

**Central Administrative Tribunal
Principal Bench**

**RA No.157/2017
OA No.2894/2012**

Reserved on : 18.07.2019
Pronounced on : 27.08.2019

**Hon'ble Mr. Justice L. Narasimha Reddy, Chairman
Hon'ble Mr. Mohd. Jamshed, Member (A)**

1. Union of India
Through its Secretary
Ministry of New and Renewable Energy
B-14, CGO Complex, Lodhi Road,
New Delhi 110 003.
2. Union of India
Through its Secretary
Department of Personnel and Training
North Block,
New Delhi 110 001. ... Applicants.

(By Advocate : Mr. Rajinder Nischal)

Vs.

1. Vinod Kumar Jain
S/o Late S. P. Jain
R/o S-62, Type-62, Type IV (S)
HUDCO Place, Ansal Plaza,
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2. Gaj Raj Singh
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3. Sohail Akhtar
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4. Bhuvnesh Kumar Bhatt
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5. H. R. Khan
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6. Dilip Nigam
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7. Mansa Ram Nouni
S/o Shri U. D. Nouni
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8. J. P. Singh
S/o Late P. S. Malhotra
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9. S. K. Singh
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10. Jugal Kishor
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New Delhi 110 003.
11. K. C. Vaghri
S/o Shri F. C. Vadhri
R/o F-101, Raghbir Nagar,
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Ministry of New and Renewal Energy
B-14, CGO Complex, Lodhi Road,
New Delhi 110 003. Respondents.

(By Advocates : Shri R. K. Kapoor, Shri Rajat Kapoor and
Ms. Priyanka Pandey)

: O R D E R :

Justice L. Narasimha Reddy, Chairman:

This Review Application is filed by the respondents with a prayer to review the order dated 03.07.2014 passed by this Tribunal in OA No.2894/2012. The said OA was decided along with OA No.2892/2012. For the sake of

convenience, the parties are referred to as arrayed in the OA.

2. The applicants were working in various capacities in the Ministry of Environment and Forests. The Flexible Complementing Scheme (FCS), that provided for upgradation of the Scientists of various categories to next higher position on being found fit by the Assessment Board is applicable to them. The eligibility to be considered depends on completion of the specified residency period. The applicants pleaded that they became eligible to be considered on completion of the residency period, and though the necessary exercise in this behalf was required to be undertaken by the respondents on the 1st of January and 1st of July of every year, the calendar was not adhered to, and thereby, they were put to hardship. Reliance was placed upon the judgment of Hon'ble Supreme Court in ***Union of India vs. S. K. Murti*** and the corresponding judgment of the High Court of Delhi in ***S. K. Murti vs. Union of India*** (WP No.14263/2004).

3. The OAs were resisted by the respondents. One of the contentions raised in the counter affidavit, particularly in para 7, was that the cases of the applicants were considered by the assessment Board which met on 05.12.2002 and declared the applicants as "Unfit".

4. The Tribunal has undertaken extensive discussion, particularly, with reference to the judgment in **S. K. Murti** (supra) and **A. Duraisami vs. Union of India and Another** (OA No.1926/2013 decided on 29.05.2014). In **Duraisami's** case, the Tribunal took the view that the order in **S. K. Murti's** case passed by the Hon'ble Supreme Court cannot be treated as the one in *rem* but was only in *personam* to the extent of the applicants in the concerned OA. Ultimately, OA No.2894/2012 & 2892/2012 were disposed of in terms of the directions contained in the judgment dated 29.05.2014 passed in OA No.1926/2013, namely to consider the cases of the applicants therein in terms of the OM dated 24.05.2010, and if they are found eligible, to grant the FCS with effect from the appropriate date and to extend the consequential benefits.

