

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH
NEW BOMBAY

(17)

Transferred Application No. 528/87

Ms. Usha Savara

...

Applicant

vs

1) The Union of India through
the Ministry of Finance,
(Deptt. of Revenue)

2) C.D.Basu, Commissioner of Income Tax
Allahabad and 33 others. ...

Respondents.

Coram: Hon'ble Mr. Justice U.C. Srivastava, Vice-Chairman

Hon'ble Mr. M.Y. Priolkar, Member(A)

Appearances:

Mr. M.A. Mahalle,
for the applicant

Dated: 2-5-1991

Mr. P.M. Pradhan
for the respondents
1 & 2

Judgement

(Per: Mr. Justice U.C. Srivastava, Vice-Chairman):

The applicant, then Commissioner of Income Tax Level II, filed a writ petition before Bombay High Court praying for issue of writ in the matter of mandamus order or directions for setting aside order of promotion dated 5th March 1984 in its entirety or at least promotion of Respondents 17 to 35 who were junior to her as Commissioner of Income Tax Level-I, and for holding a fresh meeting of appropriate Departmental Promotion Committee (for short D.P.C.) for selecting Commissioner of Income Tax (for short C.I.T.) level-II (for short L-II)

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for promotion to the post of C.I.T. Level-I (for short L-I) with effect from 29th February 1984 or the entire 35 vacancies or lesser vacancies after considering her case ignoring any uncommunicated adverse remark including "fall in the standard* of performance" and to fix her seniority in the cadre of C.I.T Level-I and to pay her difference of salary and allowance with interest. A prayer for confirmation and feeder promotion of Respondents 2 to 30 to be kept subject to result of writ petition was made. After coming in force of Central Administrative Tribunals Act the writ petition was transferred to the Tribunal and in the mean time applicant also retired from service.

2. The applicant joined the service as Income Tax Officer Class I in All India Revenue Service after becoming successful in the competitive examination. After intervening promotions she was promoted as C.I.T. Level II in the year 1980 and retaining her seniority was posted as C.I.T. (Appeals III) at Bombay.

3. For the next higher post viz. C.I.T. Level-I, which in fact is only a time scale promotion viz. from the scale of 2250 to 2500 to the scale of Rs. 2500-2750, the selection which is selection on merit is made by a Departmental Promotion Committee (for short D.P.C.). The D.P.C. comprises Chairman/Member Union Public Service Commission as Chairman, Secretary, Ministry of Finance Department of Revenue, Chairman, Central Board of Direct Taxes and one Member of Central Board of Direct Taxes. The re-commendation of the D.P.C. are subject to the approval of the Appointing Authority.

4. Under the Departmental Circular D.P.C. is to meet every year and this practice for meeting of D.P.C. every year held good upto December 1983 when the same was withdrawn. The previous D.P.C. met on 29.4.82 and draw a panel of 52 officers. The next D.P.C. did not meet within a year but met on 30-9-83 and out of a list of 36 officers, placed 34 officers ^{on} select ^{list} dropping two only including the applicant. The applicant's grievance is that delaying the meeting of D.P.C. the Principal Respondent in this case enlarged the zone of choice and those who otherwise were not within the zone of consideration within one year of the meeting of earlier DPC viz. ^{for non-} completion of two years of service as C.I.T. Level II were also included in the zone of consideration and if that would not have been done her name in all events would have been on the select panel.

5. Admittedly the vacancies upto 31.12.83 were 36 and consideration for all the vacancies was made from a list of 58 eligible Officers. Out of these 36 respondents ^{who} were so selected, 19 were junior to the applicant and 10 were not eligible if D.P.C. would have met within a period of one year of the previous D.P.C. meeting. The D.P.C. classifies the officers excluding those considered unfit for promotion as 'outstanding', 'very good' and 'good' on the basis of merit assessed after examination of record of service. The applicant was placed in the category of 'good' ^{by} and D.P.C. which placed 36 officers in the category of 'outstanding' and 'very good' thereby excluding the applicant from promotion.

