

CENTRAL ADMINISTRATIVE TRIBUNAL  
ALLAHABAD BENCH  
ALLAHABAD

This is the 12<sup>th</sup> day of December 2018

ORIGINAL APPLICATION NO. 330/1219/2007

**HON'BLE MR. GOKUL CHANDRA PATI, MEMBER (A)**  
**HON'BLE MR. RAKESH SAGAR JAIN, MEMBER (J)**

1. D.P. Agnihotri, Son of Late Shri Shiv Shanker Agnihotri, presently residing at C-3/16, Gulmohar Vihar, Kanpur.

.....Applicant.

**VERSUS**

1. Union of India, through Secretary, Ministry of Finance (Department of Revenue), Government of India, North Block, New Delhi.
2. The Chairman, Central Board of Direct Taxes, North Block, New Delhi.
3. The Chief Commissioner of Income Tax/Cadre Controlling Authority, Aayakar Bhawan, Kanpur.

.....Respondents.

Advocate for the Applicant : Shri Rakesh Verma

Advocate for the Respondents: Shri Murli Manohar

**O R D E R**

**(Delivered by Hon'ble Mr. Gokul Chandra Pati, Member -A)**

The OA has been filed by the applicant with the prayer for following reliefs :

- i) To issue a writ, order or direction in the nature of mandamus directing the respondents to hold Review DPC and to review the DPCs held for the recruitment year 2002-2003 to 2007-2008 for promotion to the post of Income Tax Officer (Group-B) in accordance with the circular dated 11.7.2002, 31.1.2005 and 1.8.2007, within a period as may be stipulated by this Hon'ble Tribunal.
- ii) To issue a writ, order or direction in the nature of Mandamus directing the respondents to strictly follow the instructions with regard to concept of treatment of SC/ST category candidates promoted on their own merit as laid down in the Circular dated 11.7.2002 read with Circulars dated 31.1.2005 and 1.8.2007 and after reviewing its recommendations made earlier for the recruitment year 2002-2003 to 2007-2008, promote the petitioner against one of the resultant unreserved vacancies of Income Tax Officer (Group – B) with effect from due date, within the period as may be fixed by this Hon'ble Tribunal.
- iii) To issue any other and further suitably writ, order or direction which this Hon'ble Tribunal may deem fit and proper in the circumstance of the case.
- iv) To allow this petition with costs in favour of the petitioner."

2. The brief facts of the case as stated in the OA are that the applicant who is a General category candidate, was initially appointed as LDC against direct recruitment quota after selection w.e.f. 21.1.1974. Thereafter, w.e.f. 21.6.1975, the applicant was appointed as Upper Division Clerk against direct recruitment quota after qualifying open selection. Thereafter, the applicant was promoted to the post of Income Tax Inspector in regular and substantive capacity w.e.f. 7.7.1997 in the pay scale of Rs.5500-10500 and has been working under the control of the respondent No.3 in the above capacity. In the year 2000, the applicant qualified the Departmental Qualifying Examination (in short DQE) for promotion to the post of Income Tax Officer and in the list of eligible Inspectors for promotion to the Group B post of Income Tax Officer (copy of which is annexed at Annexure A/1 to the OA) and the name of the applicant finds place at Sl. No. 83 of the list having passed the DQE in 2000. IN this list, the name of several persons of reserved category is also mentioned who had also qualified the above examination in different years in between 1995 and 2006.