5. The respondents filed W.P. (c) No.194/2017 before the Hon'ble High Court of Delhi feeling aggrieved by the judgment in the OAs. One of the contentions raised in the WP was that though a specific plea was raised in the counter affidavit that the cases of the applicants were considered by the Assessment Board and they were found 'Unfit', the Tribunal directed that their cases be considered, and to antedate their promotion. The Hon'ble High Court disposed of the writ petition, with following observations:-

“6. It is not the case of the petitioners that the respondents have filed a contempt petition, claiming that the petitioners have not rightly implemented the decision. In case, any contempt petition is filed, it will be open to the petitioners to justify and explain their stand and it will be equally open to the respondents to contest the same in accordance with law. In case the petitioners feel that their stand in paragraph 8 of the counter affidavit was not considered and they should file an application for review, they are at liberty to do so. We clarify that if any such application for review is filed, the same will be examined as per the parameters of review. Of course, the petitioners will have to justify and explain the delay and it is equally open to the respondents to contest the review application.

7. At this stage, we are not inclined to issue notice only on the basis of assumptions and interfere with the impugned order. The writ petition is accordingly disposed of without commenting on the merits and leaving the issue open to be raised again, if required and necessary.”

It is in this background, that the respondents filed the review petition.

6. The plea of the applicants is that they are entitled to be extended the benefit of DPCs in regular intervals, and with a view to avoid hardship to the employees who have otherwise become entitled to be considered for promotion or upgradation, as the case may be, a calendar was also fixed but the same was not adhered to. It is not clear as to whether there was any delay in convening of the meeting for deciding the eligibility of the officers who were being extended the benefit of FCS at the relevant point of time. One important fact which the Tribunal, however, did not notice while disposing of the OA is that the applicants were,

in fact, considered by the Assessment Board and were found “Unfit”. The occasion to antedate any promotion would arise, if only, the concerned officer was found eligible to be conferred with the benefit, at a belated stage. In para 7 of the counter affidavit, the respondents stated as under:

“7. All these scientists, including Dr. Jugal Kishore has been considered by the respective assessment boards and not found fit (as detailed in the statement at R/3). Mere seniority or completion of residency period or marking/recommendation by the Selection Committee on the basis of ACR/APAR are not the only criteria for in-situ promotion but is only the parameter to find out the eligibility of the concerned Scientist for being considered for promotion under merit based FCS by the Assessment Board and recommendations of which are finally submitted to the Competent Authority for consideration and his orders. The promotion becomes effective only after the Competent Authority accepts the recommendations of the Assessment Board and is effective from the date the Competent Authority accepts/orders, not from the retrospective date as it will devoid the basic concept to encourage qualified Scientist/technocrats for their achievements in research and development and field work.”

In the introductory portion of the counter affidavit also, extensive reference was made to the consideration of cases of the applicants. The minutes of the Board were filed as Annexure R/3. The applicants herein were shown as not found fit. In their rejoinder, the applicants tried to gloss over the issue by stating that the consideration was on a different aspect. If one takes into account the prayer in the OA, the said plea was totally untenable. As a matter of fact

the applicants have misled the Tribunal by not mentioning the result of their consideration.

7. Coming to the legal issue, the question as to whether an employee would be entitled to be promoted with retrospective effect was dealt with by the Hon'ble Supreme Court in ***Union of India and Others vs. K. K. Vadera and Others*** 1989 Supp (2) SCC 625. Their lordships clinchingly laid down the law as under:-

“5.....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.”

This was followed in the subsequent judgment of the Hon'ble Supreme Court in ***Baij Nath Sharma vs. Hon'ble Rajasthan High Court at Jodhpur and Another*** (1998) 7 SCC 44.

8. The question whether an employee is entitled to be promoted from a date on which the vacancy arose or from the date on which the DPC was scheduled to meet as per

the calendar, stands answered unequivocally by the judgment of the Hon'ble Supreme Court in **Vadera's** case. Obviously, not being aware of the judgment of the Hon'ble Supreme Court, the Tribunal issued directions in certain cases, to the effect that the promotion of an officer as and when found fit by the DPC, shall be with effect from the date on which the vacancy arose. OA No.192/2005 is one such. The Union of India filed writ petition before the Hon'ble High Court of Delhi. Through its detailed judgment dated 12.01.2007, the Hon'ble High Court in **Union of India vs. Rajendra Roy and Ors.** extracted the judgment of Hon'ble Supreme Court in K. K. Vadera's case, referred to the judgment in **Baij Nath Sharma's case** and held as under:-

