

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A.No.1253/2015

Tuesday, this the 13th day of October 2015

**Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Dr. B. K. Sinha, Member (A)**

Dr. S.C. Bansal, aged 59 years
s/o Mr. Kunwar Pal Gupta
r/o 26, Radhey Shyam Park
G T Road, Sahibabad
Ghaziabad 201005

Also at

Dr. S C Bansal
Deputy Director (S&R)
Department of Food and Public Distribution
Govt. of India
Krishi Bhawan, New Delhi-1

(Mr. S K Tyagi, Advocate) ..Applicant

Versus

1. Union of India through Secretary
Ministry of Consumer Affairs Food & Public Distribution
Department of Food and Public Distribution
Krishi Bhawan, New Delhi-1
2. The Deputy Secretary (SRA)
Department of Food and Public Distribution
Krishi Bhawan, New Delhi-1

..Respondent

(Ms. Bhaswati Anukampa, Advocate)

O R D E R (ORAL)

Mr. A.K. Bhardwaj:

The applicant joined the Government of India, Ministry of Consumer Affairs Food & Public Distribution, Department of Food & Public Distributor as Assistant Director (S&R) in the year 1992. In terms of the recruitment rules for the post of Deputy Director, 50% posts are to be filled

by promotion from amongst Assistant Directors (S&R). Nevertheless, when the posts were not filled for more than one year, by operation of Ministry of Finance's instructions, the same were abolished. Subsequently, in October 2010, six posts of Deputy Director (S&R) were revived and the applicant was given *ad hoc* promotion against one of the posts w.e.f. 1.11.2010. Finally, he was given regular promotion as Deputy Director in September 2013. In the present Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has sought issuance of direction to the respondents to give him regular promotion to the post of Deputy Director w.e.f. 1.11.2010, i.e. the date on which he was promoted on *ad hoc* basis.

2. Mr. S K Tyagi, learned counsel for applicant argued with aplomb that once there were vacancies available on 1.11.2010 and the applicant was given *ad hoc* promotion, there is no reason to deny regular promotion to him from the said date. To buttress his plea, he placed reliance upon the judgment of Hon'ble High Court of Delhi in **Sunil Kumar Mehra v. MCD & another** (W.P. (C) No.2059/2012) decided on 8.5.2013.

3. On the other hand, learned counsel for respondents espoused that in terms of paragraph 6.4.4 of the Department of Personnel & Training's O.M. No.22011/5/86-Estt. (D) dated 10.4.1989, promotions may be effective either from the date of recommendations of the Departmental Promotion Committee (DPC) or assuming the charge of the post by the incumbent, whichever is later.

4. We heard the learned counsels for the parties and perused the record.

5. As has been ruled by the Hon'ble Supreme Court in **Union of India & others v. Majji Jangammayya & others**, AIR 1977 SC 757, it is for the State to take decision regarding filling up of the vacancies or keeping the same vacant as long as it wishes. The relevant excerpt of the said judgment reads thus:-

“58. The observations of this Court in Bishan Sarup Gupta's case (AIR 1972 SC 2627) (supra) are that if as a result of the fresh seniority list it is found that any officer was eligible for promotion to the post of assistant Commissioner on account of his place in the new seniority list, the department might have to consider his case for promotion on his record as on the date when he ought to have been considered and if he would be selected his position will be adjusted in the seniority list of Assistant Commissioners. The object is to see that the position of such a person is not affected in the seniority list of assistant Commissioners because he is actually promoted later pursuant to the new seniority list although according to the new seniority list itself he should have been promoted earlier. The observations do not mean that although the Committee can meet for the selection of officers for promotion to the post of Assistant Commissioner only after the seniority list is approved by this Court, the selection would be deemed to be made at the time when a vacancy in the post of Assistant Commissioner occurred and the eligibility of officers for selection will be determined by such deemed date of selection. No employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs. Government has the right to keep the vacancy unfilled as long as it chooses. In the present case, such a position does not arise because of the controversy between two groups of officers for these years. The seniority list which is the basis for the field of choice for promotion to the post of Assistant Commissioner was approved by this Court on 16 April, 1974. Promotions to the post of Assistant Commissioners are on the basis of the selection list prepared by the Committee and are to be made prospectively and not retrospectively.”

6. In **Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur & another**, 1988 SCC (L&S) 1754, it could be ruled that no employee has acquired a right to promotion from the date of availability of vacancies. Paragraphs 8 & 9 of the judgment read thus:-

"8. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. It is not the case here. From the promotional quota, four promotions were made only on 30.12.1996 i.e., after the appellant had retired. Those promoted were given promotions from the dates the orders of their promotions were issued and not from the dates the posts had fallen vacant. It is also the contention of the High Court that these four officers, who were promoted to RHJS, were senior to the appellant as per the seniority list. The question which falls for consideration is very narrow and that is if under the Rules applicable to the appellant promotion was to be given to him from the date the post fell vacant or from the date when order for promotion is made. We have not been shown any rule which could help the appellant. No officer in RJS has been promoted to RHJS prior to 31.05.1996 who is junior to the appellant. Further decision by Rajasthan High Court has been taken to restore the imbalance between the direct recruits and the promotees which, of course, as noted above, is beyond challenge.

