

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

O.A. No.100/3519/2013

New Delhi this the 10th day of January, 2017

HON'BLE MR. JUSTICE PERMOD KOHLI, CHAIRMAN
HON'BLE MS. NITA CHOWDHURY, MEMBER (A)

Shri Dinesh Kumar Singh
S/o Shri P.P. Singh
R/o 24-C, Evershine Apartments,
D-Block, Vikas Puri,
New Delhi-110018.

.. Applicant

(By Advocate: Shri Manoj Ranjan Sinha)

Versus

1. Union of India
Through Secretary-Commerce,
Department of Commerce
(Supply Division)
Udyog Bhawan,
New Delhi-110001.
2. The Secretary,
Department of Personnel & Training,
North Block,
New Delhi.
3. Secretary,
Union Public Service Commission,
Dholpur House,
Shah Jahan Road,
New Delhi.
4. The Director General (S&D),
DGS&D, 5, Sansad Marg,
Jeevantara Building,
New Delhi-110001.

..Respondents

(By Advocates: Shri Rattan Lal for Respondents No.1 to 4
Shri R.V. Singh for Respondent No.3)

ORDER (ORAL)

By Ms. Nita Chowdhury

Learned counsel for the applicant submitted that the issue involved
in **OA No.176/2015 – Jai Bharat Aggarwal and Others Vs. U.O.I. &**

Others is identical to the one involved in the present OA and requested that the said OA No.176/2015 be also heard with the present OA. The same was again reiterated in the order passed on 21.07.2015. OA No.176/2015 was heard today, i.e., 10.01.2017 and oral order has been passed in the said case allowing the OA by setting aside the order dated 17.07.2014 in the said OA.

2. The facts pertinent to this case are that the present applicant has filed OA No.3519/2013 against the order dated 17.09.2013 vide which the respondents have summarily rejected the request of the applicant seeking promotion against the vacancies of the year 2010-11 on the post of Deputy Director General (DDG) SAG from a date earlier to the date when he was actually promoted. By means of this OA, applicant is also seeking a direction to the respondents to hold review DPC for the year-wise vacancies which have arisen in the past for the post of DDG from the year 2010-11 in the light of the orders passed by this Tribunal in the case of **M.A. Khan Vs. U.O.I. and Others – OA No.2364/2008** decided on 03.11.2009.

3. The applicant further avers that he was appointed as a Group 'A' Officer in Indian Supply Service in the year 1979 through Engineering Service Examination, 1977, conducted by the Union Public Service Commission (UPSC). He has since received three promotions in his service career spanning 34 years. His promotion as Director (Supply) JAG was w.e.f. 01.12.2006 and the same has been upheld in OA No.176/2015, quashing the order dated 17.07.2014 whereby retrospective promotion granted to the applicant herein along with others

was withdrawn. In the present OA, the applicant has also challenged the validity of the order dated 17.07.2014 withdrawing his ante dated promotion as Director (Supply) from the date of occurrence of vacancy. The first part of the relief already stands granted to the applicant in view of the order passed in OA No.176/2015 vide judgment of even date. 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.

4. However, the facts and circumstances of the present case are totally different. In O.A. No.176/2015, it has been held that applicant, along with others was given promotion from a previous date as 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 in that OA. The Ministry of Law & Justice, Department of Legal Affairs in that case 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 - as it is in the peculiar circumstances of the particular case.

5. Now based on the decision in that OA bearing No.176/2015, he seeks his promotion as DDG (Supply) to which he was actually promoted on 12.06.2013 be revised and he be given notional promotion w.e.f.

16.11.2012 on the ground that 9 vacancies for the post of DDG had arisen in the years 2010-11 and 2011-12. He alleges that the delay in holding of the DPC has deprived him of an opportunity to occupy the vacant position from the date from which it was vacant.

6. On assuming the charge of the promoted post of DDG on 24.06.2013, he immediately made a representation seeking promotion with effect from the date his juniors were promoted. The respondent No.1 in response to his representation dated 24.06.2013, have passed an order vide Office Order No.3/2013 dated 16.09.2013 in which they have partially modified the promotion order of the applicant and made it effective from 16.11.2012, i.e., the date when the juniors of the applicant had been promoted. They have rejected the request of the applicant regarding promotion with effect from the date when the vacancy occurred, i.e., 29.12.2010. Hence the present OA.

7. The respondents have in both their written and verbal arguments reiterated the correctness of their conduct in rejecting the claim made in this OA. They submit that there are innumerable judgments of the Apex Court wherein it has been held that promotion has to be accorded from the date on which DPC is held and not from the date of occurrence of vacancy.