3. It is stated in the OA that the Scheduled Caste candidates in the aforesaid eligibility list had qualified the DQE by availing the benefit of reservation and under the relaxed standards of norms of selection. It is also stated that in order to qualify a General candidate has to obtain at least 60% marks, whereas SC/ST candidates have to obtain 55% marks. As per the applicant some of the reserved category candidates secured less than the qualifying marks of 60% fixed for a general candidate. The respondents, vide order dated 14.6.2007 (Annexure No. A/2 to the OA) promoted seven persons belonging to Scheduled Caste to the post of Income Tax Officer in the pay scale of Rs.7500-12000 w.e.f. 14.5.2007 in pursuance of recommendation of the Departmental Promotion Committee held on 12.6.2007. The names of Shri Hemant Kumar, Shailendra Kumar, Than Singh, Munni Lal, Veer Singh, Ram Autar Singh and Vishambhar Lal were included in the order dated 14.6.2007 at Sl. No. 2, 3, 5, 7, 9, 14 and 21 respectively. Similarly vide order dated 16.7.2007 (Annexure No. A/3 to the OA), seven more Scheduled Caste candidates were granted promotion on the recommendation of the DPC held on

12.6.2007 on the post of Income Tax Officer. Names of such promoted candidates are Shri Budh Singh, Brij Bhushan Singh, Ajay Prakash, Chaturi Lal, Ram Swaroop, Phool Chand and Harpal, whose names find place in the aforesaid list at Sl. No. 1, 2, 8, 11, 12, 13 and 14 respectively. Further, vide order dated 1.11.2007 and 28.11.2007, two more candidates i.e., Nathuni Prasad and Kailash Chandra were promoted on the recommendation of the DPC/Review DPC held on 12.6.2007 and 5.10.2007.

4. It is stated in the OA that none of the aforesaid candidates, qualified the DQE for promotion to the post of Income Tax Officer without availing the benefit of relaxed standards. Yet the aforesaid persons have been allowed promotion and posted against unreserved post. Due to this action of the respondents, the applicant is still stagnating on the post of Income Tax Inspector, though he had already qualified the DQE for promotion to the post of Income Tax Officer in the year 2000. It has been further stated that 51 posts have been held by SC candidates as against 31 sanctioned strength. Against the total 161 unreserved sanctioned posts, only 140 unreserved candidates are working. It is stated in the OA that 21 unreserved posts have been illegally held by the employees belonging to reserved category on account of action of the respondents of allowing promotion to the above posts by adjusting them against the unreserved post.

5. It has further been stated that as per the DoPT OM No. 36028/17/2001 Estt (Res) dated 11.7.2002 (Annexure No. A/6) to the OA) a reserved category candidate can be adjusted against unreserved post only when such candidate qualifies the selection on his own merit without availing the benefit of relaxed standard. The treatment of SC/ST candidates promoted on their own merit has further been clarified vide letter dated 31.1.2005 (Annexure No. A/7 to the OA) with reference to the above referred earlier circular dated 11.7.2002 that the above policy will be effective from 11.7.2002 and that the said policy will not be applicable in the case of promotion by non-selection method, as in such promotion the concept of merit is not involved and the promotions are made only on the basis of seniority-cum-fitness. The respondent No. 2 vide letter

dated 1.8.2007, addressed to All the Chief Commissioners of Income Tax (CCA), all Directorates were duly informed about the clarification given by the DoPT on the concept of own merit vide letter dated 24.7.2007.

6. Aggrieved by the action of the respondents, the applicant submitted a representations dated 25.10.2007 and 13.11.2007 to the respondent No.3. When the said representations were not decided, the applicant filed the present OA.

7. In the counter affidavit filed by the respondents in reply to the OA, it is stated that the promotions were granted to those SC/ST candidates who were within the normal zone of consideration and were senior to unreserved category candidates. The clarification from CBDT was sought in this regard. Meanwhile, an order dated 1.10.2008 in OA NO. 1011 of 23008 was passed by this Tribunal directing to decide the representation of Shri M.C.Mishra before 22.10.2008, if the DPC is held. The relief sought in the representation furnished by Shri M.C.Mishra is similar as prayed for in this OA. It is stated in the counter affidavit that the decision on the issue is being taken shortly and issues being identical will be given effect to, in this case also.

