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**Central Administrative Tribunal
Principal Bench**

OA No. 668/2004

New Delhi, this the 27 day of May, 2005

**Hon'ble Mr. Shanker Raju, Member (J)
Hon'ble Mr. S.K. Malhotra, Member (A)**

1. S.K. Saxena s/o Late Sh. S.S. Lal,
91, Sharda Apartments,
West Enclave, Pitampura, Delhi – 34.
2. R.P. Singh s/o Sh. G.P. Singh,
r/o 99, Sharda Apartment,
West Enclave, Pitampura, Delhi – 34.Applicants

(By Advocate: Shri Arun Bhardwaj)

-versus-

1. Union of India through
Secretary,
Ministry of Defence,
South Block, New Delhi – 110 011.
2. Engineer-in-Chief,
E-in-C's Branch,
Army Headquarters, Kashmir House,
DHQ, PO, New Delhi – 11.
3. Director Personnel (M),
Directorate General (Personnel/E-1B),
Military Engineer Services,
Engineer-in-Chief Branch,
Army Headquarters,
Kashmir House, DHQ, PO,
New Delhi – 110 011.
4. Secretary,
UPSC, Shahjahan Road,
New Delhi – 110 011.Respondents

(By Advocate: Ch. Shamshuddin Khan)

ORDER

By Mr. Shanker Raju, Member (J):

Applicants, through this O.A., challenge respondents' orders dated 7.6.2003 and 18.6.2003 whereby their request for promotion as Executive Engineer has been turned down.

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2. Both the applicants, who were serving as Assistant Engineer, as per eligibility, were entitled to be considered for promotion to the post of Executive Engineer in accordance with recruitment rules. DPC met in 1999 and recommended 58 names.

3. Applicant no. 2, along with others, filed OA No. 1563/2000 with a grievance to hold the DPC as the petitioners were superannuating. By an order dated 26.9.2000, following observations were made:

“9. In this connection, Shri Krishna stated at the bar that respondents would have no objection, if a direction is given to respondents that in the case of any delay in filling up of the vacancies in the respective promotion quotas, the seniority of those to be promoted would not suffer and seniority would be determined from the date a slot in the respective promotion quota became available to them in the ratio of 2:1. We direct accordingly.

10. In this connection, we are informed that some of the Assistant Engineers, who are likely to come within the zone of consideration would be retiring on superannuation shortly. We call upon the respondents to ensure that the aforesaid directions are strictly adhered to such that the benefits, or promotion, in case they are selected for promotion as Executive engineers are not denied to them merely because they would have retired on superannuation in the meanwhile.”

4. A representation was preferred for compliance of the directions (supra). Applicant no. 1 had superannuated on 31.08.2001 whereas applicant no. 2 had superannuated on 31.12.2001. A DPC was held in January, 2002 and a panel was drawn of recommended candidates against vacancies of the year 1999 till 2002. Name of the applicant no. 1 was placed at serial no. 16 and of second applicant at serial no. 47 in the panel against vacancies of 1999-2000. After superannuation, representation preferred was not disposed of, which led to filing of OA No. 2728/2002 and in compliance of the directions, the claim of the applicants was rejected on the ground that after superannuation, one cannot be promoted as promotion is prospective in nature.

5. Learned counsel for the applicant stated that in the light of decision of Patna High Court in C.W.J.C. No. 2809/2002, for delay in promotion, latches are attributable to the respondents and one cannot be denied actual benefits of promotion.

6. Learned counsel states that the executive instructions would not be allowed to infiltrate the arena covered by judicial decisions. In this view of the matter, it is stated that on a consent order passed in OA No. 1563/2000, DPC was to be held and seniority was not to be affected. However, a positive direction was issued that in case of selection on promotion as an Executive Engineer, on the ground that the applicants had superannuated, promotion would not be denied to them. Referring to the above, it is stated that in the wake of decision (supra), the rejection of request for promotion and benefits thereof, is illegal.

7. Respondents' counsel, on the other hand, vehemently opposed the contentions and stated that while the compliance of OA was being done, another OA filed at Allahabad i.e. OA No. 465/1999 was filed and due to conflicting decisions, compliance of one order would be contempt to the other. It is contended that when, in an appeal preferred in the Allahabad High Court, no stay was granted, DPC held considered the cases of the applicants and in the light of decision of the Apex Court in *UOI vs. M.Jangammayya*, AIR 1977 SC 757, no employee had a right to be promoted against vacancy and it is the prerogative of the government to keep the said vacancy unfilled. In this backdrop, it is stated that in the light of DOP&T OM of 1998 and letter dated 9.4.1996, promotion is only prospective in nature and as the applicants had superannuated, no relief can be granted to them.

