

.1.

**CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH**

**Original Application No.180/00897/2016**

**Thursday this the 10<sup>th</sup> day of January, 2019**

**C O R A M :**

**HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER  
HON'BLE Mr.ASHISH KALIA, JUDICIAL MEMBER**

V.T.K.Nayanar, S/o.Shri.M.P.Narayanan Namboodiri,  
Commissioner of Central Excise & Customs (Retd.),  
2A, Jomer Haven Apartments, Illom Road,  
Paliyam Road Cross, Ernakulam, Cochin – 682 016.

...Applicant

**(By Advocate Mr.C.S.G.Nair)**

**v e r s u s**

1. Union of India represented by the Secretary,  
Department of Revenue, North Block, New Delhi – 110 001.
2. Chairman, Central Board of Excise & Customs,  
North Block, New Delhi – 110 001.
3. Secretary to the Government of India,  
Department of Personnel and Training,  
North Block, New Delhi – 110 001.

...Respondents

**(By Advocate Mr.K.Kesavankutty,ACGSC)**

This application having been heard on 4<sup>th</sup> January, 2019, the Tribunal on 10<sup>th</sup> January, 2019 delivered the following :

**ORDER**

**Per : HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER**

O.A.No.180/897/2016 is filed by Shri.V.T.K.Nayanar, retired Commissioner of Central Excise and Customs for being deprived of his promotion as Chief Commissioner on account of the delay in convening the

.2.

Departmental Promotion Committee (DPC) and issuing orders on the basis of the Appointments Committee of the Cabinet (ACC) approval. The reliefs sought in the O.A are as follows :

1. To direct the respondents to promote the applicant as Chief Commissioner of Customs & Central Excise based on the select panel prepared by the DPC held on 21.6.2013 with effect from 1.8.2013 on notional basis and refix the pay in the grade of Chief Commissioner and grant all consequential benefits including leave encashment and other retirement benefits within a stipulated period.
2. Grant such other relief or reliefs that may be prayed for or that are found to be just and proper in the nature and circumstances of the case.
3. Grant cost of this O.A.

2. The applicant had joined Indian Revenue Service (IRS) (Customs & Central Excise) on 1.9.1981 as a direct recruit. He retired on 30.9.2013 after 32 years of service as Commissioner of Central Excise and Customs, Madurai Commissionerate, Tamilnadu. As per Rule 22 of the Indian Customs & Central Excise Service 'A' Rules 1987 the post of Commissioner of Central Excise is a Grade II service and appointment to Grade I of the service ie., to the post of Chief Commissioner shall be made by selection from among officers of Grade II of the service who possess 3 years regular service in the grade. Having been promoted to Grade II service ie., to the post of Commissioner during 2002 on regular basis the applicant had become eligible for promotion as Chief Commissioner during the year 2005.

.3.

3. Despite detailed instructions brought out by the 3<sup>rd</sup> respondent in the Model Calendar governing DPC communicated as per OM No.22011/5/86-Estt.(D) dated 10.4.1989 as amended by OM No.22011/5/91 Estt.(D) dated 27.3.1997, the DPCs are to be convened every year if necessary on a fixed date and vacancies existing shall be filled in accordance with the Recruitment Rules in force (Annexure A-2). As per Annexure A-3 a time schedule for convening the DPCs has also been prescribed with the objective of ensuring that the prepared panel is utilized as and when the vacancy arises during the course of the vacancy year. In all cases requiring approval of the ACC, administrative action for convening DPC is to be initiated at least 8 ½ months before the commencement of the vacancy year and that DPCs are to be held at least 4 months before the commencement of the vacancy year. Thus for the vacancy year 2013-2014, action ought to have been initiated by 15<sup>th</sup> July 2012 and DPC should have been convened by the end of November, 2012.

