CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

RA No.213/2005 in
OA No.147/2004

New Delhi this the 2nd day of May, 2008

Hon'ble Shri Shanker Raju, Member (J)
Hon'ble Shri Shailendra Pandey, Member (A)

1. Union of India,
through
Secretary,
Department of Industrial Policy & Promotion,
Ministry of Commerce & Industry,
Udyog Bhawan, New Delhi.

2. Joint Secretary,
Department of Industrial & Promotion,
Ministry of Commerce & Industry,
Udyog Bhawan, New Delhi. -Petitioners

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

Versus

1. Jastinder Singh
S/o late A.S. Sodhi
R/o J-169, Saket,
New Delhi-17. -Respondent

(By Advocate: Shri S.S. Tiwari)

O R D E R

Hon'ble Shri Shailendra Pandey, Member (A)

R.A.No.213/2005:

The contention of delay is rejected in view of specific directions given by the Hon'ble High Court of Delhi passed in Writ Petition (C) No.7094/2007 on 26.09.2007, and the RA is allowed for the reasons discussed herein after.

2. In OA 147/2004, the applicant had sought promotion to the next higher grade of AIA (Chemical) and IA (Chemical) with consequential benefits. (The applicant had been suspended on 30.04.1976 as a criminal case had been registered against him and he had retired on 31.10.1986 while still under suspension but on his being acquitted, he

was fully exonerated and the entire period of suspension was treated as on duty with full pay and allowances). The Tribunal after perusal of the record produced by the respondents in the OA, observed as follows:-

> "6. ..... as per the directions of the Tribunal a Review DPC was held which was chaired by a member of UPSC. The minutes of the DPC are detailed one and self speaking and contained full justifications for the recommendations. The respondents have placed before the DPC whatever information was available because the ACRs as per norms/instructions have been weeded out after 5 years of retirement. There are no ACRs available thus review have to be carried out on available record, which was the DPC proceedings held on 19.6.81 for the vacancies of the year 1979, 80, 81 and 82 and the DPC held on 25.10.1983 for the vacancies for the year 1983. After opening of the sealed covers of the DPCs dated 19.6.81 and 25.10.83 it was revealed that the endorsement by the DPCs was "not yet fit for promotion". The respondents added that the averments of the applicant that those with benchmark `Good' have been promoted was denied as those with a `Good' grading were promoted only after they met the benchmark as `Very Good'. ..."
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> ....
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> 10. We find that Shri R.C.Bhattacharya who is junior to the applicant with a grading of `Good' (Annexure A-1) reproduced in para 9 above), has been placed at Sl. No.5 for the panel of 1981-1982 and in the consolidated panel at Sl. No.8. It is therefore clear that the averments of the respondents that juniors mentioned by the applicant were promoted only after they achieved the benchmark of "Very Good", is incorrect. The respondents did not disclose to the Review DPC that the grading of applicant was `Good' in the covering note. With a grading of `Good' the applicant is eligible for placement at S No.5 in the panel for the year 1981-82 and in the consolidated panel at Sr No.8 and for promotion to AIA (Chemical) on the date his junior Shri R C Bhattacharya was promoted i.e. w.e.f. 25.7.1983.
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> 11. For the vacancies of the year 1981-82, the name of the applicant was placed in sealed cover and on opening of the sealed cover it has

been revealed that the assessment of the Departmental Promotion Committee was "Not yet fit for promotion". There is no mention regarding his overall assessment or grading. The Tribunal in OA 2061/1990 (supra) has already directed that in case of acquittal of the applicant he would be entitled to all consequential benefits. The respondents have stated that he had `Good' grading. They have, however, weeded out his CR Dossier after his retirement, which they should not have done in view of the Tribunal's direction in OA 2061/1990. Therefore, the benefit of absence of ACR dossier must go to the applicant, and his case has to be considered similar to the case of his junior Shri R C Bhattacharya."

