

**Central Administrative Tribunal
Principal Bench**

OA No.176/2015

New Delhi, this the 10th day of January, 2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Ms. Nita Chowdhury, Member (A)**

1. Jai Bharat Agarwal
(Group "A" Retired Age 66 years, Pension matter)
S/o Late Shri Sham Sunder Lal,
602, Mahagun Maple,
F-26, Sector 50,
NOIDA, UP
2. Krishan Kumar Marwaha
(Group "A" Retired Age 62 years, Pension matter)
S/o Late Shri L.M. Marwaha,
17 DDA SFS Flats,
Ashok Vihar Phase-4,
Delhi-110052
3. Obaid Ahmad Khan
(Group "A" Retired Age 66 years, Pension matter)
110, Abdul Fazal Apartments,
Vasundhra Enclave,
Delhi-110096
4. Shri Chand Asnani,
(Group "A" Retired Age 67 years, Pension matter)
S/o Shri Hoond Raj T Asnani,
J-12/16 1st Floor,
Rajouri Gardens,
New Delhi-110027

- Applicants

(By Advocate : Shri B. S. Mathur)

VERSUS

Union of India and others
Through

1. Secretary (Commerce),
Ministry of Commerce,
Udyog Bhawan, New Delhi-110001
2. Director General (S&D),
DGS&D, Jeevan Tara Building,
5, Parliament Street,
New Delhi-110001

- Respondents

(By Advocate : Shri Sandeep Tyagi)

: O R D E R (ORAL) :

Justice Permod Kohli, Chairman:

Applicants in the present OA joined the Government service during the period 1970 to 1977 and Group 'A' category of Indian Supply Service in the year 1977 & 1978 through Engineering Service Examination, 1975 & 1976 conducted by the Union Public Service Commission (UPSC for short). They earned promotions to the post of Director (Supplies) from time to time. One Mr. M. A. Khan who was in the same cadre as the applicants was working as Director (Supplies). He filed OA No.2364/2008 before Principal Bench of this Tribunal claiming therein that he was promoted on 14.06.2007 as Director (ISS) JAG though the vacancy in the post of Director occurred on 31.10.2003, and he is entitled to be considered for ante dated promotion from the date of occurrence of vacancy. His contention was that OMs issued by the DoP&T required the vacancies to be filled up on yearly basis. His OA was allowed vide judgment dated 03.11.2009 with the following observations/directions:-

"6. Before we may part with this order, we may mention that the applicant himself along with two others filed OA No.603/2008 before this Tribunal. The relief asked for in the said OA was for grant of NFJAG. The said relief was also resisted by the respondents on one of the grounds raised in the present case, i.e., pendency of various court cases. We may refer to the relevant part of the pleadings made by the respondents in that case. It was inter alia pleaded that immediately after amendment of recruitment rules, the non-functional selection grade could not be granted for the reason that Shri A. K. Jain and five others, all in the Senior Time Scale of ISS, had filed a writ petition before the Supreme Court of India. The petition was for issuing a writ in the nature of certiorari to quash the 85th (Amendment) Act, 2001. In short, the litigation referred to in the reply, according to the respondents, became the reason for delayed grant of non-functional selection grade to the applicants. This plea and the contention based thereon was rejected by this Tribunal in its order dated 9.1.2009, and the learned counsel representing the parties were ad idem that the writ filed against the said order came to be dismissed by the High Court.

7. In view of the discussion made above, we allow this Application, directing the respondents to consider promotion of the

applicant from the year 2003 by constituting a review DPC, if required. Let this exercise be done as expeditiously as possible and preferably within a period of three months from today. There shall, however, be no orders as to costs.”

2. The competent authority considered the above directions and vide order dated 04.02.2010 (Annexure A-2) ordered grant of notional fixation of pay from the date of availability of vacancy, and for financial benefit of fixation of pay from the date of actual promotion to the post of Director (Supplies) in favour of Mr. M. A. Khan and the present applicants. This order was passed in compliance to the order dated 03.11.2009 passed by this Tribunal in OA No.2364/2008. Shri Khan was granted notional promotion w.e.f. 19.05.2004. All the applicants except applicant No.2 were also granted promotion w.e.f. 19.05.2004. Applicant No.2 got promotion w.e.f. 20.05.2004. Consequent upon their notional promotion from the back date and actual promotion from the date of availability of vacancy, the respondents revised the seniority list vide Office Memorandum dated 16.09.2010 (Annexure A-3). The applicants were granted all the benefits on such notional and actual promotion. It is relevant to note that the applicant No.4 had retired from service on 30.04.2007 before the date of grant of promotion to him. Other applicants retired from service on attaining the age of superannuation.

