

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI**

**OA NO.1323/2012
&
OA NO.1342/2012**

RESERVED ON 18.09.2015
PRONOUNCED ON 27.10.2015

**HON'BLE MR. JUSTICE B.P. KATAKEY, MEMBER (J)
HON'BLE MR. K.N. SHRIVASTAVA, MEMBER (A)**

OA No.1323/2012

Madan Lal,
S/o late Shri Mohan Lal,
R/o B-1040 A, Ansal Palam Vihar,
Gurgaon-122017 (Haryana). ...Applicant

(By Advocate: Mr. L.R. Khatana)

VERSUS

1. Union of India,
Through Secretary to the
Govt. of India,
Department of Personnel & Training,
Ministry of Personnel, P.G. & Pensions,
North Block, New Delhi-110001.
2. Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001. ...Respondents

(By Advocate: Mr. R.N. Singh)

OA No.1342/2012

Sodi Ram
S/o late Shri Fakuir Chand,
R/o D-391, Street No.14A/7,
Sadh Nagar Palam Colony,
New Delhi-110045. ...Applicant

(By Advocate: Mr. L.R. Khatana)

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(By Advocate: Mr. R.N. Singh)

:ORDER:

HON'BLE MR. JUSTICE B.P. KATAKEY, MEMBER (J):

The applicants in OA No.1323/2012 and OA No.1342/2012, who retired from service on attaining the age of superannuation on 18.04.2007 and 30.06.2006, respectively, have filed these OAs challenging the order dated 27.02.2012 passed by the Government of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, rejecting their claim for notional promotion to the grade of Under Secretary with effect from the 1st of July of the year in which they were included in the select list i.e. 2003 and 2004, respectively.

2. Both the OAs are taken up for hearing and disposal together as the issue involved in both the OAs is identical and as agreed to by the learned counsel for the parties.

3. It has been contended by the learned counsel for the applicants that since they have been selected for promotion to the grade of Under Secretary and their names were included in the select list for the year 2003 and 2004, respectively, they are entitled to get the notional promotion with effect from 1st July of the year of selection, though they have retired from service when the said select lists were published, more so when the persons junior to them in the said select list have been given the benefit of promotion with effect from 1st July of the year of selection, when the applicants were in service. Referring to the Office Memorandum dated 25.08.2009 issued by the Government of India, Ministry of Personnel, Public Grievances & Pensions (Department of Personnel & Training), it has been submitted that since the regular select list could not be drawn within the prescribed period due to protracted litigation and for no fault of the applicants, they are entitled to get their notional promotion with effect from 1st July, 2003 and 2004, respectively, there being stipulation in the said OM that the appointment of the officers included in the select list may be deemed to have been made effective with effect from 1st July of the year of selection, for the purpose of approved service and for fixing their pay as Under Secretary on notional basis.

4. The learned counsel referring to the decision of this Tribunal dated 22.04.2010 in OA No.1409/2009 (**P.G. George Versus**

Union of India and another) and batch has submitted that a Co-ordinate Bench of this Tribunal has also held that the applicants therein, who have retired from service prior to the publication of the select list, would be entitled to the benefit of notional promotion from the date their immediate juniors were promoted and consequently direction for recalculation of post-retirement dues was issued, which benefit, however, has been denied to the applicants only on the plea that the order passed in the said cases is limited to the applicants therein only and cannot be applied to the present applicants, even though the respondent-authority has implemented the direction issued by this Tribunal in the said order. The learned counsel further submits that since the benefit of notional promotion has been given to the similarly placed persons, who were selected for the years 2003 and 2004, denial of such promotion to the applicants would be arbitrary and would infringe the guarantee of equality in Article 14 of the Constitution of India. The learned counsel, therefore, submitted that the necessary direction may be issued to the respondent-authority to grant the benefit of notional promotion to the applicants to the grade of Under Secretary with effect from the date when such promotion was granted to persons junior to them and also for refixation of their retiral benefits.