Accordingly, the Tribunal passed the following directions:

1) The applicant should be placed in the panel for the year 1981-82 below D C Patwardhan and above R C Bhattacharya by creating a supernuary [sic.: supernumerary] post so as not to disturb the promotion of R C Bhattacharya at this late date.

2) The applicant will be considered to have been promoted to the post of AIA (Chemical) w.e.f. 25.10.1983 i.e. the date when his junior Shri R C Bhattacharya was promoted.

3) The applicant will be eligible for further promotion in the grade of IA (Chemicals) from the date of promotion of any person junior to the applicant.

4) He will also be eligible for all consequential benefits including pay fixation, increments, back-wages and re-fixation of pension as per rules and law."

3. The aforesaid directions have been assailed by the respondents on the ground that there is an error apparent on the facts and in law whereby the Tribunal had recorded a finding that the junior to the respondent Shri R.C. Bhattacharya was recommended for promotion by the DPC without attaining the Benchmark of 'Very Good'. In this regard, it is stated that the record produced before the Tribunal has clearly demonstrated that Shri R.C. Bhattacharya, though placed in the panel of 1981-82, was recommended for promotion to the higher post by the DPC

held in the year 1983 when Shri R.C. Bhattacharya had attained the Benchmark of 'Very Good'.

4. Learned counsel states that a DPC held in the UPSC on 1st and 2nd July 1992 (held as a result of revision of the seniority list in the feeder grade which made it necessary to review the proceedings of all the DPCs held from 1978 to 1990) clearly took cognizance of the post as a selection post. The finding of this DPC with respect to the applicant also was that he was not found fit for promotion; learned counsel has attached along with the RA the record of the DPC.

5. It is the contention of the learned counsel of the applicants in the RA that a DPC has no power to recommend any person for promotion unless the person concerned has, on the basis of assessment of ACRs, attained the required minimum bench-mark for promotion to the next higher grade and that the DPC has no power to relax the minimum bench-mark required for promotion in any case, and that even the administrative Department/Ministry has no power to relax the bench-mark requirement for promotion and, therefore, to hold that a person who did not possess the required benchmark had been promoted in the year 1983 by the DPC is not in accordance with law. It is also emphasized by him that the review DPC was held as per the specific directions of the Tribunal even though the concerned records, i.e., ACR dossiers of the applicant in OA had already been weeded out after his retirement in 1986 (as per instructions on the subject which prescribed that ACR dossiers of retired Government servants have to be retained only for five years after their retirement). It is further sated that the review DPC was accordingly held under the chairmanship of a Member of the UPSC as per the provisions of the then extant recruitment rules on 16.09.2003 to assess the suitability of the respondent for promotion to

the grade of AIA (Chem). The review DPC, after considering all the relevant facts and records, found that the respondent was "unfit for promotion" to the grade of Development Officer (Selection Grade) subsequently re-designated as Additional Industrial Adviser (Chemicals) in the erstwhile DGTD. It is also stated that on the basis of the recommendations of the review DPC, the petitioners issued an order vide Office Memorandum dated 18.09.2003 to the effect that the case of promotion of the respondent to the grade of AIA (Chem) was duly considered by the duly constituted DPC (review DPC) and that he was `not found fit' for promotion to the next higher grade of AIA (Chem). It is also pointed out that the review petitioners had filed a detailed counter reply to the Original Application pointing out therein that the various contentions raised in the OA were totally untenable and that the persons junior to the review respondent had been promoted only in the years when they had attained the required benchmark of `Very Good'. It is also contended that even if it is taken that a junior to the respondent had been promoted in violation of the benchmark, the same would not, ipso facto, entitle the review respondent who had been suspended in the year 1976 and thus had no current ACRs for the relevant five years, to be promoted on the basis of an earlier `Good' grading which he may have had before his suspension in 1976. It is settled law that the DPC may give a grading `different' from that in the ACRs based on its own assessment. In the instant case, the DPC had assessed the respondent as `not yet fit for promotion'.