8. They have also has argued that the non-convening of DPC cannot be attributed to the respondents, and retrospective promotion is impermissible in law. Respondents have relied upon Para 6.4.4 of the Guidelines on Departmental Promotion Committees circulated vide DOP&T office memorandum No.22011/5/86-Estt.(D) dated 10.04.1989

to contend that retrospective promotion is impermissible. The relevant para reads as under:-

“6.4.4 **Promotions only prospective** – While promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier year(s).”

9. We have carefully gone through the records and relevant judgments.

10. In ***Union of India & others Vs. K. K. Vadera & others [1989 Supp (2) SCC 625]***, a question arose whether promotion to the post of Scientist-B should take effect from the date it was granted or the date of creation of the promotional post. The Division Bench of the Hon’ble Supreme Court held as under:

“5. There is no statutory provision that the promotion to the post of Scientist “B” should take effect from July 1 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 July 1, 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 Scientist “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.”

11. Similarly in ***Nirmal Chandra Sinha Vs. Union of India & others*** [(2008) 14 SCC 29], relying upon ***K. K. Vadera's*** case (supra) and some other cases, another Division Bench of the Hon'ble Supreme Court opined as under:

“7. It has been held in a series of decisions of this Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide *Union of India v. K.K. Vadera* [1989 Supp (2) SCC 625 : 1990 SCC (L&S) 127], *State of Uttaranchal v. Dinesh Kumar Sharma* [(2007) 1 SCC 683 : (2007) 1 SCC (L&S) 594] , *K.V. Subba Rao v. Govt. of A.P.* [(1988) 2 SCC 201 : 1988 SCC (L&S) 506 : (1988) 7 ATC 94] , *Sanjay K. Sinha-II v. State of Bihar* [(2004) 10 SCC 734 : 2005 SCC (L&S) 169] , etc.

8. Learned counsel for appellant Nirmal Chandra Sinha, however, relied on a decision of this Court in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89]. We have carefully perused the decision and we are of the opinion that the said decision is distinguishable. In that case the facts were that, under the relevant rule for promotion as General Manager it was necessary to have at least two years' tenure on the lower post. The respondent did not actually have two years' tenure, yet this Court held that he was eligible for promotion since he had been empanelled and the vacancy on which he should be promoted had occurred before two years of his consideration for promotion.

9. In our opinion, the aforesaid decision in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89] was given on the special circumstances of that case and on humanitarian considerations, but it cannot be said to be a precedent for other cases. When the rule requires two years' actual service in the lower post before a person can be considered for promotion as General Manager, that rule cannot be violated by considering a person who has not put in two years' service in the lower post. Moreover, in the aforesaid decision in *Union of India v. B.S. Agarwal* [(1997) 8 SCC 89] the respondent had not actually been promoted as General Manager, but he only claimed that he was eligible to be considered for promotion as General Manager. This fact also makes the aforesaid decision distinguishable.

10. **In the present case, appellant Nirmal Chandra Sinha was promoted as General Manager on 29-11-1996, but he claims that he should be deemed to have been promoted w.e.f. 13-3-1996 with consequential benefits. We are**

afraid this relief cannot be granted to him. It is settled law that the date of occurrence of vacancy is not relevant for this purpose.”

12. The same very issue came to be considered by the Apex Court in ***State of Uttar Pradesh & Others Vs. Ashok Kumar Srivastava and Another*** Civil Appeal No.6967 decided on 21.08.2013. In the said case, after relying upon the various judgments of the Supreme Court in ***Union of India v. S.S. Uppal and another (1996) 2 SCC 168; State of Karnataka and others v. C. Lalitha (2006) 2 SCC 747; State of Uttaranchal and Another Vs. Dinesh Kumar Sharma (2007) 1 SCC 683***; and ***Pawan Pratap Singh and Others Vs. Reevan Singh and Others (2011) 3 SCC 267***, it was ruled that seniority has to be decided on the basis of rules in force on the date of appointment and no retrospective promotion or seniority can be granted from a date when an employee has not even been born in the cadre.

13. This Tribunal in the matter of ***J.D. Vashisht & Others Vs. U.O.I. and Others*** in ***OA No. 3811/2012*** has elaborately considered and explained the matter with regard to retrospective promotion with which we are in full agreement and as such applicant cannot be granted retrospective promotion from the date of occurrence of the vacancy, i.e. 16.11.2012.

14. In view of the above, relief claimed under clause (c) of para 8 to the extent challenge is to the order dated 17.07.2014 is allowed in view of the order passed in OA No.176/2015. The other reliefs claimed, particularly for direction to promote applicant to the post of Deputy Director General

(Supply)-SAG from the date of occurrence of vacancy, i.e., 29.12.2010 is impermissible in law and is denied.

15. The OA is accordingly partially allowed in above manner. No costs.

(NITA CHOWDHURY)
MEMBER (A)

(JUSTICE PERMOD KOHLI)
CHAIRMAN

Rakesh