

**Central Administrative Tribunal
Principal Bench**

OA No.3586/2016

New Delhi, this the 21th day of October, 2016

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. V.N. Gaur, Member (A)**

Shri V S Rawat, Age 64 years

s/o Sh. J.S. Rawat

92/2, Neel Kanth Vihar

Dehra Dun-248001.

Retd. As : Joint Area Organizer (JAO)

..Applicant

(By Advocate: Shri Aniruddh Joshi)

Versus

1. Union of India
Through Secretary
Ministry of Home Affairs
North Block, New Delhi.

2. Director General
Sashastra Seema Bal (SSB)
Force Head Quarters
East Block- V, R.K. Puram
New Delhi-110066.

...Respondents

ORDER (ORAL)

Justice Permod Kohli, Chairman :-

The applicant along with one Shri Sarat Adhikari had earlier filed OA No.1712/2011 before this Tribunal seeking further promotion to the post of Joint Area Organiser etc. The case of the applicant was that the Recruitment Rules were de-notified and thereafter this Tribunal set aside the order of de-notification of the Recruitment Rules and

thereafter, the aforesaid OA was filed seeking promotion. This said OA was disposed of vide order dated 05.09.2011 with the following directions:-

"3. That being so, we dispose of this Original Application directing the respondents to consider the case of the applicants for promotion to the post of Junior Area Organizer from 2007 onwards in view of our order dated 05.01.2010 passed in OA No.2104/2009, and if they are found to be eligible and fit for promotion, they will also be entitled to all consequential benefits, as laid in OA No. 2104/2009 as well, and order in that regard shall be passed as expeditiously as possible and preferably within a period of six weeks from today. There shall be no order as to costs."

2. Consequent upon the aforesaid directions, the applicant was considered for next promotion to the post of Joint Area Organiser and he was promoted vide order dated 20.01.2012. The applicant retired from service on 30.04.2012. He made representations dated 14.09.2011, 02.01.2012 and 26.05.2016 seeking further promotion to the post of Area Organiser. The grievance of the applicant is that though he has been accorded promotion as Joint Area Organiser on 20.01.2012 but he has not been considered for promotion to the post of Area Organiser. Admittedly, the applicant was promoted as Joint Area Organiser on 20.01.2012 and thus, he was not having residency service of two years for further promotion before his retirement i.e., 30.04.2012. In any case, he made representation, which has

been rejected vide the impugned order dated 15.06.2016 on two counts (i) that retrospective promotion is not permissible and; (ii) the applicant who had retired on 30.04.2012 has not been granted promotion to the rank of Area Organiser by the DPC held on 04.07.2012. Even reference is made to an order of the CAT dated 14.05.2013 in case of OA No. 2853/2012 titled **B.P. Gairola V/s UOI and Others**, where under this Tribunal directed grant of retrospective promotion. The said Order is stated to have been set aside by the Hon'ble Delhi High Court vide judgment dated 04.08.2014

3. The applicant is seeking retrospective promotion. It is contended that no DPC was held during the period the applicant was in service and on account of delay in holding a DPC, the applicant has been denied further promotion to the post of Area Organiser. It is settled law that retrospective promotion is not permissible. This Tribunal placing reliance upon various judgments of the Hon'ble Supreme Court, vide Order dated 08.09.2016 passed in OA No.3811/2012 titled **J.D. Vashisht and Ors. Vs. UOI and Anr.** has held as under:-

"9. Facts having been admitted, this takes us to the question whether promotions can be made retrospectively, if so under what circumstances. In **Union of India & others v 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."

In **Nirmal Chandra Sinha v 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."