5. Per contra, the learned counsel appearing for the respondents submits that the applicants are not entitled to the

benefit of notional promotion in terms of the Office Memorandum dated 25.08.2009, since the applicants on the date of issuance of the said Office Memorandum were admittedly not in service having retired. The learned counsel submits that since the applicants have already retired from service on the date when the select list was published, they cannot claim the promotion, based on their selection, being not in service, due to the simple reason that the promotion can be granted only to the persons who are/were in service on the date of publication of the select list. Referring to the DOP&T OM dated 12.10.1998, it has also been submitted that a retired officer, after his retirement, is considered for empanelment only for the purpose of identification of correct zone of consideration, when the DPC meeting could not be convened while the officer was in service. It has been submitted that empanelment of such retired officer, would not create any right to claim notional promotion. The learned counsel further submits that the decision rendered by this Tribunal in **P.G. George** (supra) is not applicable in the facts and circumstances of these cases. The learned counsel, in support of his contention, has submitted that though this Tribunal vide order dated 07.02.2007 passed in OA No.1466/2006 (**R.N. Malhotra Versus Union of India**) had directed the respondents to grant notional promotion, the same has been set aside by the Hon'ble High Court of Delhi vide order dated 06.07.2012 passed in W.P.(C)

No.4908/2007 (**Union of India Versus R.N. Malhotra**) by holding that a retired employee would not be entitled to notional promotion unless and until an officer junior to such retired officer had been promoted prior to his superannuation. The learned counsel has also placed reliance on another judgment of the Hon'ble High Court of Delhi dated 12.04.2013 passed in W.P. (C) No.8102/2012 (**Union of India and another Versus K.L. Taneja and another**).

6. In reply to the arguments advanced by the learned counsel for the respondents, learned counsel for the applicant has submitted that the decision rendered by the Hon'ble High Court of Delhi in **R.N. Malhotra and K.L. Taneja** (supra) are not applicable in the facts and circumstances of this case, since the issue involved in those cases was different from the issue involved in the present case, apart from the relevant rules, upon appreciation of which the aforesaid judgments were delivered by the Hon'ble High Court.

7. The arguments advanced by learned counsel for the parties received our due consideration. We have also perused the pleadings of both the parties.

8. The undisputed fact is that the applicants in OA No.1323/2012 and OA No.1342/2012 were due for consideration for promotion to the cadre of Under Secretary in the years 2003

and 2004, respectively. No select list, however, could be prepared, as required under Rule 12(2) of the Central Secretariat Service Rules, 1962 (in short 1962 Rule) and the Central Secretariat Service (Promotion to Grade I and Selection Grade) Regulations, 1964 (in short 1964 Regulation), for appointment to the Grade I of the CSS due to the protracted litigation. The applicants in no way were parties to the delay in preparation of the select list. Admittedly, the applicants in OA No.1323/2012 and OA No.1342/2012 were eligible for consideration for promotion to the Grade I of the CSS i.e. Under Secretary for the year 2003 and 2004, respectively, select list for which, however, could not be prepared for the reasons as aforesaid, which has also been reflected in the Office Memorandum dated 25.08.2009 and 07.01.2010 by which the select lists pertaining to the years 2003 and 2004 to 2008, respectively, were published.

9. The Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) by the said Office Memorandum dated 25.08.2009 has published select list for the year 2003, prepared under Rule 12(2) of the 1962 Rules and the 1964 Regulations, for appointment to the Grade I of the CSS. In the said Office Memorandum it has been stipulated in para 3 as under:-

"3. The vacancies against which officers have been included in the Select Lists relate to the period from 1st July, 2003 (the Select List year) to 30th June,

2004 (the following year). The regular Select List could not be drawn within the prescribed period for such panel due to protracted litigation and these panels have gone in arrears. Therefore, the appointment of the officers included in the aforesaid Select List may be deemed to have been made effective with effect from 1.7.2003, for the purpose of approved service and for fixing their pay as Under Secretary on notional basis. The actual benefits however would be available only from the date, officers are so appointed to the grade of Under Secretary of CSS."

10. Similar notification was also issued by the same authority on 07.01.2010 publishing the select list for the years 2004 to 2008 for promotion to Grade I of CSS. Para 3 of the said OM dated 07.01.2010, which is relevant on the issue involved, is reproduced below:-

"3. The vacancies against which the officers have been included in the Select Lists relate to the period from 1st July, 2004 (the Select List year) to 30th June, 2005 (the following year) so on and so forth for the subsequent Select Lists' years. The regular Select Lists could not be drawn within the prescribed period due to ongoing litigation and resultantly these panels had gone in arrears. Therefore, the appointment of the officers included in the aforesaid Select List year, for the purpose of approved service and for fixing their pay as Under Secretary on notional basis. The actual benefits however would be available only from the date, officers are so appointed to the grade of Under Secretary of CSS and assume charge of the post."

