

Central Administrative Tribunal
Principal Bench

OA-2926/2004

New Delhi this the 17th day of December, 2004.

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

Sh. J.S. Singhal,
Income Tax Officer, Rohtak,
S/o Sh. Maidhan Singhal,
R/o H.No. 100, Sector-6,
R.K. Puram, New Delhi.

..... Applicant

(through Sh. K.C. Mittal, Sr. Counsel with Sh. Harvir Singh)

Versus

1. Union of India through
the Secretary,
Department of Revenue,
Ministry of Finance,
North Block,
New Delhi.

2. The Chairman,
Central Board of Direct Taxes,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

..... Respondents

(through Sh. V.P. Uppal, Advocate)

Order (Oral)

Hon'ble Shri Shanker Raju, Member(J)

Applicant, who is retiring on superannuation on 31.12.2004, has sought the following reliefs:-

- “(a) Direct the Respondents to hold DPC for promotion to the post of Assistant Commissioner of Income Tax as per the instructions issued forthwith for vacancy year 1st April 2003 – 31st March 2004 and also for the vacancy year 1st April 2004 – 31st March 2005 and grant promotion to the applicant with retrospective date against the vacancy year of 1st April 2003 – 31st March 2004 with all consequential benefits.
- “(b) Direct the Respondents to grant ad hoc promotion with retrospective effect and with all consequential benefits in the event the Respondents are not able to hold regular DPC and grant regular promotion before 31st December 2004.

(c) Pass such other orders or issue such direction/directions as may be deemed fit in the interest of justice.

(d) Award costs to the applicant."

2. Applicant was promoted as Income Tax Officer on 30.11.1994. As per statutory Indian Revenue Service Rule, 1988, 50% vacancies for the post of Asstt. Commissioner of Income Tax (ACIT), are to be filled up by way of departmental promotion. Applicant, being SC, has attained eligibility in November 1997. As no DPC was held for the years 2003-2004, 2004-2005 and in the wake of 139 & 125 vacancies for the respective years, applicant approached the Tribunal in OA-1810/2004 wherein by an order dated 21.9.2004, the following directions were issued:-

"15. For the reasons states above, we direct that the respondents shall hold the DPC for consideration of promotion of the Income Tax Officer to the post of Assistant Commissioner of Income Tax against 50% quota which is to be filled up by promotion within a period of 45 days from today. Counsel for respondents indeed submitted that the date of the meeting is to be decided by the UPSC which is not a party to the matter but we do expect that the respondents shall take up the matter with the UPSC and prevail upon it to hold the meeting as directed above. In the circumstances, we leave the parties to bear their own costs. OA stands disposed off in terms of the above order. Copy of the order be given dasti to the counsel for the respondents for its delivering to the appropriate authority of the respondents."

3. Despite directions and the expiry of the statutory period of 45 days on 6.12.2004, as UPSC has not held DPC and sent representation to the respondents, the present OA has been filed.

4. Learned counsel of the applicant Sh. K.C. Mittal contended that as per the DPC guidelines of 1989 along with OM dated 13.10.1998 issued by the DOP&T in cases where the approval of ACC is not required, the time limit adhered to is completion of ACR, sending complete proposal to the UPSC and before 8 months of the order of recruitment, the zone of consideration is to be completed and the proposal is to be sent. By not adhering to the time limit and for want of certificate of 'no vacancy' from the appointing authority, applicant shall be at a substantial loss where by not filling of the promotee quota, the right of the applicant for consideration for promotion shall not be available until his superannuation. This, according to him, would heart burn and non-adherence, without any justification, cannot be countenanced.

5. Learned counsel of the applicant has placed reliance on a decision of the Apex Court in U.O.I. & Ors. Vs. N.R. Banerjee & Ors. (1997 SCC (L&S) 1194) and also referred to the decision of a Constitution Bench of the Apex Court in Shankarsan Dash Vs. U.O.I. (1991(3) SCC 47) to contend that when there is arbitrariness in the action of the State, it is mandatory to fill up the vacancies, as one has a fundamental right to be considered.