4. Regrettably, the DPCs for the year 2013-2014 was conducted only on 21.6.2013 indicating a delay of 7 months (Annexure A-5). There were 23 vacancies and 38 officers were considered. The applicant was at Sl.No.20 as is seen at Annexure II of Annexure A-5. 27 officers were found fit for promotion. After having provided for seal cover procedure in respect of certain other candidates, the applicant was the 13<sup>th</sup> official who was found fit for promotion. Ultimately as per communication No.18/32/2013 E.O.(SM II) dated 8.10.2013 issued by the 3<sup>rd</sup> respondent the ACC has approved the

.4.

proposal for promotion including the applicant (Annexure A-6). However it is to be understood that the proposal for ACC approval as per Annexure A-4 had been sent to 3<sup>rd</sup> respondent on 28.6.2013 and the approval of the ACC was communicated to the 1<sup>st</sup> respondent only on 8.10.2013 (Annexure A-6).

5. When the promotion orders were issued as per Office Order No.232/13 dated 1.11.2013 (Annexure A-7) the applicant did not find a place in the list and his junior Shri.R.K.Singla who was at Sl.No.14 was promoted. This was on the ground that the applicant had retired on superannuation on 30.9.2013. Having come to know about the issue of Annexure A-7, a representation was submitted to the 2<sup>nd</sup> respondent. However, nothing came out of it nor of the further two representations filed on 14.8.2015.

6. The applicant concedes that having retired before the issue of promotion order at Annexure A-7, he has no claim for actual promotion *per se*. However, he seeks the benefit of notional promotion with consequential benefits as the delay had occurred due to the administrative failure on the part of the respondents which deprived the applicant of his entitled benefits. The inordinate delay has caused grave injustice to the applicant. The proposal for ACC approval had been taken up on 28.6.2013 but approval was obtained only after more than three months during which time the applicant retired.

7. The respondents have filed a brief reply statement. The core of the defence of the respondents is to the effect that administrative reasons were the cause for the alleged delay. The DPC proposal had been sent to Union Public Service Commission (UPSC) for the vacancy year 2013-2014 on 12.3.2013 and the applicant was indeed one of the officers who was in the eligibility list. The DPC considered the same on 21.6.2013 and the said proposal was taken up on 28.6.2013 for seeking approval of the ACC through DoP&T. The DoP&T conveyed the approval of ACC vide their letter dated 8.10.2013 and the promotion order was issued on 1.11.2013. The applicant had retired on 30.9.2013 and for this reason not included in the list.

8. Heard Shri.C.S.G.Nair, learned counsel for the applicant and Shri.K.Kesavankutty, learned ACGSC for the respondents. All the records were perused. The case of the applicant is that due to the administrative laxity as evidenced in the delay in obtaining the ACC approval, he had been deprived of his legitimate claim to be promoted to the next higher grade. He was fully eligible for the said promotion. But he is willing to concede that on account of his superannuation at the end of September, 2013 he cannot be allowed to function in the promoted grade. However, he makes a convincing case for notional benefits of the higher post with effect from September, 2013. In this context the Office Memorandum dated 12.10.1998 at Annexure A-11 is pertinent. The operative part of the said O.M states as follows :

“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 year wise panel(s), who were within the zone of consideration in the relevant year(s). According to 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 year wise zone of consideration/panel and, consequently, their juniors are consider (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 principles prescribed in the Department of Personnel and Training Office Memorandum No.22011/8/87-Estt.(D) dated April 9, 1996.”

9. Clearly the applicant was a victim of circumstances beyond his control. The preparation of the list of officials comprising the zone of consideration, taking up the same with the UPSC for convening the DPC, meeting of the DPC, obtaining the ACC approval and final orders of promotion issued by the competent authority are various stages in the process. It is admitted that the proposal duly approved by the DPC had been submitted to the ACC through DoPT on 28.6.2013. The officer retired on 30.9.2013 when the orders of ACC and thereafter that of the competent authority in the department were still awaited. This inordinate delay is the sole factor which deprived the officer of promotion. While admitting that the respondents cannot post a retired employee on the promoted post, we are of the view that there is a justified reason for allowing the notional promotion with effect from September, 2013 as he has sought. He has relied on judgment of

the Hon'ble High Court of Delhi in **Union of India & Ors. v. G.D.Goel** (WPC No.4657/2005 decided on 14.3.2008) and judgment of the Hon'ble Supreme Court in **Union of India & Ors. v. K.V.Jankiraman (AIR 1991 SC 2010)** in support of his claim. The decision of the Hon'ble Supreme Court in K.V.Jankiraman (supra) is particularly relevant and it reads as follows :