11. The applicants in these OAs have made specific averments that the persons junior to them have been promoted to the Grade I of CSS. In OA No.1323/2012 it has been pleaded that one Shri Pratap Singh Verma, whose name was empanelled in the extended panel of 2003 has been given the benefit of notional

promotion w.e.f. 1st day of July 2003. In OA No.1342/2012 it has been pleaded that Shri S.K. Gandhi, Ms. Geeta Bhatia, Shri S.K. Chhikara, Shri P. Shashi Kumar and Shri Jai Bhagwan Khokar, whose names appeared in the select list subsequent to the year 2004, for which year the applicant was selected, have been given notional promotion w.e.f. 1st July of their years of selection. Such positive assertion of the applicants have not been denied by the respondents.

12. In **P.G. George** (supra), a Co-ordinate Bench of this Tribunal while considering the issue as to whether the employees, who have retired from Government services, would be eligible for notional promotion retrospectively, if the meeting of the Departmental Promotion Committee held after their retirement considered them fit for promotion and persons junior to them have been promoted retrospectively from the date when such persons (applicants therein) were in service, having regard to the various provisions of 1962 Rules as well as various judicial pronouncements, more particularly the definition of 'approved service', has held that the applicants therein are entitled to the benefit of notional promotion and accordingly directed the respondents to grant notional promotion to the applicants therein from the date when their immediate juniors were promoted in various select lists for the years 2003, 2004, 2005 and 2006 and also to recalculate their post-retirement dues.

13. Though the respondents in **P.G. George** case (supra) challenged the aforesaid order of this Tribunal dated 22.04.2010 before the Hon'ble High Court of Delhi in W.P. (C) No.4864/2010, the same has been dismissed by agreeing to the view expressed by this Tribunal in the aforesaid order. The relevant paragraphs of the said judgment are reproduced below:-

"7. Suffice would it be to state that as correctly held by the Tribunal, if the Department fails to convene a Department Promotion Committee in time and gives no reasons for delay and then considers all the eligible candidates as on the date of vacancy and by the time a few, who are empanelled, have retired they cannot be denied the benefit of a notional appointment to the post in question. As rightly held by the Tribunal, having not worked on the post in question they would not be entitled to wages, but for purposes of pension, after giving them notional appointment, pensionary dues would have to be paid in the applicable scale.

8. The Tribunal has rightly held that under the OM dated 12.10.1998, the only bar is that the benefit of actual promotion would not be given to these employees, meaning thereby, the retired employees would not get wages. But, the impact of the circular dated 13.2.2009 where it is clearly stated that the empanelled candidates would be benefit to the dues on notional basis would mean that such retired employees who could not get actual promotion would be entitled to notional promotion.

9. We may wish to add one extra reason in support of the finding returned by the Tribunal.

10. Learned counsel for the petitioner concedes that such Government employees who are empanelled at a later date and are still in service are granted notional promotion to the post in question with effect from the date of the vacancy, meaning thereby, these candidates are given the applicable pay scales with increments in the scale with effect from a retrospective

date, but salary in the higher scale with increments is paid from the date they joined. This means that the benefit of notional promotion in the form of being placed in the higher pay scale with a retrospective date is given to them. Thus, there is no reason why the same benefit be also not extended to the retired employees who could not earn promotions for no fault of theirs.

11. As an extended limb of our aforesaid reasoning would be the argument that if the petitioner is permitted to not give notional benefits to the retired employees there would be chances of favouritism, corruption and nepotism for the reason it would be very easy to delay the declaration of result of the DPC and thereby ensure that an empanelled candidate stands retired and the benefit to go to the next one.

12. There is one more reason to be added. What is the use of including the names of retired persons by including them in the zone of consideration when as a matter of fact they have to be given no promotion. Besides, it is settled law that only those persons who are eligible to be promoted have to be put in the zone of consideration and it would be a case of inverted logic to say that the retired persons are not eligible to be promoted (notionally), but are eligible to be within the zone of consideration. One cannot operate simultaneously in two mutually contradictory directions."

14. In **R.N. Malhotra** (supra), a Co-ordinate Bench of this Tribunal vide order dated 07.02.2007 had directed the respondents therein to consider grant of notional promotion to the applicants for the purpose of pay fixation and retiral benefits, on the backdrop of the fact that those applicants, who have retired from service, could not be considered, when in service, as DPC was not convened timely and as per the DOP&T OM dated 12.10.1998, though they have been considered for promotion but

they have no right for actual promotion. The Hon'ble High Court has set-aside the said direction of this Tribunal by holding that a retired officer would not be entitled to notional promotion unless and until an officer junior to such retired officer had been promoted prior to his superannuation. The Hon'ble High Court had also taken note of the fact that no officer junior to Sri R.N. Malhotra had been promoted prior to Sri Malhotra's superannuation. The Hon'ble High Court had also taken into consideration the DOP&T OM dated 12.10.1998 as well as various pronouncements of the Hon'ble Supreme Court. However, the fact remains that the Recruitment Rules concerned in **P.G. George** case and **R.N. Malhotra** case are different.

