

CENTRAL ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH.

ORIGINAL APPLICATION NO.: 901 of 1999.

Dated this , the 31<sup>st</sup> day of March, 2000.

Subhash Kapur, Applicants.

Shri V. S. Masurkar alongwith Advocate for the  
Shri K. R. Yelwe, applicants.

VERSUS

Union of India & Others, Respondents.

Shri R. K. Shetty alongwith Advocate for the  
Shri R. R. Shetty, Respondents.

Shri R. P. Saxena alongwith Advocate for the  
Shri G. S. Walia, Intervenors.

CORAM : Hon'ble Shri Justice R. G. Vaidyanatha,  
Vice-Chairman.

Hon'ble Shri B. N. Bahadur, Member (A).

(i) To be referred to the Reporter or not ? *yes*

(ii) Whether it needs to be circulated to other Benches *no* of the Tribunal ?

(iii) Library. *yes*

*Reported*  
(R. G. VAIDYANATHA)  
VICE-CHAIRMAN.

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CORAM : Hon'ble Shri Justice R. G. Vaidyanatha, Vice-Chairman.  
Hon'ble Shri B. N. Bahadur, Member (A).

Subhash Kapur,  
Deputy General Manager (P&A),  
Canteen Stores Department,  
119, M.K. Road,  
Mumbai - 400 020.

... Applicant.

(By Advocate Shri V.S. Masurkar  
alongwith Shri K. R. Yelwe).

VERSUS

1. Union of India through  
the Secretary,  
Ministry of Defence,  
South Block,  
New Delhi - 110 011.
2. Deputy Director General,  
Canteen Services, QMG's  
Branch, Army Head Qrs.,  
DHQ Post Office,  
New Delhi - 110 011.
3. The Chairman,  
Union Public Service Commission,  
Dholpur House,  
Shahajahan Road,  
New Delhi - 110 011.
4. Brig. Y.R. Maindiratta,  
Joint General Manager-II,  
Canteen Stores Department,  
119, M. K. Road,  
Mumbai - 400 020.
5. The Secretary,  
Department of Personnel &  
Training, Ministry of  
Personnel, Training &  
Public Grievances,  
Government of India,  
New Delhi - 110 001. ... Respondents.

(By Advocate Shri R. K. Shetty alongwith  
Shri R. R. Shetty for the respondents.  
By Advocate Shri R.P. Saxena alongwith  
Shri G. S. Walia for the Intervenors).

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*for*

O R D E R

PER : Shri R. G. Vaidyanatha, Vice-Chairman.

This is an application filed by the applicant under Section 19 of the Administrative Tribunals Act. Respondents have filed reply. We have heard Mr. V. S. Masurkar on behalf of Mr. K. R. Yelwe, the Learned Counsel for the applicant, Mr. R. K. Shetty alongwith Shri R. R. Shetty, the Learned Counsel for the respondents and Mr. R. P. Saxena alongwith Shri G. S. Walia, the Learned Counsel for the Intervenors.

2. The applicant was working as a Deputy General Manager in the Canteen Stores Department at Mumbai on the date he filed the application. He received an order of promotion dated 22.09.1999 to the effect that he is promoted as Joint General Manager w.e.f. 01.01.2000. The applicant is aggrieved by this condition in the order of promotion that it will take effect from 01.01.2000. According to the applicant, when there is an existing vacancy, he should have been promoted forthwith and his promotion could not have been postponed to 01.01.2000. During the pendency of the O.A. the applicant has now taken over as Joint General Manager on 01.01.2000. Now he wants a direction to the respondents to give benefit of promotion from the date of order of promotion dated 22.09.1999 and with consequential benefits like arrears of pay, seniority, etc.

3. The defence of the respondents is that the Government has issued an Official Memorandum prescribing a model calendar for holding D.P.Cs. They are relying on two O.Ms. dated 08.09.1998 and 17.09.1998. According to the respondents, in view of the revised

procedure fixed by the Government, the date of eligibility for each year will be as on first of January of that year. That means, the date of eligibility of a candidate for promotion must be as on 1st of January of the year in which the vacancy occurs. In this case, it is not disputed that vacancy arose in 1999. Since the eligibility date is 01.01.1999, the applicant could not have been considered for promotion, since as on 01.01.1999 he was not eligible, since he did not have the required five years service in the feeder cadre. Therefore, the applicant cannot be considered for the vacancies occurring in 1999, since on 01.01.1999 he did not have the eligibility criteria in the form of five years service in the feeder cadre. The applicant completed five years of service in the feeder cadre by March, 1999. He is, therefore, entitled to be considered for the next vacancy year, namely 01.01.2000 when he will have completed more than five years in the feeder cadre. That is how the applicant's order of promotion is given effect to w.e.f. 01.01.2000.

