

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

Original Application No. 260/0020 of 2017

Date of Reserve: 02.04.2019
Date of Order: 16.04.2019

CORAM:

HON'BLE MR.GOKUL CHANDRA PATI, MEMBER(A)
HON'BLE MR.SWARUP KUMAR MISHRA, MEMBER(J)

Pradeep Kumar Mishra, aged about 50 years, S/o. Laxmikant Mishra at present working as Regional Provident Fund Commissioner, Grade-I, Odisha, Janapath, Unit-11, Bhubaneswar-751 022, Dist. Khurda, Odisha.

...Applicant

By the Advocate(s)-M/s.K.C.Kanungo, S.Pradhan

-VERSUS-

1. Union of India represented through the Secretary, Labour & Employment Department Shram Shakti Bhawan, New Delhi.
2. Chairman, Central Board of Trustee, Employees Provident Fund Organisation, Shram Shakti Bhawan, New Delhi.
3. The Central Provident Fund Commissioner, At-14, Bhikaji Kama Place, New Delhi.
4. Sri Sashi Bhusan SInha, Additional Provident Fund Commissioner, Grade-II, At-Zonal ACC Office of Provident Fund Commissioner, Bandra, Maharashtra.
5. Shri Guatam Dixit, At/Po. Provident Fund Commissioner, Zone Office, Kanpur, Uttar Pradesh.

...Respondent

By the Advocate(s)- Mr.S.K.Pattnaik,
Senior Advocate
M/s.P.K.Pattnaik,
H.K.Tripathy.

ORDER

PER GOKUL CHANDRA PATI, MEMBER(A)

The OA has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

- "(i) This Hon'ble Tribunal may direct the Respondents to promote the applicant w.e.f. May, 2016 as additional provident Fund Commissioner-II;
- (ii) And further may direct the Respondent Authority to pay consequential financial and service benefits w.e.f. May 2016 as attached to the post of Additional Central Provident Fund Commissioner-II;
- (iii) Any other appropriate order/orders may kindly be passed which would be deemed fit and proper in the facts and circumstances of the case, in the ends of justice be passed."

2. The dispute involved in this case is that the applicant, who is working as the Regional Provident Commissioner-I (in short RPFC) Bhubaneswar under the respondents organization, has not been promoted to the post of Additional Provident Fund Commissioner-II (in short APFC-II) in spite of his name being recommended at serial number 1 by the DPC in its meeting held on 28.4.2016 (Annexure-A/5). Thereafter, when a vacancy arose on 1.5.2016, the applicant was not promoted and the matter was delayed for one reason or other. Eventually, his junior in service one Sri Sashi Bhusan Sinha was promoted vide order dated 27.12.2016 (Annexure-A/10), after issue of a charge memo against the applicant vide order dated 17.11.2016 (Annexure-A/8). It is the case of the applicant that the respondents have deliberately delayed his promotion from 1.5.2016 till he was issued the charge memo dated 17.11.2016 for the cause of action which arose in the year 2009-10. It is stated that the action of the respondents is arbitrary

and amounts to colourable exercise of power (vide para 5.1 of the OA).

3. The respondents have filed their Counter, opposing the OA without disputing the basic facts. It is stated that the Vigilance clearance in respect of the officers was called for and the DPC proceedings were referred to the Chairman of the Central Board of Trustee (respondent no.2) for approval. When the matter was under consideration, the charge memo dated 17.11.2016 (A/8) was issued to the applicant for allegations against him for the period from 30.1.2009 to 15.9.2010 under the rule 10 of the EPF Staff (Classification, Control & Appeal) Rules, 1971 (in short 'Rules') for which the sealed cover procedure was adopted for the recommendation of the DPC in respect of the applicant in accordance with the OM dated 14.9.1992 (Annexure-R/1) of the DOPT. After the applicant could not be promoted due to the pending disciplinary proceedings, his juniors were promoted. The judgment of Hon'ble Apex Court in the case of **Union of India etc. vs. K.V. Jankiraman reported in AIR 1991 SC 2010**, in which it was held that an employee has no right to promotion. He has the right to be considered for promotion and hence, the action not to promote the applicant was justified.