9. In Union of India and Ors. v. K K Vadera and Ors., AIR 1990 SC 442 this Court with reference to Defence Research and Development Service Rules, 1970, held that promotion would be effective from the date of the order and not from the date when promotional posts were created. Rule 8 of those Rules did not specify any date from which the promotion would be effective. This Court said as under:-

"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 the 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 these 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 a 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 falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

7. Such position was also reiterated by the Hon'ble Supreme Court in **State of Uttarakhand & another v. Dinesh Kumar Sharma, 2006** (13) SCALE 246. Relevant excerpt of said judgment reads thus:-

"18. With regard to the issue as to whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether seniority will be reckoned from the date of substantive appointment which is 1999, it can be observed that an employee will be considered member of a cadre from the date of his/her substantive appointment in the cadre after selection. Substantive appointment is defined under Rule 3 (k) of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 where:

"Substantive appointment" means the appointment not being an ad-hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and if there are no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government.

Therefore it is clear that unless a selection is made in accordance with the rules and in the absence of rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government and there can be no automatic promotion or appointment to any post on the recommendation of the Public Service Commission, unless the government sanctions such promotion and appointment.

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23. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of Jagdish Ch. Patnaik and Ors. v. :State of Orissa and Ors. [1998]2SCR676 .

24. Coming to the question of whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rule s, 1991 and grant a relief in favour of the respondents, it will be helpful to reproduce the High Court's order:

From the perusal of the aforesaid order, it is clear that the authority has not applied its mind on the facts of the case as stated by the petitioner, in the representation, and has rejected the representation on the ground that since the appointment

letter was issued to the petitioner on 19.11.1999, therefore he is entitled to his seniority from that date. Even if the recruitment year is changed the order of appointment cannot be made with retrospective effect. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999. Therefore, this could have consequently affected the consequential benefits available to the petitioner had his promotion being made w.e.f. the date of promotion of falling of vacancy. Therefore, the order dated 1st October, 2002 suffers from non application of mind and is hereby liable to be ignored.

The fact that the vacancy had fallen on 1st May, 1996 and 1st June, 1996 in the recruitment year 1995-96 are not disputed by the respondents. The petitioner cannot be made to suffer on account of delay in recommendation by the Director of Agriculture for promotion of the petitioner. The petitioner cannot be held responsible and cannot be made to suffer as such became entitled to be considered for promotion on 1st May, 1996. Therefore, the government is directed to re-consider the matter and send it back to the Commission for appropriate orders suitable in the facts and circumstances of the case. Subject to the above, the writ petition is disposed off finally.

This observation of the High Court in our view is erroneous. The High Court while observing that, "the appellants rejected the representation of the respondents on the ground that since the appointment letter was issued to the respondent on 19.11.1999, he is entitled to his seniority from that date. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999", has committed an error in understanding and appreciating Rule 17 and 21 of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, which categorically states that the date of 'substantive appointment' will be the date that shall be taken for determining promotion, seniority and other benefits."

8. As far as the view taken by the Hon'ble High Court in **Sunil Kumar Mehra's** case (supra) is concerned, the same is taken in the wake of

peculiar circumstances prevalent in the Corporation where the regular DPCs did not meet for years together and the employees were given more than one *ad hoc* promotions. In the said case, since after acquiring the eligibility for the post of Additional Town Planner the applicant continued on the post for fairly long spell, the Hon'ble High Court directed for reckoning his seniority from the date of his *ad hoc* appointment to the post. In the sake case, it could be ruled that the MCD was under a legal duty to convene a DPC to make promotion to the post of Additional Town Planner in respect of the vacancy year 1997 because a vacancy arose on 1.7.1996 when Mr. Ashok Kumar Khanna superannuated a day prior. MCD did not do the needful but waited for nine years. In the present case, it is not so that after revival of the post in the year 2010 respondents delayed the regular promotion, like in the case of Sunil Kumar Mehra (*ibid*).

9. In the circumstances, we nix the prayer of the applicant for regular promotion. Nevertheless, it would be open to the respondents to examine the case of the applicant for treating the regularization of his promotion from the date of *ad hoc* promotion in their own wisdom.

10. With these observations, the Original Application stands disposed of. No costs.

(Dr. B.K. Sinha)
Member (A)

October 13, 2015
/sunil/

(A.K. Bhardwaj)
Member (J)