6. The applicant's grievance is that her service record is very good, and she having been assessed to be of that category in 1980 was promoted as C.I.T. Level II and if there was an adverse entry thereafter, then ~~assessment~~ ^{without} taking her explanation or if there was fall in standard then without apprising her of the same and taking her explanation as was enjoined under the Departmental Circulars dated 2nd March 1968 and 20th May 1972 having the force of law the same could not have been considered in lowering down her merit resulting in her supersession giving a go bye to her seniority which in fact could not have been excluded in making promotion.

7. In the absence of statutory rules the executive instructions partake the nature of rule and guide the matters they preside. Regarding Departmental Promotion Committees and the procedure to be followed by ^{them} in the matter or promotion the Office Memorandum issued by ^{the} Government of India dated 24th December 1980 was the Rule or instructions guiding promotion at the relevant point of time. The O.M. which was issued after consulting Union Public Service Commission provides that the D.P.C. shall restrict the field of choice ^{with} reference to number of clear vacancies proposed to be filled in the year. Where the number of eligible officers in the feeder cadre is less all the officers eligible should be considered. D.P.C. is to meet at regular annual intervals and where no such meeting is held in any year the Appointing Authority should record a certificate in breach that there were no vacancies to be filled during the year. If however, D.P.C. could not be held for reasons beyond control

even though vacancies arise during that year or year the first D.P.C. that meets is to follow the procedure prescribed. The procedure so prescribed in the said O.M. is that actual number of regular regular vacancies that arose in each of the previous years and regular vacancies to be filled in the current year are to be determined and for each year those officers also would be within the field of choice with reference to that year only and thereafter select list is to be prepared placing the list of earlier year over that of next year and so on. For preparing panel record of that officer only upto that year is to be taken into account and not that of subsequent year.

The select list so drawn would be operative only for one year and in any case it would cease to be in force after 10 months or when the fresh list is prepared which ever is earlier.

8. There is no denial of fact that out of 36 vacancies most of them pertained to the year in question but in the earlier affidavit apart from vague specification of total seats upto 31-12-83 break up of vacancies has not been given. It was not ~~been~~^{that} pleaded in preceeding year when applicant was eligible ^{that} there were no vacancies or that any such certificate was issued ^{by} the Appointing Authority. No reason for holding D.P.C. ^{meeting} for one year has been given and in the counter affidavit no such case that for reasons beyond control of D.P.C. could not be held. In view of the same O.M. the case of the applicant should have been considered for the year 1982 along with eligible candidates of that year and not with that of 1982 and 1983 candidates. Her merit was required to be considered along

with the merit of 1982 or 1982 eligible candidates only and it was to be found out whether she was to be placed in the panel for that year. Her merit was not to be compared with the merit of subsequently eligible candidates though the same was admittedly done. She appears to be the only candidate of the eligible batch of a particular year ^{who} was denied promotion on the ground that category upto 'very good' exhausted all the vacancies.. The selection so made was in clear violation of the O.M. of 1980 referred to, which was binding on the Department as well as the D.P.C. The contention that ^{if} selection would have been made within a year or ~~that~~ in accordance with yearwise vacancy and comparison of merits, the applicant ^{who was} the lone rejected candidate ^{and} ~~who~~ at least till 1980 when she was promoted was obviously a very good officer would have been graded ^{at} a higher ^{grade} or would have been selected is not without force. The selection depriving her from promotion as against the rules which were to be followed was then in violation of law.