4. The applicant has filed the Rejoinder stating that his promotion proposal was processed, but it was not approved by the respondent no.2 who raised the issue of restructuring of the cadre. When the query was complied, still his promotion was not approved by the respondent no.2 who cleared the promotion for the ACPF Grade-I post for which similar query was made. It is alleged by the

applicant that the guidelines of the DOPT about the DPC and promotion have been violated by the respondents in his case.

5. We have heard the counsels for both the sides and also perused the pleadings on record. The issue to be decided in this case is whether the respondents have violated the circulars of the DOPT at Annexure-A/3 of the OA in not allowing the promotion to the applicant.

6. The respondents have cited the DOPT's OM dated 14.9.1992 to justify their action not to promote the applicant in spite of the fact that the DPC had recommended his case for promotion to the post of ACPF-II and admittedly, there was a post vacant as on 1.5.2016. It is the case of the respondents that when the applicant's case for promotion was under consideration, a charge memo dated 17.11.2016 (A/8) was issued to him and thereafter, following the OM dated 14.9.1992, his case has been treated as if it is kept in sealed cover. The para 7 of the OM dated 14.9.1992 states as under :-

"7. A Government servant, who is recommended for promotion by the Departmental Promotion Committee, but in whose case the circumstances mentioned in para-2 above arises after the recommendations of the DPC are received but before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the DPC. He shall not be promoted until he is completely exonerated of the charges against him and the provisions contained in this O.M. will be applicable in his case also."

7. The applicant has referred to the OMs of the DOPT at Annexure-A/3, which specify a model date chart for timely convening of the DPC and for taking advance action to finalize the

promotion proposals. But these circulars have not specified anything in the event of the date chart not being followed. The consequences of not following the instructions in taking timely action on the recommendations of the DPC have not been specified in these OMs of the DOPT. We are unable to agree with the contentions of the applicant that he was entitled for promotion w.e.f. 1.5.2016 (the date when the vacancy arose) since the DPC had recommended his name. There is nothing on record to show that the applicant was not allowed promotion w.e.f. 1.5.2016 due to mala fide on the part of the respondent no.2 in not approving the proposal without delay. The applicant's counsel has submitted a written note of argument highlighting the instructions of the DOPT on timely holding of the DPC. No rule or instructions of Government has been submitted by the applicant, entitling him to claim promotion from the date of vacancy. Hence, there is no violation of DOPT circulars referred to in the OA by the Respondents and the issue at para 5 is decided accordingly.

8. The applicant's counsel has enclosed a copy of the judgment of Hon'ble Apex Court in the case of **RP Singh vs. Union of India in Civil Appeal No. 2605 of 2013**. In that case, the petitioner Mr. RP Singh was recommended for promotion by the DPC and his name was approved by the Appointment Committee of the Cabinet for promotion, but he was not promoted where as others empanelled with him were promoted in November, 2010 since there were some complaints against the petitioner in that case. The direction of Hon'ble High Court to allow ad-hoc promotion to the petitioner was challenged before Hon'ble Apex Court and it was held that the petitioner was entitled for regular promotion from the date of promotion of other employees who were empanelled with

him. In RP Singh case, the recommendation of the DPC was approved by the competent authority and it was withheld thereafter by subordinate authorities. But in the present OA, the recommendations of the DPC were not approved by the respondent no. 2 who is the competent authority. Hence, the judgment in the case of RP Singh (supra) is not applicable for the present OA.