6. This would clearly show that the applicant (in the OA) had been properly assessed by the DPC duly constituted for the purpose and had been expressly found to be `unfit' for promotion to the next higher grade. Therefore, the finding of the Tribunal that the person who is junior to the

review respondent in grading has been promoted and since the review respondent had also `Good' grading he is also entitled to the same grade, is erroneous and also against the facts on record.

7. On the other hand, Shri S.S. Tiwari vehemently opposed the contention and stated that a new document (Annexure P-8, which purportedly are the minutes of the Review DPC meeting held on 01/02.07.1992) has been introduced by the respondents, which was in the knowledge of the official respondents in OA but they did not choose to make it a part of their pleadings in the OA.

8. We have heard the rival contentions of both the parties and have also perused the material on record.

9. In our considered opinion, the crucial question to be decided in this RA is whether in the light of the facts and supporting records now produced before this Tribunal, particularly in the context of the DPC which was constituted for this purpose having clearly held that the respondent was unfit for promotion, the earlier directions to promote the respondent even though he had not achieved the requisite bench mark can be allowed to remain.

10. It is generally accepted that in review a mistake which is not apparent on the face of the record but requires probe, cannot be an error on the face of the record to warrant interference of the Tribunal. It is also pertinent to note in this connection that records produced by the original respondents did not include at the time the supporting records produced by them now. These records were available with the original respondents, and there is no explanation why after due diligence these were not produced at the time of hearing of the OA, and in normal circumstances the document should not be treated as a discovery of new material to warrant any interference.

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11. However, it is also true that once the full facts as are now before this Tribunal it would be just and proper for the Tribunal to go to the root of the matter and see that no wrong directions are allowed to remain. It is seen from Annexure P-8 viz. minutes of the DPC held on 1st and 2nd July, 1992 (consisting of a Member of the UPSC as Chairman and two Secretaries to the Government of India (ID) and (CPC) as the other two members) that for 3 vacancies of 1983 taken into account by the DPC which met on 25.10.1983 Shri R.C.Bhattacharya had been assessed as `Very Good' while Shri Jastinder Singh had been assessed as `Not yet fit' for 1983, 1984 and 1985. It seems the earlier order was passed as complete supporting documents had not earlier been produced resulting in a promotion being ordered which, under the law, could not have been allowed as the person did not make the requisite bench-mark and was not assessed as fit by the DPC. In this connection, it is necessary to refer the case of the Hon'ble Supreme Court in **S. Nagaraj & Ors. V. State of Karnataka, JT 1993 (5) SC 27**, in which the Hon'ble Supreme Court held as under:

> "(18) JUSTICE is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the court. In Administrative Law the scope is still wider. Technicalities apart if the court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the bench of

which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

(19) REVIEW literally and even judicially means re-examination or re- consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In **Raja Prithwi Chand Lal Choudhury** v. **Sukhraj Rai & Others,** AIR 1941 Federal Court 1, the court observed that even though no rules had been framed permitting the highest court to review its order yet it was available on the limited and narrow ground developed by the Privy council and the House of Lords. The court approved the principle laid down by the Privy council in **Rajunder Narain Rae** v. **Bijai Govind Singh** 1 Moo PC 117 that an order made by the court was final and could not be altered:

> "... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these courts possess, by Common law, the same power which the courts of record and statute have of rectifying mistakes made in drawing up its own judgments, and this court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

> "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a court of last resort, where by some accident, without any blame, the party has not been

heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme court Rules this court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of court. The court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

(Emphasis added)

12. In view of the above discussion and in the peculiar facts and circumstances of the case, the RA stands allowed and the OA is restored to its original number.

O.A.No.147/2004:

13. We have heard both the learned counsel on the OA and have also perused the material on record.

14. Shri S.S. Tiwari states that Shri R.C. Bhattacharya was promoted as AIA (Chemical) w.e.f. 1981 on the assessment given by the earlier DPC where his grading was 'Good'.