9. It was also been contended on behalf of the applicant if there was fall in standard within a period of two years ^{it was obligatory} under the O.M. of 1968 reiterated in 1972 the applicant should have been apprised of the same. The said circular was withdrawn in December 1983 that is after meeting of the D.P.C. In the written statement the non-communication of any fall in the standard has been admitted. But it has been pleaded that instructions of 1968 were issued at a time when grading in the confidential reports was still prevalent but at

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the same time there was a proposal to change the form in which C.R were written was under way and the same was finalised only on 6.3.68. In it the grading in the Confidential Reports was done away with and the reason for the same apparently was it was to be done at a higher level probably at D.P.C. Even there ^{after} the ^{incorporation} of ~~instructions~~ of 1968 again in the Departments O.M. No. 51/5/92-Estt(A) dated 20th May 1972 has been explained by saying that ^{on} abolition of grading in C.R. it had become redundant. The explanation, not given by the authority issuing instructions but by the Department at Bombay through a Deputy Commissioner at Bombay, questioning and doubting the wisdom of the Department obviously without authority in the past is worth rejection. Notwithstanding the ^{doing} away of the gradation in the C.R. it ^{appears} the Department kept the principles of natural justice that is giving of opportunity to one where standard was falling to improve himself or be ready for consequences which in that event would be free from charge of arbitrariness. The subsequent withdrawal of the said circular after two years accompanied and witnessed by changes ^{during} a decade had no retrospective effect. In the case of Fernandes Vs Central Board of Direct Taxes (Special Civil Appeal 3545) of 1979 it was held that the fall in standard as per O.M. of 1968 is to be treated as adverse remark ^{and} is to be communicated to individual and if it is not done same is to be ignored for purposes of further promotion. The case was relied on by Central Administrative Tribunal Madras in Kailash Nath Gupta Vs Union of India and others 1988(2) C.A.T. Page 154 in which

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same view was taken and it was further held that withdrawal of said circular of 1968 on 31-12-83

had no retrospective effect. A fresh review committee was directed to be constituted in the said case.

In the instant case the entries from 1979 to 1982 in the C.R. of applicant were as follows:-

1979.	-	Outstanding
1980	-	Very good
1981	-	Good
1982	-	Very good

In the year 1983 it is mentioned that with reference to an enquiry by Vigilance her explanation has been called and that she has submitted it. Thereafter it does not contain any reference to the date of the enquiry. No reference to same ^{finds} place in the written statement and apparently no action on the same has been taken before or after her retirement which means that the same was dropped.

A reference to this fact even though matter was still pending and either would have ended in her implication or exoneration, Being in C.R. it was before the D.P.C. The D.P.C. could not have closed its eyes to it and possibility of its influence towards adverse side in the minds of the Members of D.P.C. can not be ^{ruled} out.

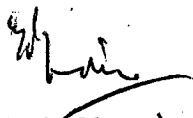
The entry in C.R. which is in the nature of gradation by the authority concerned coupled with the above remarks were considered along with candidates of subsequent years for comparing their merits. The entire procedure in the case of applicant being against O.M. of 1968, 1972 and 1980 referred to above being in breach of law

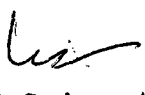
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to the prejudice of the applicant was vitiated and can not be sustained and has got to be set aside.

10. In view of the fact that exclusion of the applicant from the panel for being promoted to the grade of C.I.T. Level I was not in conformity of law and was in clear non-compliance with instructions by Government of India and the Department which partook the nature of applicable and enforceable rules, the same was patently illegal and is set aside. Even though the applicant has retired from service but D.P.C. is to meet and to reconsider her case for promotion to the said grade at that stage in accordance with law in the light of this judgement.

11. If in the vacancies which existed within one year of the meeting of previous D.P.C. in 1981 she comes within panel ignoring the adverse or prejudiced remarks she will get nominal promotion with effect from the date when others of that panel including those who were junior to her were promoted in higher grade which in turn would be visited by consequential benefits including pension and other pensionary benefits. Let the next D.P.C. if, it is to assemble within 3 months, consider her case or let a Review D.P.C. be convened for this purpose within 3 months from the date of the receipt of judgement to consider the case of the applicant as directed above. The T.A. is allowed in the above terms but parties will bear their own costs.


(M.Y. Priolkar)
Member(A)


(U.C. Srivastava)
Vice-Chairman