8. In the rejoinder affidavit, it has been stated that the representation furnished by Shri M.C.Mishra has already been decided vide OM No. CCIT/CCA(684)/MCM/08-09/891 dated 24.10.2008/6.11.2008 by the respondent NO.3 (copy enclosed to the rejoinder). It has been further stated that the benefit of the SC and ST candidates have been extended by the department despite the fact that they had already availed necessary benefits at the earlier stage and as per the instructions, they cannot avail the relaxation/double benefit for promotion against general category vacancy.

9. The respondents have filed supplementary counter affidavit (in short SCA) in which it is stated that as per the DoPT OM dated 12.10.1998 issued on the procedure to be followed by the DPC in regard to retired employees, the applicant has no right for promotion after retirement and he is not entitled for consequential benefits also even though some employees belonging to reserved

category were inadvertently promoted in excess of the quota fixed for reserved category.

10. Heard the counsels for the parties and perused the pleadings available on record. Counsels for the parties have also filed their respective written submissions broadly reiterating the averments made in respective pleadings.

11. We have considered the pleadings and submissions of both the parties including written submissions filed by learned counsels and also perused the documents/circulars placed on record. Admittedly, the applicant had qualified the DQE and was eligible for promotion to the post of Income Tax Officer (in short ITO) in the year 2000. The applicant has also retired from service during pendency of this OA as stated in the SCA in which it is stated that as per the DOPT circular dated 12.10.1998, a retired officer cannot get the benefit of promotion on account of convening of the review DPC.

12. The applicant is aggrieved by the recommendations of the DPCs held on 12.6.2007 and on 5.10.2007, based on which some of the candidates belonging to the reserved category, who had qualified the DQE on the basis of the relaxed criteria, were promoted by the respondents against the unreserved posts, while ignoring the applicant. The applicant filed representation in time before the respondents on which no action was taken. Then this OA was filed raising his grievance regarding promotion of the applicant as unreserved candidate against the unreserved posts against which reserved category candidates were promoted. Hence, there is no delay on the part of the applicant in raising his grievances in view of the factual position of the case.

13. Before proceeding further, we will examine the validity of the averment of the respondents in the SCA that the applicant being a retired employee, has no right for promotion after his retirement in view of the DOPT OM dated 12.10.1998. The date on which the applicant retired from service has not been indicated by the respondents in their pleadings or submissions. The said OM dated 12.10.1998 of the DOPT states as under:-

"Procedure to be followed by the Departmental Promotion Committees in regard to retired employees -

2. Doubts have been expressed in this regard e consideration if employees who have since retired but would also have been considered for promotion, if the DPC(s) for the relevant year (s) had been held in time.

3. The matter has been examined in consultation with the Ministry of Law (Department of Legal Affairs). It may be pointed out in this regard that there is no specific bar in the aforesaid Office Memorandum, dated April 10, 1989 or any other related instructions of the Department of Personnel and Training for consideration of retired employees, while preparing yearwise panel(s), who were within the zone of consideration in the relevant year(s). According to the legal opinion also, it would not be in order, if eligible employees, who were within the zone of consideration for the relevant year(s) but are not actually in service when the DPC is being held, are not considered while preparing yearwise zone of consideration/panel and, consequently, their juniors are considered (in their places) who would not have been in the zone of consideration, if the DPC(s) had been held in time. This is considered imperative to identify the correct zone of consideration for relevant year(s). Names of the retired officials may also be included in the panel(s). Such retired officials would, however, have no right for actual promotion. The DPC(s), may, if need be, prepare extended panel(s) following the principle prescribed in the Department of Personnel and Training. OM No. 22011/8/87-Estt.(D), dated 09.04.1996".

14. The issue of eligibility of promotion of retired offices was considered by Hon'ble Delhi High Court in the case of **Union of India & Anr vs. B.P. Gairola & Ors.** in the light of the DOPT OM dated 12.10.1998 and it was held as under:-

"12. This Court in Rajendra Roy (supra) and subsequently in R.N. Malhotra (supra) had the occasion to deal with the same office memorandum. The Division Bench on both the occasions applied the law declared by the Supreme Court in K.K. Vadera (supra) and Baij Nath Sharma (supra). We notice that in K.L Taneja (supra) too, an identical issue was involved, i.e. claim for retrospective promotion. While summarising the law in para 21, the Court stated that it is only if a rule supports the grant of retrospective promotion, that it is admissible and can be claimed. The exceptions to this principle are if a rightful claim of an officer or public servant is denied at the relevant time and his juniors in the cadre are given promotion, or he is able to plead and prove malafide in the given facts of the case."