6. On the other hand, respondents' counsel contended that as the UPSC is not impleaded as a party, in the wake of despite of maintenance of roster for the SC&ST category and carry forward of vacancies, the matter has now been settled. The proposal has already been sent to the UPSC and on receipt of their recommendations the promotion would be further processed. According to the learned counsel for respondents one has no indefeasible right, even after empanelment, to be accorded promotion and holding of the DPC is time consuming process as cadre of Income Tax Officers is a decentralized cadre and scattered in 18 different charges under the Chief Commissioner of Income Tax. It is impossible to send DPC proposal for the year 2004-2005 unless or until UPSC clears the panel for 2003-2004.

7. As regards ad hoc promotion, it is stated that it is not permissible as per standing instructions of DOP&T unless prior concurrence of UPSC/DOP&T is obtained. It must have been in accordance with rules to accord promotion to the applicant on ad hoc basis. Moreover, the following decisions have been cited to contend that it is the prerogative of the Government to fill up the vacancies:-

1. Bihar State Electricity Board Vs. Suresh Prasad & Ors. (2004(3)ATJ 205).
2. UOI Vs. Majji Jangammayya (AIR 1979 SC 757)
3. UOI&Ors. Vs. K.K. Vadera & Ors. (1989 Suppl.(2)SCC 625)
4. State of Orissa & Ors. Vs. Bhikari Charan Khuntia & Ors. Etc.

8. On careful consideration of the rival contentions, we are of the considered view that in Shankarsan Dash, Constitution Bench of the Apex Court had held that though inclusion of a name of a candidate in merit list does not confer right to be selected but this would not mean that State would by an arbitrary action does not fill the vacancies.

9. Though this ratio has been wrongly interpreted in Banerjee's case (supra), the following observations have been made by the Apex Court in N.R. Banerjee's case (Supra):-

"9. It would, thus, be seen that 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 the action plan in finalizing the ACRs, preparation of the select 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.

10. The DPC in the present case was directed to consider the cases of all the eligible candidates within the zone of consideration so that there will not be any heart-burning among the eligible persons whose claims have been withheld for consideration for promotion to the higher post. IN Syed Khalid Rizvi V. Union of India the mandatory duty of the preparation of the select list of the officers for promotion to the All India Services has been indicates in para 35 of the judgment at p.605 thus:

"We, therefore, hold that preparation of the select list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and this Court takes serious note of wanton infraction."

11. It would thus be seen that the claims of the candidates eligible have to be considered for promotion objectively and dispassionately, with a sense of achieving manifold purpose – (i) affording an opportunity to the incumbent to improve excellence, honesty, integrity, devotion to public duty; (2) inculcating discipline in service; (3) afford opportunity to every eligible officer within the zone of consideration for promotion to a higher post or office; and (4) ensuring that the Committee regularly meets and considers their claim objectively, impartially with a high sense of responsibility in accordance with the procedure and finalisation of the list in advance so as to fill up vacancies arising in the year from the approved panel without any undue delay. They are salutary principles and form the purpose and the policy behind the above rules and the Government should follow them.