“ Similarly, the argument that the petitioner was not entitled to the grant of emoluments on the principle of No work, no pay, is apparently misconceived and based upon wrong notions of law. If a civil servant is not offered the work to which he was legally entitled, he cannot be deprived of the wages for the post to which he subsequently is held entitled to. Permitting such a course to be adopted would be encouraging the imposition of double penalty, that is, firstly by declining the civil servant his right of promotion and secondly by depriving him of the emoluments to which he would have been entitled to upon promotion which subsequently was considered in his favour. Deprivation to work against the post to which a civil servant is entitled on promotion is always at the risk and responsibility of the State and cannot be made a basis for depriving such a civil servant of the emoluments to which he was entitled, had he been promoted in accordance with the rules at the time when he became eligible for such promotion. The courts cannot ignore the magnitude of these sufferings and the pains to which a civil servant is subjected on account of deprivation of the monetary benefits particularly in this case sky rocketing prices and non availability of essential requirements of livelihood. The Court cannot shut its eyes and forget the holocaust of economic deprivation to the petitioner and his dependents. Such a deprivation might have upset the career of the dependents, depriving the society of the services of such youth and budding dependents or children of the petitioner. They executive once being satisfied that a civil servant was entitled to the promotion with retrospective effect cannot deprive him of the benefit of the salary accruing on account of such promotion from an early date without assigning valid, cogent and specific reason. The order impugned in this case by which the petitioner/appellant was deprived of his right to claim back wages is admittedly non-speaking without assigning any justification of cogent and specific reasons.”

.8.

10. Based on the reasoning expressed above, the O.A succeeds. The benefits sought in the O.A are allowed in full and the respondents are directed to ensure that the same is given effect to within a period of three months from the date of receipt of a copy of this order. No costs.

**(Dated this the 10<sup>th</sup> of January 2019)**

**(ASHISH KALIA)  
JUDICIAL MEMBER**

**(E.K.BHARAT BHUSHAN)  
ADMINISTRATIVE MEMBER**

asp

**List of Annexures in O.A. No.180/00897/2016**

- 1. Annexure A1** – A copy of the Indian Customs & Central Excise Service Group 'A' Rules, 1987.
  - 2. Annexure A2** – A copy of the extract copy of the OM No.22011/5/91 Estt.(D) dated 27.3.1997 as printed in Swamy's Book connected to OM dated 8.9.1998.
  - 3. Annexure A3** – A copy of the OM No.22011/1/2011 Estt.(D) dated 11.3.2011 issued by the 3<sup>rd</sup> respondent Officers on all India basis published as on 1.4.2007.
  - 4. Annexure A4** – A copy of the Letter No.C.50/RTI/26/2016-Ad.II dated 16.5.2016.
  - 5. Annexure A5** – A copy of the Letter No.F-1/15(15)2013-AP.2 dated 25.6.2013 addressed to the 1<sup>st</sup> respondent.
  - 6. Annexure A6** – A copy of the list of Communication No.18/32/2013 E.O. (SM II) dated 8.10.2013 of the 3<sup>rd</sup> respondent.
  - 7. Annexure A7** – A copy of the Office Order No.232/13 dated 1.11.2013.
  - 8. Annexure A8** – A copy of the representation dated 10.5.2014.
  - 9. Annexure A9** – A copy of the representation dated 14.8.2015.
  - 10. Annexure A10**- A copy of the representation dated 8.3.2016.
  - 11. Annexure A11** –A copy of the OM No.22011/4/1998 Estt.I dated 12.10.1998 issued by the 3<sup>rd</sup> respondent.
  - 12. Annexure A12** – A copy of the OM No.22011/11/89 Estt.(D) dated 25.1.1990 issued by the 3<sup>rd</sup> respondent.
-