8. On careful consideration of the rival contentions of the parties, the following observations of the decision of the Apex Court in *Anil Ratan Sarkar vs. State of WB*, 2001 (5) SCC 327, are relevant to be highlighted:

“24. This circular however stands challenged before the learned Single Judge who was pleased to quash the same upon acceptance of the contentions of the writ petitioners, the appellants herein. The learned Single Judge categorically recorded that the petitioners being Graduate Laboratory Instructors, the question of further classifying them does not and cannot arise and upon reliance of the annual report as noticed above quashed and set aside the

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circular. The State Government however being aggrieved went before the appellate court and the Appellate Bench however allowed the appeal and opined that the Government Order dated 26-12-1994 cannot be said to be arbitrary or contrary to the decision of this Court, since it is clearly stated therein that Graduate Laboratory Instructors shall continue to enjoy the teaching status. The High Court, however, have failed to appreciate the role of Physical Instructors in the matter of fixation of pay scale in terms of the order of this Court and it is on this count a definite statement has been made even before this Bench that there are existing two definite classes of Physical Instructors, one being qualified and another being unqualified, but there is no factual support thereof. Surprisingly, the basis of the order of this Court has not been delved into by the High Court and the High Court thus clearly fell into an error. Needless to say that in the event there was some documentary support vis-à-vis the stand of the respondent State as regards the existence of two definite grades of Physical Instructors obviously the government Order issued in December, 1994 could not have been found fault with – since the same would have been in consonance with the order of this Court. But there being no factual support therefore, we are not in a position to record our concurrence with the submissions of Mr. Reddy as regards the justifiability of making Group B salary available even after conferment of teaching status as upheld by the Appellate Bench of the High Court. The conferment of status as a teacher runs counter to fixation to pay scale of Group B employees since all the other teachers of the government and non-government colleges are placed in the category of teachers. A teacher cannot possibly be allowed a pay scale of a non-teaching post. The same is a contradiction in terms and we need not dilate thereon. The criterion of fixation of pay scale is dependent upon the placement of the person concerned-in the event the placement is in a teaching post obviously one expects to get a pay scale fixed for a teacher and not for a non-teaching member of the staff. Apparently the High Court has not dealt with the issue in this perspective and thus clearly fell into an error in categorizing a teacher with a non-teaching pay scale. The circular clearly authorizes the Graduate Laboratory Instructors of non-government colleges to continue to have the teaching status but decries the financial benefits therefore! Would the same be not an arbitrary exercise of powers or can it by any stretch be suggested to be otherwise rational and indiscriminatory. This Court at an earlier occasion unequivocally upheld the reasoning of the learned Single Judge in the earlier writ petition as accepted by the Appellate Bench and in the wake of such a finding of this Court question of decrying a pay scale which is otherwise available to another teacher (in this case the Physical Instructor) does not and cannot arise more teacher (in this case the Physical Instructor) does not and cannot arise more so by reason of the earlier order of this Court. Administrative ipse dixit cannot infiltrate on to an arena which stands covered by judicial orders."

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9. If one has regard to the above, the ratio deci dendi clearly holds that in case of a judicial direction, any administrative instructions cannot infiltrate and has to be overridden impliedly.

10. In the earlier OA No. 1563/2000, it has been specifically made clear that on holding of DPC, promotion cannot be denied on the ground that the applicants thereafter had retired on superannuation. Accordingly, the instructions of DOP&T cannot infiltrate in the arena covered by the judicial decisions and would not either be in conflict or override it.

11. Admittedly, the applicants were empanelled for the vacancies for the years 1999-2000 and as such they cannot be denied promotion merely because they had superannuated.

12. In the result, for the forgoing reasons, OA is partly allowed. Impugned orders are set aside. Respondents are directed to consider the applicants for promotion as Executive Engineer w.e.f. 1999 but would be accorded promotion notionally and as a consequential relief, their pensionary benefits be re-calculated and they be paid arrears thereof, within a period of three months from the date of receipt of a certified copy of this order. No costs.


(S.K. Malhotra)
Member (A)


(Shanker Raju)
Member (J)

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