

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

O.A.No. 1192/1997

Date of Decision: 28 - 9 - 1998

Shri Suresh K. Kalra

APPLICANT

(By Advocate Shri C. L. Dhawan

versus

Union of India & Ors.

RESPONDENTS

(By Advocate Shri Madhav Panickar

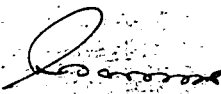
CORAM:

THE HON'BLE SHRI T. N. Bhat, Member (J)

THE HON'BLE SHRI S.P. BISWAS, MEMBER(A)

1. TO BE REFERRED TO THE REPORTER OR NOT? YES

2. WHETHER IT NEEDS TO BE CIRCULATED TO OTHER
BENCHES OF THE TRIBUNAL?


(S.P. Biswas)
Member(A)

Cases referred:

1. Punjab & Haryana HC - Surjit Kaur & Ors. Vs. State of Punjab & Ors. III 1992 CSJ (HC) 161
2. Y.V. Rangaiah V. J. Sreenivasa Rao AIR 1983 SC 852
3. K. Narayananan V. State of Karnataka (1993) 5 SLR 290 (SC)
4. II (1987) ATLT 1 SBI V. Y. K. Srivastava & Ors. & T. N. Goel & Ors. V. Chairman SBI & Ors.

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1192/1997

New Delhi, this 28th September, 1998

Hon'ble Shri T.N. Bhat, Member (J)
Hon'ble Shri S.P. Biswas, Member (A)

Shri Suresh K. Kalra
s/o late Shri S.S. Lal Kalra
A-119, Anand Vihar, Delhi-92 .. Applicant

(Through Advocate Shri C.L. Dhawan)

versus

Union of India, through

1. Cabinet Secretary
Rashtrapati Bhavan
New Delhi
 2. Secretary
Research & Analysis Wing (RAW)
Cabinet Secretariat
7, Bikaner House Annexe, New Delhi
 3. Establishment Officer
Deptt. of Personnel & Training
North Block, New Delhi
 4. Sandeep Bhatnagar
 5. S.K. Sharma
 6. Bhaskar Reddy
 7. P.K. Upadhyay
 8. D.S. Rajan
 9. B.P. Kothiyal
(all through R-2)
- Respondents
- (By Advocate Shri Madhav Panickar)

ORDER

Hon'ble Shri S.P. Biswas

The applicant, an officer in Research & Analysis Wing (RAW for short) under the Cabinet Secretariat, Government of India, is aggrieved by A-6 undated order by which some of his juniors have been promoted to the grade of Director (Grade IV of RAS) in the pay scale of Rs.4800-5700 ignoring his superior claim. He is before us seeking reliefs in terms of (i) issuance of directions to R-1 to R-3 to

uphold the findings of DPC held in 1993, (ii) set aside A-6 impugned order; (iii) to stay regularisation and confirmation of R-4 to R-9 in the post of Director/Additional Commissioner (RAS) and (iv) promote the applicant with retrospective effect with consequential benefits including pay, allowances and seniority. 17

2. Background facts necessary for disposal of this OA as well as appreciation of legal issues involved are as under:

The applicant initially joined Indian Forest Service (IFS for short) of UT cadre in May, 1979 and was appointed as Assistant Conservator of Forests in the junior scale of Rs.700-1300. He was promoted to Senior Time Scale (STS for short) and Junior Administrative Grade (JAG for short) in 1983 and 1988 respectively. Subsequently, he joined service in RAW on deputation basis in 1988 first as Under Secretary but was immediately promoted as Deputy Secretary from 19.5.89 as per Rules. After due compliance with the Rules, applicant resigned from IFS and got absorbed in Research & Analysis Service (RAS for short) in the main stream cadre of RAW with effect from 1.12.90. This was in continuation of previous service with all service benefits. He was appointed in substantive capacity in RAW retrospectively with effect from 1.12.91 by an order dated 11.9.96 (A-3). Applicant was due for promotion to the next higher rank in Grade IV in the capacity of Director/Additional Commissioner

as per the provisions under Schedule I of RAW (Recruitment, Cadre and Service) Rules, 1975, since he fulfilled all the conditions. DPC was duly held in September/October, 1993 as per the orders of Respondents No.1 and 2 and names of applicant as well as R-4 were considered and recommended. Proceedings of the DPC were sent to the Government of India for obtaining approval of Appointment Committee of Cabinet (ACC for short), after the proposals were scrutinised by DoPT, R-3. These proceedings of the DPC, however, were returned by ACC in June, 1995 with the objection that the aforesaid Recruitment Rules of 1975 needed amendment. R-2 was further directed to review the promotion status of the applicant as well as R-4 after making the requisite amendment. It is this decision of ACC which has been challenged by the applicant on the ground that vacancies that occurred at a particular time have to be filled up by applying the R/Rules prevalent at that relevant date and not by the rules amended/notified on a later date.