15. This issue was also considered by the Principal Bench of this Tribunal in the case of Shri P.G. George vs Union Of India in OA No. 1409/2009 alongwith a bunch of other OAs involving similar issue vide order dated 22.4.2010, reported in [indiankanoon.org/doc/70182123](http://indiankanoon.org/doc/70182123). After discussing the judgments of Hon'ble Supreme Court and Hon'ble Delhi High Court in a number of cases, the Tribunal in the order dated 22.4.2010 held as under:-

"8. It is thus very clear that :  
 there is no rule that promotion should be given from the date of creation of the promotional post;  
 if promotions are effected prospectively from the date of issue of the order of promotion, retired employees would not be eligible for promotion retrospectively;  
 and if promotion is granted retrospectively and a person junior to the retired employee has been promoted from the date when the retired person was in service and if the retired person has been found fit by the DPC, such retired person would be entitled to promotion retrospectively on notional basis from the date his immediate junior has been promoted."

16. From above judgments, it is clear that a retired officer normally does not have any right to claim for retrospective promotion, even if the post was kept vacant or the holding of the DPC is delayed unless malafide on the part of the authorities for such delay is established. As noted in the case of BP Gairola (supra), such promotion with retrospective effect can be claimed by a retired officer if his rightful claim was denied while promoting a junior employee prior to the retirement of the employee. Applying these principles to the present OA before us, it is clear that the applicant had represented for his promotion in time when his junior employees belonging to SC/ST category were promoted against unreserved quota while ignoring the case of the applicant. The DOPT OM dated 12.10.1998 stated that retired officers found suitable in the review DPC cannot be allowed actual promotion. But if any of the junior of the retired officer was promoted ignoring his case while he was in service, then he can claim for such promotion which can be considered in spite of the DOPT OM dated 12.10.1998 if he was found suitable or eligible for such promotion as per the rules. Hence, we are unable to accept the averment of the respondents in the SCA that since the applicant is retired, he will not have any claim for promotion as per the DOPT OM dated 12.10.1998.

17. In the instant OA, the applicant was undisputedly eligible for consideration by the DPC for promotion to the post of ITO after the year 2000 as he had qualified in DQE in 2000 and was otherwise eligible. Hence, the DPC held on 12.6.2007 should have considered the case of the applicant. But there is nothing on record to show if the applicant was considered by the DPC held on 12.6.2007 and subsequently, and if he was considered, then the

finding of the DPC about the applicant's suitability for promotion to the post of ITO is not furnished alongwith the pleadings by the parties. It is also not cited as a ground by the respondents for denying promotion to the applicant. Hence, he was not found to be unfit for promotion by the DPC. In spite of that, his case was ignored while promoting some employees who were junior to him and belonged to SC/ST category against unreserved posts, which were to be filled up from eligible officers based on seniority.

18. In another case of similar nature i.e. in the case of Shri M.C. Mishra, the respondents had examined the matter as stated in their order dated 6.11.2008 copy of which is enclosed as Annexure 1 to the Rejoinder. The said order stated as under:-

"3. This has been carefully considered. The DoPT had issued instruction vide OM dated 11.7.2002, regarding reservation in promotion and treatment of SC/ST candidates promoted on their own merits which was further clarified vide OM dated 31.1.05. The concept of 'own merit' was not clear, and, therefore, a further reference was made by the Deptt. Of Revenue to DOPT, which clarified the matter vide their extract ID No. 38038/11/2007-Estt (Res) dt. 24.7.07. This was forwarded to all CCIT (CCA) as per CBHDT's letter F. No. A-41015/26/2007-Ad.VII dated 1.8.07, which reads as under :