“16. The Hon'ble Supreme Court held that the appellant would certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation which was not the case before the Court. The Court also noticed that there was no rule under which promotion could be granted from the date of occurrence of the vacancy. The Court relied upon its earlier decision in K. K. Vadera (supra) and dismissed the appeal of Baijnath Sharma. This decision in our view, seals the fate of the respondent. No doubt, the Hon'ble Supreme Court regretted the inaction on the part of the High Court to make timely promotions since delays and inaction, resulted in deprivation of promotion to the deserving candidates without any fault of theirs. The Supreme Court also expressed the desire that such occurrences should not recur. But that by itself cannot give a right to the respondent to go against the jurisprudence evolved in the main part of the judgment.”

The only exception recognized to the non retrospective nature of a promotion is where an officer junior to another was promoted with effect from a particular date and the senior who was overlooked earlier, was found fit at a subsequent stage. Even this is subject to the rider that the date of promotion of the junior occurs much before the one, on which senior retired from service.

9. In the judgment in the present OA, extensive reference was made to the orders passed by the Hon'ble High Court and Hon'ble Supreme Court in S. K. Murti's case. It is important to note that the only basis for claiming retrospective promotion in S. K. Murti's case was that the Assessment Board was required to meet on 01.01.1999 for conferring the benefit under FCS, but it was convened only in September, 2000. The Tribunal rejected the plea that the promotion which was ordered w.e.f. 19.09.2000 shall be with retrospective effect from 01.01.1999. In its order dated 05.10.2010, passed in the resultant writ petition, the Hon'ble High Court took note of various OM's pertaining to the issue. The respondents took the plea that even in the OM which stipulated the calendar, it was clearly mentioned that no promotion shall be granted with retrospective effect.

10. The adjudicatory part of the order of the High Court can be perceived from paragraphs 6 & 7. That read as under:-

“6. The last sentence of para 20 is relied upon by the respondents to urge that the office memorandum clearly states that no promotion should be granted with retrospective effect. To this the answer by the petitioner is that the preceding two sentences makes it very clear that the Assessment Boards have to be constituted well in advance keeping in view the fact that 1st January and 1st April of each year are crucial dates to effect promotion.

7. Now, nobody can take advantage of his own wrong. Nothing has been shown to us by the respondents to justify not constituting the Assessment Board/Selection Committee in time.”

It does not appear that the respondents therein, i.e., Union of India brought to the notice of the Hon’ble High Court, the judgment of the Hon’ble Supreme Court in K. K. Vadera’s case (supra) or Baij Nath Sharma’s case or the judgment of the High Court in Rajendra Roy’s case.

11. In the SLP that has arisen out of S. K. Murti’s case, the Hon’ble Supreme Court did not address the issue independently, nor the judgment in K. K. Vadera’s case was taken into account.

12. Though in several OAs which were referred to in the judgment in the present OA, it was mentioned that the observations made by the Hon’ble Supreme Court in **S. K. Murti’s** case are only in *personam*, to the extent of the

applicants in OA No.826/2013, we do not intend to address that question at all. As of now, the judgment of the Hon'ble Supreme Court in K. K. Vadera's case and Baij Nath Sharma's case (supra) holds the field and no different view was expressed in subsequent judgments. Therefore, the question of granting retrospective promotion does not arise.

13. Added to this, the applicants were considered for promotion at the relevant point of time and were held "Unfit" to be extended the benefit of FCS. This material fact missed the attention of the Tribunal when the OA was decided earlier.

14. We, therefore, allow the RA and recall the order dated 03.07.2014 passed in OA No.2894/2012.

15. In view of the discussions undertaken above, on merit also, we dismiss the OA. There shall be no order as to costs.

(Mohd. Jamshed)
Member (A)

(Justice L. Narasimha Reddy)
Chairman

/pj/