3. At the time of filing this Application, all the applicants had retired from service. The applicants have filed this Application being aggrieved of the order dated 17.07.2014 whereby promotion granted to the applicants to the post of Director from the date of occurrence of vacancies has been withdrawn. They have accordingly sought for the following reliefs:-

“(A) Direct the Respondents to withdraw their illegal and discriminatory Impugned Order no. C-18011/2/2009-A.1(Pt.) dated 17th July 2014.

(B) Grant any other relief which the Hon'ble Tribunal may consider fit under the facts and circumstances of the case."

4. The validity of the impugned order dated 17.07.2014 has been assailed on following grounds:-

4.1 That the order impugned has been passed in violation of principles of natural justice without issuing any show cause notice or without affording any opportunity of being heard to the applicants.

4.2 That the order impugned is bad in law as the same has been passed withdrawing the benefit of promotion after the retirement whereas the applicants had already earned the fruits of promotion.

4.3 That the order granting promotion was in fact in implementation of the judgment of this Tribunal dated 03.11.2009 which had attained finality, and thus withdrawal of promotion in violation of the directions of this Tribunal is contrary to law and against the dictum of the judgment of this Tribunal.

4.4 That the notional promotion was granted to the applicants on the basis of the selection panel recommended by the DPC against the year wise vacancy vide order dated 04.02.2010 and thus withdrawal of such promotion is impermissible in law.

5. The claim of the applicants is, however, resisted by the respondents. It is stated that the first three applicants were promoted to the post of Director, i.e., Junior Administrative Grade of ISS initially w.e.f. 14.06.2007. Applicant No.4, namely, Shri S. C. H. Asnani retired on 30.04.2007 before his promotion to the post of Director. Later on, promotion of all the applicants were ante dated to 01.07.2006 after considering their representation in view of the implementation of the Tribunal's order dated 03.11.2009 passed in OA No.2364/2008. It is

also stated that M. A. Khan was promoted to the post of Director on 14.06.2007. He filed OA No.2364/2008 before Principal Bench of this Tribunal which was allowed and a direction was issued to consider him for promotion against the vacancies of 2003. It is pertinent to note that while considering the claim of the applicant M. A. Khan in OA No.2364/2008, this Tribunal in para 5 of its order made following observations:-

“Assuming that there was some justification for the respondents to withhold promotions lock, stock and barrel, till such time the courts were to render decisions in various cases pending at different levels, then in that case, promotion of the applicant and others ought to have been considered from the date the vacancies occurred. Year-wise vacancies had to be notified and against such vacancies, eligible persons had to be considered.”

It is under the above observations that in compliance to the Tribunal's order the date of promotion of M. A. Khan and other similarly situated persons including the applicants were ante dated according to the occurrence of vacancies in the grade. The proposal for promotion to the post of DDG for vacancy year 2010-11 was submitted to UPSC. The UPSC, however, returned the proposal with the observation that the order dated 03.11.2009 passed by this Tribunal in OA No.2364/2008 was meant only for the applicant namely Shri M. A. Khan, but the same was extended by the department to some other officers that too without obtaining the approval of the Department of Personnel & Training and without consulting the UPSC. The UPSC, however, submitted that in accordance with para 6.4.4 of DoP&T's OM dated 10.04.1989 promotion will have only prospective effect even in cases where the vacancies relate to earlier years. It was accordingly mentioned that ante dating the promotion of officers to a date before the meeting of DPC is contrary to the DoP&T guidelines. The Commission also pointed out that extending the benefit of the order of the Tribunal to other officers without

consulting the DoP&T and Commission did not appear to be correct decision and it might have far reaching repercussions inasmuch as there was very likelihood of similar demands from other officers working in different levels in different departments. The Commission also referred to DoP&T's OM No.28027/9/99-Estt.(A) dated 01.05.2000 which *inter alia* provides that whenever there is any judgment/order of any court against the instructions issued by the Government, Ministry of Law & DOP&T may be consulted for their opinion prior to implementation of such orders of the court. The Commission accordingly asked the department to review the seniority list of the feeder cadre in the grade of Director in consultation with DoP&T and to send a revised proposal for consideration of the Commission thereafter. The matter was accordingly referred to DoP&T through department of Commerce. The DoP&T did not agree to the ante dating of promotion of the applicants and other officers in terms of its OM dated 10.04.1989. The department after due consultation decided to withdraw the order giving ante dating promotion to the officers other than Mr. M. A. Khan, and their promotions were to be effected from the date of actual appointment which resulted in passing of the impugned order.