One Mr. Ram Babu has entered appearance as an Intervenor by filing M.P. No. 716/99 objecting to the applicant's claim for promotion. Mr. Ram Babu is no doubt senior to the applicant, but he was superseded and applicant has been promoted. Mr. Ram Babu has filed O.A. No. 925/99 seeking a direction for his promotion. We have heard both the O.As. together and are disposing both the O.As. today. Mr. Ram Babu has also taken the plea that applicant has no right to seek promotion from a particular date and he cannot get his promotion ante-dated to the date of vacancy or to the date of D.P.C. We are hereby allowing M.P. No. 716/99 permitting Mr. Ram Babu's advocate to address arguments as an Intervenor.



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4. In the light of the pleadings and the arguments addressed at the bar, the point for consideration is, whether the applicant is entitled to a direction to the respondents to give him promotion from the date of D.P.C. or from the date of issuance of promotion order or atleast from the date when the vacancy arose, namely - 01.11.1999 ?

5. It is an admitted fact that as on 01.01.1999, the applicant had not completed five years service in the feeder cadre and, therefore, he was not eligible for being considered for promotion if we go by the O.Ms. of 1998. The new O.Ms. of 1998 have given certain directions for holding D.P.Cs. regularly. This is not a new principle brought into existence for the first time in 1998. Earlier, all the departments were proceeding on the basis of 1989 O.M. which prescribed first July of each year as the date of eligibility. Now the new O.Ms. of 1998 fixed the date of eligible as 01.01.2000. There is some difference between the dates of eligibility where confidential reports are written calendar wise or it is written financial year wise. But that is not relevant for our present purpose.

Admittedly, as on 01.01.1999, applicant has not completed five years of service and, therefore, he was not eligible to be considered for promotion. The Learned Counsel for the applicant contended that even if it is so, the Government could have relaxed the rules and could have considered the applicant for promotion, even if he was short by few months for completing five years. Relaxation of the rules is purely in the domain of

Government. Courts or Tribunals cannot give a direction to the Government to relax the rule and grant promotion. At any rate, that question does not arise as on today, since applicant has already been promoted and he has taken charge.

It is true that D.P.C. was held in September, 1999. Actual vacancy occurred on 01.11.1999 when the previous officer on deputation handed over charge on 31.10.1999. Applicant's Counsel contended that atleast from the date of D.P.C. or atleast from 01.11.1999 the applicant should have been promoted and it cannot be postponed to 01.01.2000.

As already stated, respondents are relying on the two O.Ms. for determining eligibility during the particular calendar year. Since the applicant was not eligible as on 01.01.1999, the respondents say that he cannot be promoted during 1999 and he is entitled to be promoted only in 2000, since he becomes eligible on 01.01.2000. The Learned Counsel for the applicant contended that there is no merit in the contention of the respondents.

The applicant is not challenging the vires of 1998 O.Ms. inspite of respondents relying on the O.Ms. of 1998 and applicant even amended the O.A. to ask some additional reliefs but he has not amended the O.A. to challenge the legality or validity of the O.Ms. of 1998. As already stated, it is not a new principle which the Government brought into force in 1998. Even in 1989 there was such a principle where the date of eligibility for promotion was 01.07.1999 and by these O.Ms. the date is changed to 1st January of a year. In fact, the O.M. is meant to help

officials to get promotions early. It may be in a given case like the applicant, the O.M. has come in the way in postponing the promotion. Since the applicant has not amended the O.A. and he has not sought for quashing of the O.Ms. on any legal ground, we cannot go strictly into the question of legality of the provisions of two O.Ms. of 1998. It is a general O.M. issued on all India basis for all departments to follow.