9. The applicant's counsel has cited in the written argument the order dated 28.3.2018 passed by the Tribunal in the case of **Atish Kumar Behera vs. UOI & others in OA No. 319, 367 and 368 of 2017**. In that case, the charge-sheet was issued on 16.5.2017 against the officer in that OA after his name was recommended by the selection committee on 10.3.2017. The charge-sheet dated 16.5.2017 was challenged in the OA No. 368 of 2017, which was allowed vide the order dated 28.3.2018 and the charge-sheet was quashed mainly on the ground that the incident mentioned in the charge-sheet had taken place 8 to 9 years back and there was no explanation for such delay in framing the charge-sheet against the officer and the proceedings were initiated only after his name was cleared by the selection committee. Since the charge-sheet was quashed by the Tribunal, there was no ground to treat the case deemed to be kept in sealed cover. But in the present OA before us, the charge-memo dated 17.11.2016 (A/8) is not under challenge. Hence, the ratio of the order dated 28.3.2018 of the Tribunal will not be applicable for the present OA before us.

10. The applicant has referred to the judgment of Hon'ble Apex Court in the case of K.V. Jankiraman (supra) in which one of the issue was when the sealed cover procedure can be resorted to and

it was held that after issue of the charge-sheet in a disciplinary proceeding to the employee, the sealed cover procedure can be resorted to, not before. In this OA, no decision was taken to keep the recommendations of the DPC in sealed cover before issue of charge-sheet. The sealed cover procedure was resorted to after issue of charge-sheet on 17.11.2016 in accordance with the DOPT's OM dated 14.9.1992 9Annexure-R/1 to the Counter as stated in para 6 of the Counter filed by the respondents. The averments in para 6 of the Counter have not been specifically contradicted or denied by the applicant in his Rejoinder or Additional Rejoinder with reference to any Rule or guidelines of the Government. The case of promotion of the applicant as recommended by the DPC was not approved by the competent authority till 17.11.2016 when the charge-sheet was issued against the applicant. Hence, the judgment in the case of K.V. Jankiraman (supra) will not be helpful for the case of the applicant.

11. We also take note of the judgment of Hon'ble Apex Court in the case of **State of Orissa and others vs. Bhikari Charan Khuntia and others reported in (2003) 10 SCC 144**, in which it was held by Hon'ble Apex Court as under:-

"7. A Constitution Bench of this Court in [Shankarsan Dash v. Union of India](#), [1991] 2 SCR 567 held that candidates whose names appear in the merit list do not acquire indefeasible right of appointment if vacancies exist. The State is under no obligation to fill up all or any of the vacancies, unless the relevant recruitment rules so indicated. Though, the State is under no legal duty to fill up all or any of the vacancies, it does not mean that State has licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for proper reasons. If vacancies or any of them are filled up, the State is bound to respect the comparative merit of candidates as reflected in the recruitment test and no discrimination can be permitted. This position was reiterated in [All India SC & ST Employees Association](#)

and Anr. v. A Arthur Jeen and Ors., (2001) 6 SCC 380 and Ludhiana Central Co-operative Bank Ltd. v. Amrik Singh and Ors., (2003) 6 Supreme 196.

8. As was observed by this Court in Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneswar v. Haraprasad Das and Ors., [1998] 1 SCC 487, whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no jurisdiction to interfere with such decision of the Government and direct it to make further appointments. In the present case, even no selection was made and not even any select list was in existence. Even if there had been any such selection or inclusion of any of the names in the select list, same could not have given any right. Therefore, mere sending of name by the employment exchange could not have and in fact has not conferred any right. The writ applications were thoroughly mis-conceived, and the court mis-directed itself as to the nature of relief to be granted."

From the ratio of the above judgment, the empanelment of a candidate will not entitle him for appointment unless it is approved by the competent authority under the rules applicable. The decision not to fill up a post or delay the decision to fill up cannot be interfered unless it is proved to be mala fide. As discussed earlier, the documents produced by the applicant before us are not sufficient to prove that the decision not to fill up the vacancy on the basis of the DPC recommendation till December, 2016 was mala fide on the part of the respondents.

12. In view of the discussions above, we are of the view that the applicant has not been able to furnish sufficient justifications in the OA to justify any interference of the Tribunal in the matter. As a result, the OA lacks merit and is dismissed. There will be no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER(JUDL.)

(GOKUL CHANDRA PATI)
MEMBER (ADMN.)