12. Considered from that perspective, the question arises whether the view taken by the Tribunal is justified in law. It is true that filling up of the posts are for clear or anticipated vacancies arising in the year. It is settled law that mere inclusion of one's name in the list does not confer any right on him/her to appointment. It is not incumbent that all posts may be filled up. But the authority must act reasonably, fairly and in public interest and omission thereof should not be arbitrary. In Shankarsan Dash V. Union of India the Constitution Bench had held that inclusion of a name of a candidate in a merit list does not confer any right to be selected unless the relevant recruitment rules so indicate. The State is under no legal duty to fill up all or any of the vacancies even though the State acts in an arbitrary manner. In Babita Prasad Vs. State of Bihar it was held that mere inclusion of one's name in the panel does not confer on him/her any indefeasible right to appointment. It was further held that the purpose of making a panel was to finalise the list of eligible candidates for appointment. The preparation of the panel should be to the extent of the notified or anticipates vacancies. Unduly wrong panel should not be operated. In Union Territory of Chandigarh V. Dilgagh Singh it was held that the mere fact that a candidate's name finds a place in the select list as a selected candidate for appointment to a post, does not confer on him/her an indefeasible right to be appointed in such post in the absence of any specific rule entitling him to such appointment. In State of Bihar V. Secretariat Asstt.

Successful Examinees Union 1986 it was held that a person who is selected and empanelled does not on account of empanelment alone acquire any indefeasible right to appointment. Empanelment is, at the best, a condition of eligibility for the purposes of appointment and that by itself does not amount to selection or creation of a vested right to appointment unless relevant rules state to the contrary. However, in the light of the above principles and in the light of the clear rules extracted hereinbefore, it is seen that the exercise of preparation of the panel is undertaken well in advance to fill up the clear vacancies or anticipated vacancies. The preparation and finalisation of the 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 could not be prepared for any justifiable reason, yearwise panel of all the eligible candidates within the zone of consideration for filling up the vacancies each year should be prepared and appointment made in accordance therewith. In *Nagar Mahapalika V. Vinod Kumar Srivastava* this Court had pointed out with respect to the prescription of the limitation of one year of the waiting list thus:

"The reason underlying the limitation of the period of a list for one year is obviously to ensure that other qualified persons are not deprived of their chances of applying for the posts in the succeeding years and being selected for appointment."

13. It is true that the material furnished before us would indicate that action was taken on 22.12.1993 by the Ordnance Factory Board and circulated for action to the taken by the Government and thereafter the Union Public Service Commission was consulted. Action taken on this material should have been taken much earlier to the date on which it was taken since they knew that four members were due to retire in August, September, October 1994 and March 1995. These were anticipated vacancies likely to arise on permanent basis and promotion to them was to be made on regular basis. In other words, they were all clear vacancies. So they were to be finalized before April 1994 and the confidential reports should have been approved before 31-3-1993 and all eligible to be considered. The direction given by the Tribunal referred to above is clearly in accordance with the procedure indicated hereinbefore. Therefore, we do not find that the orders are vitiated by any error of law warranting interference."

10. If one has regard to the above, adherence to the time limit on report the vacancy and hold the DPC are observed to be the salutary principles and form the purpose and policy behind the rules and it is mandate upon the Govt. to follow them.

11. It is trite law that preparation of select list every year is mandatory and any violation would deprive an equal opportunity to the promotee officers to reach higher status in service and this should be, infraction of which, seriously viewed and promptly ~~redressed by the Court~~. The non-promotion in a case where the person is retiring due to delay in holding DPC causes heart burn to a Government servant who has a fundamental right to be considered for promotion and it deprives an opportunity to him before he superannuates on retirement to avail of his legitimate right.

12. In the above conspectus, though we are constraint for want of impleadment of UPSC as respondent in the present OA, we find that despite directions of this Court in OA-1810/2004 and expiry of limitation of holding the DPC to fill up the quota on 6.12.2004, the process is not yet complete, this prejudices the right of consideration of the applicant.

13. In the result, we dispose of this OA with a direction to the respondents to immediately *take* up this issue of holding DPC with the UPSC and to ensure that the recommendations are issued by UPSC and received by them latest by 26.12.2004 and thereafter the respondents, subject to the result of the DPC on suitability of the applicant in accordance with instructions, should consider him for promotion before his superannuation and in that event he shall be entitled to all consequential benefits. No costs.

S. Raju
(Shanker Raju)
Member(J)

V.K. Majotra
(V.K. Majotra)
Vice-Chairman(A)

/vv/