In this connection, we may only observe that the object and spirit of the O.M. is to benefit officers in getting promotion early. The object of holding D.P.C. regularly is to see that there is no stagnation and promotions are given as and when necessary. But in the present case, we find that though applicant was not eligible for promotion on 01.01.1999, he completed five years service in March, 1999 and D.P.C. was held in September, 1999 but actual promotion is postponed to 01.01.2000. Therefore, implicit and blind following of the O.M. has affected the date of promotion of the applicant. If one goes by the spirit of the O.M., then its object is to see that officers get promotions regularly and there should be no stagnation, etc. In the facts and circumstances of the case, we observe that Government may reconsider and give suitable instructions to implement the O.Ms. bearing in mind the spirit and object of the O.Ms. and not by literally following it.

6. Even granting for a moment that after the D.P.C. was held and promotion was ordered to be issued to take effect from 01.01.2000, can an employee insist he must get promotion from the date of D.P.C. or from the date the vacancy arose. Even if we reject the department's contention that because of the O.Ms. they

had to give promotion from 01.01.2000, there is no legal right or vested right in an officer to say that he should get promotion when the vacancy arose. If such an argument is accepted, it is very difficult to follow, since hundreds and hundreds of vacancies are available in many departments and every employee will assert that he should get promotion from the date the vacancy arose. No rule or law is brought to our notice which gives a right to an employee to claim promotion from the date the D.P.C. met or from the date the vacancy arose. No such rule is brought to our notice. On the other hand, the well settled legal position is that no Court or Tribunal can give a direction to fill up a particular post with effect from a particular date.

In this connection, we may refer to a case reported in 1991 SCC (L&S) 800 (Shankarsan Dash V/s. Union of India where the Supreme Court has observed that a successful candidate does not acquire an indefeasible right to be appointed. Infact, the observation of the Supreme Court in para 7 are as follows:

"Unless the relevant recruitment rules so indicate, the State has no legal duty to fill up all or any of the vacancies."

It is not a case where the promotion is delayed arbitrarily or without giving any reasons. The order of promotion is issued by the Under Secretary to the Government of India. He is bound by the Official Memorandums of 1998. He cannot issue the order of promotion in violation of the Official Memorandum issued by the Government of India. Whether the terms of the Official Memorandum are valid or not, is a different thing. All Government departments are bound to carry out the

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policy decision of the Government, which is expressed in the form of Official Memorandums. Recruitment Rules do not say as to when a post is to be filled up, when a D.P.C. is to be held, etc. When recruitments are silent on these aspects, the Government guidelines in the form of Official Memorandum will have to be followed. As already stated, the applicant is not challenging the legality or validity of the O.Ms. As long as the Official Memorandum stands, the departmental Heads cannot act contrary to the Government instructions or policy circulars.

7. In this connection, we are forfeited in our view by the judgement of the Apex Court in the case of Union of India & Others V/s. K. K. Vadera & Others reported in 1990 (1) SLR SC 817. That case pertains to promotion of officers in the Defence Research & Development Service. The officers in that case were promoted w.e.f. 16.10.1985 but they moved the Bench of this Tribunal at Allahabad seeking a declaration that they should be deemed to have been promoted from 01.07.1984. Though the Tribunal did not grant the relief prayed for, the Tribunal gave the relief that promotions should be deemed to be with effect from the date the promotional posts were created. The matter was challenged before the Supreme Court by the Government. In that case, though the promotion orders were issued in October, 1985, the contentions of the applicants was that the post had been created between 1984 and 1985, and, therefore, they should have been promoted from 01.07.1984. The Tribunal held that the promotion should be given effect to from the date "the posts were created". Same is the contention in the present case, where applicant wants promotion from the date of D.P.C. or from the

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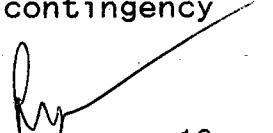
date when the vacancy arose. In para 5 of the judgement, the Supreme Court observed as follows :

"There is no statutory provision that the promotion to the post of Scientist 'B' should take effect from 1st July of the year in which the promotion is granted. It may be that, rightly or wrongly, for some reason or other, the promotions were granted from 1st July, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientists 'B' should be with effect from the date of the creation of this promotional posts. We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After the post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post fall vacant."

(Underlining is ours).

The Supreme Court allowed the appeal and set aside the order of the Tribunal. As already stated, the Learned Counsel for the applicant was not able to show any rule or provision or authority for the proposition that promotion must be deemed to have taken effect from the date of D.P.C. or date of vacancy.