*"The OM dated 11.7.2002 inter alia clarified that SC/ST candidates falling in the consideration zone cannot be denied promotion on the plea that no post is reserved for them. When no post is reserved, SC/ST candidates falling in the consideration zone should be considered for promotion along with other candidates treating them, as if they belong to general category. If any of them is selected, he should be appointed to the post and should be adjusted against unreserved point. Candidates so promoted are treated as promoted on their own merit. To determine whether an SC/ST candidate in the consideration zone can be promoted or not when there are no reserved posts, it should be seen whether the candidate would have been promoted if he did not belong to SC or ST category if yes, he should get promotion, otherwise not.*

*Unreserved vacancies are open for all categories of persons, including SCs/STs and OBCs. However, while making appointment/promotion to an unreserved vacancy, no relaxation/concession is permissible for any category of candidates. This Department's OM No. 36011/1/98-Estt (Res) dated 1<sup>st</sup> July, 1998 provides that an SC/ST/OBC candidate would be treated as unavailable for an unreserved vacancy, if he has availed any relaxation/concession including that on age limit, experience qualification, permitted number of chances in written examination, extended time of consideration longer than what is provided for general category candidates, etc. The advice as given earlier and indicated in para 4 above, is at line with the instructions contained in the above OM. The advice so given is reiterated."*

4. In view of the above clarification issued by DOPT and CBDT an SC/ST/OBC candidate would be treated as unavailable for unreserved vacancy if he has availed any relaxation./concession and he cannot be promoted against the unreserved vacancies. Hence the representation of



Shri M.C.Mishra is acceptable to this extent. However, status of sanctioned and working strength and available SC quota is to be redecided after convening the Review DPC Meeting in view of the above clarification issued by the DOPT."

19. From above, it is clear that even the respondents have accepted the mistake in promoting the SC/ST employees against unreserved vacancies if they had availed any relaxation/concession to become qualified. Hence, in the case of Sri M.C. Mishra, it was decided by the respondents that the Review DPC will be held to reconsider the matter. In the written submissions filed by the respondents' counsel on 12.11.2018, same position has been reiterated vide para 4. However, it is not stated by the respondents if the Review DPC has been convened to reconsider the case of Sri M.C. Mishra as per the order dated 6.11.2008. It is noted that the averments of the applicant in para 4(10) and 4(14) that the SC/ST employees were promoted ignoring the applicant's case against unreserved vacancies have not been contradicted in the counter affidavit filed by the respondents.

20. In view of the facts as discussed above, we are of the considered view that the applicant is entitled to be considered in the same manner as has been decided by the respondents in the case of Sri M.C. Mishra and his case also deserves to be reconsidered by holding the Review DPC. The respondents are, therefore, directed to convene the Review DPC for the DPC held on 12.6.2007 to reconsider the case of the applicant and if found fit by the DPC to be promoted to the post of ITO, the applicant shall be promoted on notional basis from the 14.6.2007, the date when his juniors were promoted against unreserved vacancy as per the recommendation of the DPC dated 12.6.2007. If he is found unfit for promotion by the DPC held on 12.6.2007, then Review DPC for the DPCs held after 12.6.2007 till retirement of the applicant shall be convened to reconsider the applicant's case and if found fit, he shall be promoted on notional basis from the date his junior was promoted based on the recommendation of this DPC. On such notional promotion, no arrear salary is payable to the applicant, but his pay shall be notionally fixed till his retirement and the revised pension shall be fixed as per the rules based on the

last pay to be fixed on notional basis. The applicant shall be eligible for differential pensionary benefits as per the rules.

21. The OA is allowed in terms of directions in para 20 above. There will be no order as to costs.

(RAKESH SAGAR JAIN)  
JUDICIAL MEMBER

(GOKUL CHANDRA PATI)  
ADMINISTRATIVE MEMBER