3. Thereafter, 1975 Rules were replaced by the RAW (Recruitment, Cadre and Service) Amended Rules, 1996 promulgated vide notification dated May, 1996 with the stipulation that these rules shall be deemed to have come into force with effect from 20.4.1989. Following this, de-novo DPC was held in July, 1996 pursuant to new R/Rules, 1996 and the DPC recommended names of nine officers as in impugned order (A-6) for promotion to the grade of

Director in RAW. The applicant is, therefore, assailing both the retrospective application of the new R/Rules applied for the purpose of filling up the vacancies that arose in 1993 as well as promotions effected by A-6 order after holding de-novo DPC in July, 1996. 19

4. Applicant seeks to justify his claim on the basis that the proceedings of the DPC constituted in 1993 had duly cleared his case alongwith R-4 for promotion to the post of Director/Additional Commissioner (Grade IV) and that those proposals/proceedings were sent to ACC after due consideration/examination by R-3. However, those proceedings were erroneously and illegally returned by the ACC on the ground that R/Rules on the basis of which applicant and R-4 were sought to be promoted needed amendment. It is worthwhile mentioning here that it was not the case of ACC that the applicant as well as R-4 did not fulfill the eligibility or the selection criteria. It is a well settled principle of law that a DPC should be held in accordance with the R/Rules existing on the date of holding of the DPC and not on the basis of R/Rules to be amended later and that too with retrospective effect. Nor the DPC could be postponed merely because the R/Rules needed to be amended. In support of his contentions, the learned counsel cited the decision of Punjab & Haryana High Court in Surjit Kaur & Ors. Vs. State of Punjab & Ors. III 1992 CSJ (HC) 161. While according approval to the principles that in

future date of occurrence of vacancies shall be taken as the relevant date of determining eligibility of promotion to higher post, the Hon'ble High Court decided that case (Surjit Kaur) on the basis of law/principles laid down by the Apex Court in **Y.V. Rangaiah Vs. J. Sreenivasa Rao, AIR 1983 SC 852**. It was held in that case that:

"We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules".

5. To add further, learned counsel drew our attention to the case of **S.K. Nandi Vs. UOI (OA No.1097/94)** decided on 9.1.95, wherein the Calcutta Bench of the Tribunal held that "the DPC should be held in accordance with the existing rules when DPC was held and not in terms of new rules which are yet to be framed subsequently". It was submitted that officers in RAW for promotion to the rank of Director/Additional Commissioner were governed by Schedule-I of the previous RAW Rules and were duly and legally promoted by the ACC prior to as well as after 1993. It was only in the case of the applicant that the ACC has sought to amend the R/Rules which was clearly discriminatory and violative of Articles 14 and 16 of the Constitution of India. Certain promotions have been made by the respondents on the basis of same unamended rules as in A-4 in the year 1994-95 after holding 1993 DPC in respect of applicant.

2
11

6. The applicant argued that the Rules existing at the time of vacancies ought to have been taken into account and failure on the part of the authorities to ensure strict compliance of the same goes to the very root of the case and since R-1 to R-3 have violated the mandatory provisions in this regard, the DPC of 1993 is liable to be confirmed. 21

7. The DPC so constituted by R-1 and R-2 in 1996 had taken into consideration the amended R/Rules of 1996 for filling up the vacancies that arose in 1993. Such an action has no legal sanctity since the same came into operation with retrospective effect. The Hon'ble Supreme Court has held in various judgements that Rules cannot be amended with retrospective effect. In the case of K. Narayanan Vs. State of Karnataka (1993) 5 SLR 290(SC), the Hon'ble Supreme Court has held that "Rules operate prospectively". Again, the Hon'ble Supreme Court in the judgement reported in II (1987) ATLT 1 in the case of State of Bank of India Vs. Y.K.Srivastava & Ors. and T.N. Goel & Ors. V. Chairman, State Bank of India & Ors. held that:

"Unless the statute specifically authorises, the rule making authority cannot frame any rules with retrospective effect"

8. Further, R-1 to R-3 while considering the case of the applicant for the DPC constituted in 1996 for promotion to the post of Director/Addl. Commissioner did not observe the instructions laid down by the Government of India

9

on the procedures to be followed by the DPC. Instructions in para 2.4.1 and 2.4.3 in DoPT's OM dated 10.3.89 have not been followed. Para 2.4.1, amongst others, stipulates preparation of select list of earlier year above the one for the next year and so on. Whereas para 2.4.3 provides that "for the purpose of evaluating the merit of the officers while preparing year-wise panels, the scrutiny of the record of service of the officers should be limited to the record that would have been available had the DPC met at the appropriate time". Thus, both the aforesaid instructions have been violated.

9. Respondents, on the contrary, submitted that the proceedings of the DPC were submitted for obtaining approval of the competent authority who, in turn, pointed out that DPC did not consider 4 officers of batches earlier than 1979 and that since the post of Deputy Secretary is in existence as a feeder grade, present R/Rules may have to be amended to incorporate qualifying service in the feeder cadre in the existing rules. Competent authority, i.e. ACC, however directed that after incorporating qualifying service in the rules cases of two officers should be reconsidered alongwith cases of other eligible officers of earlier batches.

10. The DPC held on 15.7.96 considered RAS officers of seniority between 1976 and 1981. It also considered the ACRs of preceding five years to

cover the period pertaining to the feeder grade. DPC has acted in accordance with DOPT's instructions in OM dated 10.3.89, contended the learned counsel for the respondents.

11. Sub-para 2.2.1 of the said guidelines stipulate that "CRs for 5 preceding years may be seen. However, in the present case, where the required qualifying service is more than 5 years, DPC was required to see the records with particular reference to the CRs for the years equal to the required qualifying service. DPC did not recommend the case of the applicant as he failed to come up to the prescribed benchmark of "Very good".

12. Respondents would further argue that DPC held in 1993 was to fill up anticipated vacancies and there was no post lying vacant to accommodate the applicant and other juniors to him. Applicant completed qualifying service of 5 years in the rank of Deputy Secretary only on 18.5.94. Hence applicant was not eligible for consideration by the DPC held in 1993. The contention of the applicant that he was selected by the DPC held in 1993 is not correct as the DPC had only recommended his name alongwith others and that the said recommendation was not accepted by the competent authority.

13. We are required to determine if the steps taken by R-1 to R-3 in effecting promotion to the grade of Director (Grade IV of RAS) as in Annexure

A-6, have been vitiated by violation of rules, procedural infirmities and principles of natural justice. (24)

14. It is not disputed that amended Rules of May, 1996 were given retrospective effect from April, 1989. Respondents have not shown any statutory provisions authorising them to frame the Rules with retrospective effect. The very fact that the competent authority had returned November, 1993 DPC recommendations (to fill up two vacancies) unapproved by order dated 11.8.95 and respondents officially did not claim to have held any other DPC before 15.7.96 would be sufficient enough to conclude that some of the vacancies filled up by the impugned order accrued well before the amendment took place on 15.5.96. Respondents would submit that DPC of 1993 was held to fill up anticipated vacancies. This statement of respondents raises suspicion since according to RAW Rules, 1975 there were 32 sanctioned posts of Director in RAS Cadre (Annexure R-3) and as per the Civil List of RAS as on 1.1.97, there were only 17 RAS officers in ^{position in} the rank of Director in 1993. Thus, there were atleast 15 clear vacancies in the rank of Director in 1993.

15. In any case, what is not disputed is that respondents have promoted four officers namely S/Shri M.A. Emile, Sandeep Joshi, Col. D.S. Bhandari and Col. R.N. Negi between 26.6.95 to 20.3.96 well before the amendment took place by the

impugned application of rules. This is impermissible. The question regarding giving retrospective effect to the statute came up for consideration before the Hon'ble Supreme Court in the case of **Mohd. Rashid Khan V. State of UP & Anr.** AIR 1979 SC 592, wherein their Lordship observed:

"Perhaps no rule of construction is more firmly established than this that retrospective operation is not to be given to a statute so as to impair an existing right or obligation other than as regards the matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment".