15. Shri Tiwari also states that the assessment of Shri D.C. Patwardhan and Shri R.C. Bhattacharya was 'Good' and they were empanelled for the year 1981-82 and a consolidated panel was prepared,

which was followed in the review DPC held on 2.7.1992. He, therefore, seeks promotion of the applicant also on the ground that

16. On a bare perusal of Annexure P-8, it would also be clear that the applicant had been properly assessed by the DPC duly constituted for the purpose and had been expressly found to be `unfit' for promotion to the next higher grade. Therefore, the contention of the applicant that the person, who is junior to the applicant in grading, has been promoted and since the applicant had also `Good' grading in his ACRs, he is also entitled to the same grade, is erroneous and also against the facts on record. Even if it is accepted (though this is not the case) that the junior of the applicant, namely, Shri R.C.Bhattacharya was promoted without his having made the required bench-mark of `Very Good', it would not give any right to the applicant in the OA to claim promotion when he had not achieved the required bench-mark and particularly when a DPC constituted specifically for the purpose had found him unfit for promotion.

17. It is also a well settled position in law that it is not the function of the Court to substitute its judgement for that of a DPC or selection committee, normally Courts will not interfere with assessments made by DPCs unless the aggrieved officer establishes that the DPC decision was bad according to *Wednesbury* principles or it was mala fides. The Hon'ble Supreme Court has already considered this point in a catena of Judgments. We refer to the following Judgments of the Apex Court:

(a) The Constitution Bench (3 Judge Bench) of the Apex Court in **Dalpat Abasaheb Solunke**, etc v. **Dr. B.S.Mahajan, etc.** AIR 1990 SC 434 held as under:

> "9. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same

grounds, the Court has also found it necessary to sit in appeal over the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidate tes. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its Jurisdiction.

(b) In **Nutan Arvind (Smt.)** v. **Union of India and Another**, (1996) 2 SCC 488, the Hon'ble Supreme Court held as under:

"6. The DPC which is a high level committee, considered the merits of the respective candidates and the appellant, though considered, was not promoted. It is contended by learned counsel for the appellant that one K.S. Rao was the officer at the relevant time to review the performance of the appellant whereas in fact one Menon had reviewed it. The latter was not competent to review the performance of the appellant and to write the confidentials. We are afraid we cannot go into that question. It is for the DPC to consider at the time when the assessments of the respective candidates is made. When a high level committee had considered the respective merits of the candidates assessed the grading and considered their cases for promotion, this Court cannot sit over the assessment made by the DPC as an appellate authority. The DPC would come to its own conclusion on the basis of review by an officer and whether he is or is not competent to write the confidentials is for them to decide and call for report from the proper officer. It had

done that exercise and found the appellant not fit for promotion. Thus we do not find any manifest error of law for interference."

(c) In **Badrinath** v. **Government of Tamil Nadu and Others**, (2000) 8 SCC 395, relying the earlier Judgements of the Apex Court, the Apex Court held as under:

"58. From the above judgments, the following principles can be summarised :

(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 Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury Principles or was it mala fides."

Further, the observations made by the Apex Court in **State of Bihar & Ors.** v. **Kameshwar Prasad Singh & Anr.,** 2000 (2) ATJ 614 = JT 2000 (5) SC 389, which are reproduced below are also of great relevance in this case:

"30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in Gursharan Singh v. NDMC, (1996) 2 SCC 459 held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed (Para 9) :

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to

> enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

Again in Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Others, (1997) 1 SCC 35 this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding :

> "Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

In State of Haryana & Others v. Ram Kumar Mann, (1997) 3 SCC 321 this Court observed:

> "The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service [sic.: **and subsequently that order is withdrawn and he is reinstated into the service].** Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier,

> his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."
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> (Emphasis added)

18. In view of the foregoing discussion and in the light of the factual matrix of the case, we do not find any merit in the OA. Accordingly the same is dismissed. No costs.

(Shailendra Pandey)
Member (A)

(Shanker Raju)
Member (J)

/nsnrsp/