6. The applicants have filed rejoinder to the counter affidavit filed by the respondents. Along-with the rejoinder, the applicants have placed on record a communication dated 01.11.2011 from the Ministry of Commerce and Industry to the Secretary, UPSC in response to UPSC's letter dated 10.11.2010. In this communication, it is stated that the Ministry of Commerce on the advice of the UPSC consulted DoP&T and Ministry of Law in order to finalize the issue. The advice of the DoP&T has been noticed in the communication. The DoP&T gave its advice as under:-

“The grant of ante-dated seniority is not as per instructions issued by this Department. For the purpose of seniority and qualifying service for eligibility for promotion to next higher grade, only the regular service in grade after date of holding of DPC is to be counted. The administrative department may take decision keeping in view the advice of Department of Legal Affairs on page-82/N ante.

And

“This Department does not suggest ante-dating of promotion/seniority against the principle brought out above. Supreme Court on number of judgments has held that there is no claim for promotion from the date of vacancy. Unless there is an allegation of malafide, interference of court in settled establishment principles needs to be agitated. However, the Department has implemented judgment on their own and if any legal recourse is available to them may be decided by them in consultation with Department of Legal Affairs.”

On the basis of the aforesaid advice of the DoP&T, the matter seems to have been referred to the Department of Legal Affairs. Based upon the advice of the DoP&T and Department of Legal Affairs, the Commerce Ministry communicated to the UPSC as under:-

“3. On the basis of advice tendered by DoP&T as above, the matter was considered by Supply Division keeping in view the advice of Department of Legal Affairs and it has been decided to allow the issue to rest as nothing now can be done to change the status and seniority of the officers who have been duly given these after the decision taken by the competent authority in Department of Commerce.

4. In view of the advice tendered by Department of Commerce as above, the decision taken by Supply Division to allow the issue of grant of ante-dated seniority to Shri M.A. Khan and others to rest is brought to the notice of UPSC.”

The applicants have also placed on record copy of the advice of the Ministry of Law and Department of Legal Affairs as Annexure A-4. The said advice is reproduced hereunder:-

“In the order dated 3.11.2009, Hon’ble Tribunal have gone into facts and merits of the case and have categorically, inter alia, held that the instructions with regard to convening DPC every year for selection against vacancies that may occur, are also not in dispute. The only reason for not convening the DPCs regularly for year-wise vacancies, as stated by the respondents (Govt.), is the litigation with regard to seniority pending in different fora. However, inasmuch as there was no stay, Hon’ble CAT did not find that the respondents (Govt.) were justified in awaiting decision of

all cases. There would be no justification whatsoever for the respondents (Govt.) to stall promotions of the employees, which in a given case, may span over for even more than a decade. Assuming that there was some justification for the respondents (Govt.) to withhold promotions lock, stock and barrel, till such time the courts were to render decisions in various cases pending at different levels, then in that case, promotion of the applicant and others ought to have been considered from the date the vacancies occurred. Year-wise vacancies had to be notified and against such vacancies, eligible persons had to be considered. With such explicit findings, Hon'ble Tribunal allowed the OA. Further, the plea of the Govt./respondents were also rejected by Hon'ble Tribunal in the contempt Petition filed by the Petitioner.

It is further observed that the said order of Hon'ble CAT have been accepted and implemented by the Administrative Department for the petitioner and similarly placed officers and have not been challenged by anyone. Apparently, by such implementation no one is aggrieved and there is no change in inter-se seniority position amongst the officers of Indian Supply Service. The order of the Hon'ble CAT has resulted in the notional fixation of pay from the date of occurrence of vacancies for the officers. These orders of Hon'ble CAT is more than one and half year old and have been implemented without any grievance by anyone and the consequential benefits of fixation of pay and arrears have been granted to the concerned officers, some of them have also retired.

The above order of Hon'ble Tribunal is in line with the Hon'ble Apex Court judgment in Civil Appeals No.16986-87 of 1996, arising out of SLPs (C) No.22692-93 of 1996, Union of India vs. N. R. Banerjee & Others.

Hence, Administrative Department has no legal ground or merit in this case to challenge the aforesaid judgment dated 3.11.2009 in OA No.2364/2008. At present, Administrative Department has the only option to proceed with the implemented position of the seniority of the ISS Officers. However, this pertains to specific case of officers of ISS service and would not amount to precedence for other services.”