16. In view of the aforesaid judicial pronouncements there appears to be some merit in the contention of the applicant that several vacancies had occurred before making of the new R/Rules in 1996 and eligibility of applicant ought to have been considered under the then existing Rules of 1975. R-1 to R-3 therefore have violated the law laid down on the issue of application of R/Rules. On this ground itself the OA merits consideration.

17. It is worth mentioning here that the respondents also held DPCs during the year 1994 and 1995 for promotion of five RAS officers namely S/Shri S.S. Mahapatra, K.B.S. Katoch, M.K. Payasi, Suresh Dhundia and N.K. Sharma to fill up various vacancies in the rank of Director. It is of vital importance to know as to which vacancies were sought to be filled in by these DPCs held

during 1994-1995. As these two DPCs were also not approved by the competent authority, the five vacancies either existing or anticipated, so sought to be filled in by the said DPCs, continued to remain vacant and were very much in existence ~~even before~~ ~~1996 was held~~ and therefore the contention of the respondents that the DPC of 1996 was held only to fill up the anticipated vacancies is altogether false and not tenable. Respondents did not dispute this in course of oral arguments.

18. Details in the aforesaid two paras bring out yet another procedural infirmity. DPC minutes dated 15.7.96 mentions that "Although the number of vacancies available in the rank of Director in the RAS stream is 18, the DPC was requested to assess the records of 11 eligible RAS officers for appointment to Grade IV of RAS as Director as per details given in the brief for the DPC vide Special Secretariat No.4/SPS/95(45) dated 12.7.96." There is no mention in the aforesaid minutes as regards the time when the relevant vacancies arose nor did the DPC felt it necessary to raise this issue. But the fact that names of S/Shri M.K. Payasi, K.B.S. Katoch and S.S. Mahapatra (all of RAS 1976) figured in the DPC proceedings of 1994 and 1995 as well as in July, 1996 DPC is more than enough to enter into the findings that 11 vacancies were occurred in different years. A close look at the minutes of this very DPC would reveal that the brief given to the DPC by R-1 & R-2 was inadequate.

19. In fact, as per instructions of DoPT dated 4.10.89, the concerned department is required to furnish crucial/confidential documents in respect of 9 items to the DPC or the review DPC. Two such important items relate to year-wise eligibility list of officers eligible for promotion for consideration in each year and correct position regarding vacancies and the manner of their occurrence. It appears to us that the details submitted by the department to the DPC were less than inadequate as is evident by the remarks of the DPC in para 3. The fact that the department was considering filling up the promotional posts by means of "Selection" should have been mentioned in the written brief meant for the DPC or review DPC. Based on the above, the DPC proceedings are in clear violation of DOPT's instructions in paras 2.4.1 and 2.4.3 of OM dated 22011/5/86-Estt(D) dated 10.3.89.

20. Because of aforesaid glaring irregularities, we do not consider it necessary to adjudicate any other allegations of the applicant like legality or otherwise of holding de-novo DPC etc.

21. We find that the Tribunal vide its interim order dated 12.1.98 had directed that any promotion made shall be subject to the outcome of this OA. We only hope that respondents have issued necessary follow up orders pursuant to the aforesaid interim order.

22. In the result, the OA is allowed with the following directions:

28

- (1) Annexure A-5 notification dated 16.5.96 shall stand quashed only with reference to item No.(2) which mentions that "They shall be deemed to have come into force from 20th April, 1989";
- (2) Applicant shall be reconsidered for promotion in the grade of Director/Additional Commissioner by holding a review DPC in terms of unamended R/Rules of 1975 and strictly in compliance of DoPT's instructions dated 10.3.1989;
- (3) In case the competent authority considers applicant's case favourably, the junior-most official in Annexure A-6 promotional order shall be replaced by the applicant. In other words, we do not propose to strike down the promotion of eight others unless respondents are in a position to adjust the applicant without disturbing anybody. If promoted, the applicant shall be entitled for grant of notional seniority from the date he was due for promotion and his pay shall get fixed accordingly but without any backwages.
- (4) Our order at (2) above shall be complied with within a period of three months from the date of receipt of a certified copy of this order.
- (5) There shall be no order as to costs.


(S.P. Biswas)
Member (A)


(T.N. Bhat)
Member (J)

28.9.98

/gtv/