would become a public interest litigation and the Tribunal is not empowered to hear such matters. That apart, mere non-eligibility of R-4 would not entitle the applicant to any relief.

6. The respondents no. 1 to 3 and respondent no. 4 have filed separate counter replies in which they have sought to justify the action in considering R-4 alone for the post of Director General to the exclusion of the applicant. It is contended by the respondents in their counter replies that there was a good reason for not holding the DPC in the year 1995-96 and 1996-97. The reason given is that there was a long drawn out litigation between two groups of Engineers, namely, the Direct Recruits and the Promotees regarding their inter se seniority. The judgements of the Apex Court came in P.S. Mahal vs. Union of India, reported in (1984) 4 SCC 545, and R.L. Bansal vs. Union of India, reported in 1992 (Suppl)(2) SCC 318 in which directions were given to the respondents to prepare revised seniority lists. On revision R-4 was ranked senior to Shri S.R.Goel who had been promoted as Additional Director General w.e.f. 22.2.1995. After re-casting of the seniority list R-4 was found entitled to the benefit of reckoning of his seniority from 22.2.1995 and it was for this reason that notional promotion was granted to him. As regards the

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applicant there was no such revision of seniority and therefore, the applicant could not get the benefit of notional fixation of pay etc.

7. According to the respondents, the requirement of re-fixing the seniority in pursuance to the directions given by the Apex Court amounted to an unavoidable reason for not holding the DPC at the appropriate time and postponing the same by a couple of years.

8. It is further averred by the respondents that according to the instructions issued by the DOP&T promotions can have only prospective effect, as provided in para 6.4.4, even if the vacancies relate to earlier years and, therefore, the applicant could not claim promotion from the date of occurrence of the vacancies.

9. We have heard the learned counsel for the parties at length. We have also perused the material placed on record by them.

10. Let us first deal with the question as to what are the requisite qualifications for promotion to the post of Director General according to the relevant recruitment rules. A copy of the relevant recruitment rules known as "Central Public Works Department (Director General of Works) Recruitment (Amendment) Rules, 1992" has been annexed as Annexure A-2 to the O.A. Under Column 12 of the Schedule to the said Rules the requisite qualifications are as follows:-

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"1. (a) Additional Director General (Works) with two years regular service in the grade.

(b) Additional Director General (Architecture) with two years regular service in the grade.

Provided that a person holding the post by direct recruitment on contract shall not be eligible; failing (i)

There is a Note appended to the above provision which reads as under:-

"(1) The eligibility list for promotion shall be prepared with reference to the date of completion by the officers of the prescribed qualifying service in the respective grades/posts.

"(ii) If a junior with the requisite years of service is considered the senior will also be considered notwithstanding the fact that he does not possess the requisite years of service."

11. Learned counsel for the respondents, relying upon the aforesaid Note below column 12 of the Schedule to the recruitment rules, have urged before us that in view of this clear provision in the recruitment rules respondent no. 4 was correctly held to be eligible for the post. The learned counsel further relies upon para 18.4.3 of the DOP&T's OM dated 10.4.1989 wherein, as

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already stated hereinabove, it has been provided that in a case where a junior has been promoted earlier than an officer placed above him in the select list, the qualifying service prescribed under the rules should be reckoned from the date the junior was promoted. The learned counsel argues that in the case of respondent no. 4 this has been done and it is only on that basis that the said respondent was considered as having the requisite qualifying service.

12. In reply, the learned counsel for the applicant, on the strength of the judgement of the Apex Court in Union of India & Anr. vs. M. Bhaskar & Ors (JT 1996 (5) 500) argues that the recruitment rules cannot be changed in this manner and that administrative instructions cannot have the effect of changing those rules. In that case a Memorandum had been issued which brought about some changes in the rules of recruitment of Traffic/Commercial Apprentices in the Railways as regards their scale of pay. The Apex Court held that the provisions contained in the recruitment rules could not be changed in this manner. Having carefully gone through the judgement of the Apex Court we are convinced that the principles enunciated therein would not be applicable to the facts of the instant case. In this case the OM dated 10.4.1989 only supplements the provisions contained in the relevant recruitment rules. In the recruitment rules ~~the~~ the term 'regular service' is used but it is not stated as to whether period of notional fixation of seniority would also come within the ambit of 'regular service'. This lacuna/gap in the recruitment rules is sought to be filled by para 18.4.3 the OM dated 10.4.1989. Thus quite clearly

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this is not a case of the instructions supplanting the recruitment rules but is a case of the instructions only supplementing the recruitment rules.

13. That apart, as already observed, the Note below column 12 of the Schedule to the recruitment rules provides an answer to the question as to whether re-fixation of seniority on notional basis can be considered for the purpose of reckoning the period of regular service. In our considered view the provision contained in para 18.4.3 of the aforesaid OM cannot be faulted on any score.

14. Learned counsel for the applicant further relies upon the judgement of the Apex Court in R.Prabhakar Devi & Ors. vs. Govt. of India & Ors. In that judgement on the facts of that case it was held that seniority and eligibility are two distinct things and that seniority cannot be substituted for eligibility and, further, that a rule which prescribes a uniform period of qualifying service cannot be said to be arbitrary or unjust. We have carefully gone through the judgement and we find that in the case before the Apex Court the recruitment rules in question were the Central Secretariat Service Rules, 1962. In rule 2 sub rule (c) of those Rules the term "approved service" in relation to a grade has been clearly defined. Those rules are not parimateria with the rules governing the recruitment to the post of Director General. In the rules applicable in the instant case, as already mentioned, there is no provision that only actual service rendered would qualify for consideration of an officer for promotion.

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15. Learned senior counsel for the applicant further argues that para 6.4.4 is unreasonable and illegal as it makes promotions effective only prospectively even though the vacancies might have arisen in the earlier years. In this regard he relies upon para 3.1 of the same OM which provides that the DPCs should be convened ~~at~~ ^{on} ~~an~~ ^{the} regular annual intervals and that this requirement of convening annual meetings of the DPC should be dispensed with only for reasons beyond control. According to the learned senior counsel this being the legal requirement under the O.M. there is no reason why promotions made in pursuance to the recommendations of the DPC held after great delay should have only prospective effect. Learned counsel for the respondents have urged, in reply, that re-casting of the seniority in pursuance to the judgements of the Apex Court did amount to unavoidable reasons or reasons beyond control for not holding the DPC at the appropriate time. On consideration of the rival contentions made by the learned counsel for the parites we are inclined to accept the contention of the learned counsel for the respondents.

16. Even assuming for the sake of argument that the promotion eventually granted to the applicant would relate back to the time when the DPC should have met in the normal course, the applicant could not even then be held to have "regular service" of two years, as his promotion would be effective from a back date only on notional basis. There is no corresponding provision covering such a contingency in the O.M. dated 10.4.1989,

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like the one relating to persons who are granted promotion notionally from the date when their juniors had been promoted.

17. Thus, viewed from any angle, the case set up by the applicant in this O.A. is devoid of merit. In the result we dismiss this O.A., but without any order as to costs.



(S.P. Biswas)
Member (A)



(T.N. Bhat)
Member (J)

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