7. The applicants have further referred to the Office Memorandum dated 03.09.2009 issued by the Additional Secretary to Government of India, Ministry of Law and Justice, Department of Legal Affairs. This Office Memorandum refers to the sanctity of the advice rendered by the Ministry of Law and Justice, Department of Legal Affairs. The relevant extract is reproduced hereunder:-

“Under the Government of India (Allocation of Business) Rules, 1961, giving of advice on legal matters and interpretation of laws is one of the primary functions of the Department of Legal Affairs. As early as in 1967, vide OM

No. F.18 (1)/69-O&M dated 20th May 1967, this Department has emphasized that in a case, if the Ministry/Department feels that the facts of the case have not been fully appreciated or further clarification is needed in any matter, the case may be referred back to this Department for consideration and advice in the matter. If, after further reference, the Department adheres to its previous advice, the same should be followed by the Ministry/Department concerned. It is not appropriate on the part of any Ministry/Department to say that neither the latter is bound by the advice given by this Department nor can refuse to follow such advice. These instructions have been reiterated from time to time in the past.”

8. We have heard learned counsel for the parties.
9. The entire case of the applicants rests on two principal questions: (i) whether the benefit granted to civil servants, that too, in implementation of any judgment of the Tribunal can be withdrawn in contravention of the judgment and (ii) whether such benefit can be withdrawn without following the principles of natural justice.
10. It is admitted case of the parties that the applicants were given ante-dated notional benefit of promotion vide order dated 04.02.2010 in implementation of the judgment dated 03.11.2009 passed in OA No.2364/2008 being similarly placed. The Tribunal while considering the claim of the applicants directed the respondents to consider the promotion of the applicants from the year 2003 by constituting a review DPC, if required. It is also not in dispute that the present applicants were similarly situated to that of applicant in OA No.2364/2008, namely, Shri M. A. Khan. The Department of Commerce in its wisdom considered the claim of M. A. Khan in terms of the judgment and as also the applicants who made representations for similar benefit, and passed the order dated 04.02.2010 granting them the benefit of notional promotion retrospectively and the financial benefits from the date of actual promotion. Not only this, in implementation of the aforesaid order, seniority list of officers of ISS Group ‘A’ in the Junior Administrative

Grade, i.e., Director (Supplies) was also revised. The judgment has attained finality. On the basis of the benefit granted to the applicants and M. A. Khan vide order dated 04.02.2010, pension of the applicants was fixed at the time of their retirement. The issue attained finality. It was only when the case of the eligible candidates for next promotion to the post of DDG was forwarded to the UPSC, the UPSC pointed out the so called irregularity in granting promotion to the applicants retrospectively. Admittedly, the applicants had retired and they had no stake in further promotion to the post of DDG. Such an opinion of the UPSC at that stage was totally uncalled for.

11. It is also not disputed that there are innumerable judgments of the Apex Court wherein retrospective promotion is not allowed unless the rules so prescribe. However, the facts and circumstances of the present case are totally different. The judgment of the Tribunal having attained finality, the department had no option but to implement the same. This was even the advice given by the Ministry of Law & Justice, Department of Legal Affairs vide letter dated 25.07.2011 (Annexure A-4). The Ministry of Law & Justice, Department of Legal Affairs also referred to the judgment of Apex Court in SLPs (C) No.22692-93 of 1996 ***Union of India vs. N. R. Banerjee & others*** to support its opinion that the judgment dated 03.11.2009 passed in OA No.2364/2008 cannot be avoided. Rather, the Ministry suggested that the department has the only option to proceed with the implemented position of the seniority of ISS Officers and it would not amount to precedence for other services. Even this advice has been totally ignored and the benefits granted to the applicants vide order dated 04.02.2010 have been withdrawn. Such recourse is impermissible in law. Apart from that, the other question is that the benefit granted to the applicants vide order dated 04.02.2010

has been unilaterally withdrawn by the respondents even without putting the applicants to notice, while passing the impugned order dated 17.07.2014. All the applicants had retired when the impugned order dated 17.07.2014 came to be passed. They have also earned their pension based upon the pay fixation and the benefit granted to them. The impugned order is also in violation of the principles of natural justice. It is nobody's case that the applicants ever misrepresented to the respondents to secure the benefit. Under such circumstances, the action of the respondents is totally unjustified, illegal and unwarranted.

12. For the above reasons, this OA is allowed. Impugned order dated 17.07.2014 is hereby set aside. No order as to costs.

(Nita Chowdhury)
Member (A)

(Justice Permod Kohli)
Chairman

/pj/