The above view also found favour with the Hon'ble Supreme Court in ***State of Uttaranchal & another v Dinesk Kumar Sharma*** [(2007) 1 SCC 683], and ***Sk. Abdul Rashid & others v State of Jammu & Kashmir*** [(2008) 1 SCC 732]. A similar view has been expressed by the Delhi High Court in case of ***Union of India & others v Vijender Singh & others*** [(176) 2011 DLT 247 (DB)], and another co-ordinate Bench of this Tribunal, of which one of us [Hon'ble Mr. Shekhar Agarwal, Member (A)] was the author in OA No.2506/2011 in case of ***Dr. Ramakant Singh v Union of India & others***, decided on 05.09.2014. However, we find that in the above noted cases, the earlier view of the Hon'ble Supreme Court in ***P. N. Premchandran v State of Kerala & others*** [(2004) 1 SCC 245] has not been considered. In the aforesaid judgment, the Hon'ble Supreme Court observed as under:

"7. It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in

ordinary course they were entitled to be promoted to the post of Assistant Directors, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect."

10. Though apparently the view in **P. N. Premchandran** (supra) seems to be at variance with the view taken in **K. K. Vadera's** case (supra), however, a keen reading of the two views makes the two judgments reconcilable. In **K. K. Vadera's** case and subsequent judgments referred to hereinabove, the clear and unambiguous opinion of the Apex Court is that retrospective promotion is impermissible in absence of any statutory rules, notwithstanding the occurrence of vacancies at a date anterior to the date of promotion and even the eligibility of the incumbents and their availability, or even the delay on the part of the DPC. In **P. N. Premchandran's** case, the Hon'ble Supreme Court, however, ruled that where the eligible persons were promoted on temporary basis on higher post and they were eligible at the time of such temporary promotion and continued on the post for a considerable period, although on temporary basis, on their promotion they should be promoted with retrospective effect. In **K. K. Vadera** (supra) and **Nirmal Chandra Sinha** (supra) this position has not been dealt with nor deprecated in any manner. A similar view has been expressed by the Hon'ble Supreme Court in **Suraj Prakash Gupta & others v State of Jammu & Kashmir and others** [(2000) 7 SCC 561]. Relevant observations of the Hon'ble Supreme Court are reproduced hereunder:

"52. Under Rule 23, whenever probation is commenced in respect of an officer, it is permissible to appoint him to the service with retrospective effect from such date from which the person was "continuously on duty as a member of the service". Read with Rule 2(e) which defines "member of service" it means the time from which he was "continuously *holding* the pensionable post". Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case of a direct recruit, the probation can commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service jurisprudence (see in fact, discussion under Point 4), a direct recruit cannot claim appointment from a date much before his selection. So far as a promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23, first their probation must commence. Then such person becomes a probationer for purposes of Rule 23. Once he is on probation, and if a substantive vacancy in the permanent cadre existed in which the promotee or a recruitee by transfer can be accommodated, and if such a vacancy has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 he may be appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be, from such subsequent date) from which he has been continuing on duty on a non-pensionable (*sic* pensionable) post [see Rule 2(e) defining "member of service"]. This period can certainly be one that a person holds in a stopgap or ad hoc manner. The order of "promoting a person in the service" regularly from an anterior date and the order of probation from an anterior date can be simultaneously passed. That is how under Rule 23, a person holding a temporary, stopgap or ad hoc appointment beyond three

months can become a probationer and get appointed regularly to the service with retrospective effect.”

Above view in **Suraj Prakash Gupta's** case was on the strength of statutory rule, in a case where an official is allowed to hold the promotional post even though as an *ad hoc* arrangement without being regularly promoted in accordance with the prescribed procedure but was eligible and such arrangement was against a clear vacancy, on regular promotion ordinarily he would be entitled to retrospective promotion with effect from the date he was holding the promotional post. Another situation that needs to be taken note of is where a junior has been promoted for whatever reason ignoring the rightful claim of the senior, the retrospective promotion of the senior may not be contrary to law, even in absence of any rule permitting retrospective promotion, as it would be in contravention of the doctrine of equality envisaged under Articles 14 and 16 of the Constitution of India.

4. In this view of the matter, as the applicant does not fall in any of the exceptional categories indicated in the aforesaid judgment, we do not find any merit in this application. Dismissed as such.

(V.N. Gaur)
Member(A)

(Justice Permod Kohli)
Chairman

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