We must hasten to add that there is one exception to the above rule that promotion takes effect from the date of actual promotion. That is, when a senior is superseded and a junior is promoted and the senior challenges his supersession, a Court or Tribunal may quash the supersession and direct that he shall be deemed to have been promoted when his immediate junior got promotion with consequential benefits like notional fixation of salary, notional seniority, etc. But here, such a contingency does not arise.



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Even if we reject defence of Government about giving effect to order of promotion from 01.01.2000 on the basis of O.M. of 1998, it will not help the applicant, since there is no rule or law which says that we should give effect to order of promotion from the date of vacancy.

8. In this case we passed an interim order dated 06.12.1999 where we gave a direction to the competent authority to give effect to the order of promotion or if it is not possible, then he must pass a considered speaking order. The competent authority has passed a speaking order dated 13.12.1999 stating that the promotion order cannot be given effect to with immediate effect in view of the two O.Ms. Further, it is pointed out that applicant's promotion itself is provisional, since the case filed by his senior has been allowed.

In this case, the applicant was not the senior most in the feeder cadre. The first person in the seniority list is Dharam Pal and the next person is Ram Babu and the applicant is the third person in the seniority list. As far as Dharam Pal is concerned, he was overlooked because of down grading of assessment made in the A.C.R. Dharam Pal filed O.A. No. 25/98 in the Principal Bench of this Tribunal. The judgement in Dharam Pal's case is filed by Ram Babu in his O.A. No. 925/99 (vide page 33 of the Paper Book in O.A. 925/99), which we are disposing of today. That O.A. was disposed of by the Principal Bench by order dated 10.05.1999 directing the administration to consider the case of applicant, Dharam Pal, for promotion by ignoring the down grading as 'average' and the grading should be read as 'Very Good'. In view of the judgement of the Principal Bench of the

Tribunal, now the department has to hold a review D.P.C. and consider Dharam Pal's case for promotion. If Dharam Pal is found fit to be promoted by the Review D.P.C. on the basis of service records in the light of the judgement of the Principal Bench of the Tribunal, then applicant will have to be reverted.

Similarly, Ram Babu is also senior to the applicant. Today we are disposing of Ram Babu's O.A. No. 925/99 with certain directions. If, on the basis of those directions and on the basis of review D.P.C. Ram Babu is found fit for promotion, then he may have to be promoted and the result will be, the applicant will have to be reverted. That is how in the speaking order dated 13.12.1999 the Competent Authority has already mentioned that applicant's promotion as provisional. Infact, the department has issued a corrigendum dated 28.12.1999 stating that applicant's promotion is provisional in view of decision given in Dharam Pal's case and in view of the pendency of Ram Babu's case in this Tribunal.

When the applicant's promotion itself is provisional, the question of ante-dating provisional promotion will not arise at all. As observed above, the action of the department in not giving immediate promotion to the applicant may not be correct if we go by the spirit and objects of the two O.Ms. of 1999. Even then, we cannot give a direction to the respondents to promote the applicant from a retrospective date, namely - the date of D.P.C. or date of vacancy, in view of the law declared by the Apex Court and in the absence of any provision in the rules that promotion shall take effect from the date of vacancy. Therefore, in the facts and circumstances of the case, we cannot

  
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give any relief to the applicant in the form of ante-dated promotion. In the light of the observations made above, it is open to the Government to make amendments to the O.Ms. of 1998 to see that genuine cases of promotions are not with-held or delayed due to wrong interpretation of the O.Ms. without bearing in mind the object and spirit of the 1998 O.M.

We must also mention that this is a case of promotion to a solitary post. There is only one post of Joint General Manager-II. That is why if Dharam Pal or Ram Babu is promoted by holding a review D.P.C., then applicant will have to be reverted, since there is no other place to accomodate him, since it being a solitary post. That is how the administration has treated the applicant's promotion as provisional in view of pending litigation of Dharam Pal and Ram Pal, who are admittedly seniors to the applicant.

9. In the result, the O.A. fails and is hereby dismissed. In the circumstances of the case, there will be no order as to costs.

B.N.Bahadur

(B. N. BAHADUR)  
MEMBER (A).

*R. G. Vaidyanatha*  
31-1-2000  
(R. G. VAIDYANATHA)  
VICE-CHAIRMAN.

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