15. We are, therefore, confronted with two decisions of the Hon'ble High Court, one passed in **P.G. George** case, having regard to the Recruitment Rules i.e. 1962 Rules as applicable in the case in hand, upholding the decision of this Tribunal directing grant of notional promotion to the applicant, who had retired from service when the DPC considered him for promotion, with effect from the date when his juniors were promoted, the other passed in **R.N. Malhotra** case, in which different Recruitment Rules was applicable, holding that a retired officer is not entitled to notional promotion unless and until an officer junior to such retired officer had been promoted prior to his superannuation.

16. In **K.L. Taneja** (supra), the Hon'ble High Court, taking note of various pronouncements of the Hon'ble Supreme Court has summarized as follows:-

"21. The cornucopia of case law above noted brings out the position:-

- (i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.
- (ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date would be valid because of a power existing to do so.
- (iii) Since mala fides taints any exercise of power or an act done, requiring the person wronged to be placed in the position the person would find himself but for the mala fide and tainted exercise of power or the act, promotion from a retrospective date can be granted if delay in promotion is found attributable to a mala fide act i.e. deliberately delaying holding DPC, depriving eligible candidates the right to be promoted causing prejudice.
- (iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.

17. The OM dated 12.10.1998, on which much thrust has been given by the respondents, states that while retired employee may be considered for promotion in the select list of the years in which they were in service, but they would not be eligible for actual promotion. It also provides that the purpose of inclusion of the retired employees in the list of eligible persons for inclusion in the select list is to ensure

that those persons, who were not eligible for inclusion in the zone of consideration at that time, should not get in because of non inclusion of the names of the persons, who were in service at that time in the list of eligible employees, only because they have retired. The said OM, however, does not bar notional promotion, while it bars actual promotion. It is true that actual promotion from retrospective date could not be given even to employees who were in service. However, if a person junior to a retired employee is promoted with retrospective effect, from the date when the retired employee was also in service, such benefit cannot be denied to the retired employee. The aforesaid OM dated 25.08.2009 and 07.01.2010, relevant portions of which have also been quoted above, provide that the approved service in respect of the persons, who have been included in the select list for the years 2003 and 2004 to 2008 would be counted from the first July of the select list year in terms of Rule 2 (c) (iii) of 1962 Rules. Pursuant to the said stipulation, the notional promotion to all those who have been included in the select list have been given from the first July of the year for which they were selected.

18. The decision of the Hon'ble High Court in **R.N. Malhotra** (supra) and **K.L. Taneja** (supra), in view of the aforesaid stipulation in the aforesaid OM for counting the

approved service in respect of the officers, who have been included in the select list with effect from the first July of the respective select list year, in terms of Rule 2 (c) (iii) of 1962 Rules, are not applicable in the case in hand. Moreover, the decision rendered by the Hon'ble High Court in the aforesaid cases do not relate to the 1962 Rules, which defines the 'approved service' and provides for counting of the same with effect from the first July of the respective select list year. That apart, in K.L. Taneja the Hon'ble High Court has held that if there exists a rule authorizing the Executive to accord promotion from a respective date, the same would be valid because of a power existing to do so.

19. The respondents, in fact, have implemented the direction issued by this Tribunal in **P.G. George** case, which has been upheld by the Hon'ble High Court. By such implementation, the benefit of notional promotion to the retired persons for the select list year-2003, 2004 and 2005 has been extended, without, however, extending the same benefit to the applicants, who were selected in the select list year 2003 and 2004. The respondents in view of the said decision ought to have extended the benefit of the order passed by this Tribunal to the persons, who have retired, but were selected, they being similarly placed with the applicants in the said OA. The respondent cannot deny

the said benefit to similarly placed persons on the ground that they were not parties to the said OA. The action on the part of the respondents in denying the said benefit, which has been extended to the similarly placed persons, is discriminatory and cannot be sustained in law.

20. In view of the aforesaid discussion, we are of the view that the applicants are entitled to notional promotion, pursuant to their selection, with effect from the date when their juniors were promoted. The respondents are, therefore, directed to recalculate the post retirement dues payable to the applicants and pay the same within a period of three months from today.

21. The OAs are, accordingly, allowed to the extent indicated above. No costs.

(K.N. Shrivastava)
Member (A)

(B.P. Katakey)
Member (J)

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