

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

O.A. No. 2791/1997

New Delhi this the ^{6th} Day of ^{March} ~~February~~ 1998

Hon'ble Dr. Jose P. Verghese, Vice Chairman (J)
Hon'ble Shri S.P. Biswas, Member (A)

Shri G.C. Kaushal, IPS
Son of Shri Gulaba Ram,
R/o House No. 14, Type V,
Kusumpti, Shimla

Presently:
House No. 30,
Himgiri Apartments,
Outer Ring Road,
Vikaspuri, New Delhi.

Petitioner

(By Advocate: Shri Rajeshwar Singh with
Shri M.C. Dhingra)

-Versus-

1. Union of India, through
Secretary,
Ministry of Home Affairs,
North Block, New Delhi.
2. Secretary,
Dept. of Personnel & Administrative
Reforms,
Government of India,
North Block, New Delhi.
3. National Commission for
Scheduled Castes & Scheduled Tribes,
through its Secretary,
Lok Nayak Bhawan,
Khan Market,
New Delhi
4. State of Himachal Pradesh,
through Chief Secretary,
Shimla (H.P.)

Respondents

(By Shri A.M. Singhvi, Sr.Counsel with
Shri J.S. Attri & Shri P.K. Bansal
Counsel for Govt. of H.P.)

(By Advocate: Shri VSR Krishna)

ORDER

Hon'ble Dr. Jose P. Verghese, Vice Chairman (J)

4

The applicant is an IPS Officer of 1977 batch, posted as Assistant Inspector General (Railway Traffic) at Shimla, Himachal Pradesh. The applicant claims to have had an excellent career until the petitioner began to implement the rules in favour of the constitutionally protected classes to the dislike of the powers that be. The allegation of the petitioner is that for no better reason, the petitioner had been harassed, humiliated and brought under frequent transfers and postings amounting to reversion, deliberately made alterations in the Annual Confidential Reports, instituted false proceedings and finally suspended him from service by an order dated 14.1.97 on the ground of contemplated disciplinary proceedings. The contemplated disciplinary proceedings happened to be both a fresh disciplinary proceedings by an order dated 28.1.97 as well as a restart of a previous proceedings, on the same set of facts which was earlier issued in the year 1992, subjected to disciplinary proceedings, and finally the inquiry officer returned a finding that none of the charges were proved. The petitioner is also challenging the said order in this OA. According to the petitioner, these unwarranted disciplinary proceedings were initiated against him only to deprive him from promotions which were otherwise due to his rank and status and even after the conclusion of the same, the respondents did resort to other methods of denying the said promotions. The petitioner also had approached the Hon'ble Supreme Court on two occasions and on both the occasions the Hon'ble Supreme Court had suggested transfer of cadre of the petitioner out of Himachal Pradesh which was not acceded to by the respondents 1 and 2. The respondent 3 was on the other hand more considerate towards the invocations of the petitioner and did direct the respondent 4 to perform certain acts and this OA has been filed also on the face of the defiance of the respondent 4 to comply with the directions of respondent 3, says the petitioner.

3

1.2 The facts of the case is narrated as stated herebelow. According to the petitioner the first action to victimize the petitioner was for no apparent reason whatsoever. He was posted as Superintendent of Police (leave reserve) at the Police Hqrs with no duties and responsibilities and at the same time reducing his pay by virtue of such posting. After a representation failed, the petitioner challenged the said action of the respondents before the Chandigarh Bench of this Tribunal, in 1986 and the only defence taken by respondents therein was that "some inquiry" is being contemplated against the petitioner. Since the defence of the respondents were not satisfactory, the Tribunal allowed the application.

1.3 It was further alleged by the petitioner that "some inquiry" referred to by the respondent before the Tribunal in the aforesaid OA, finally came to be a criminal case, and an FIR No 1/88 dt 20.2.88 was lodged against the petitioner. Again the petitioner approached the Hon'ble High Court at Shimla by a petition to quash the said FIR and upon instructions and on the basis of the advice of the Union Law Ministry which gave the opinion that no case is made out in the said FIR against the petitioner, the respondents stated before the High Court and assured that the said FIR is under the process of cancellation. The assurance given by the respondents was not readily carried out, till a contempt of court proceedings were initiated against respondent 4 and finally the FIR was formally cancelled by the Special Judge, Dharmasala, by categorically recording that there was no evidence, whereupon the Hon'ble High Court discharged the contempt petition.

(9)

1.4 The respondent 4 could not take the fact of cancellation of the FIR under such circumstances and seems to have proceeded to issue a charge sheet against the petitioner, containing substantially the same set of allegations which were in the FIR, which already stood cancelled by that time. The allegation of the petitioner is that filing an FIR, and subsequent cancellation and following it up by a charge sheet was all intended to prevent the petitioner from being promoted to the post of Sr. Superintendent of Police (Selection Grade) to which he was entitled in the year 1990. It was stated by the petitioner that ultimately this charge sheet was proceeded with at the instance of an inquiry officer who submitted his report on 30.12.95 exonerating the petitioner of all the charges. It is further pointed out that it is the same charge sheet which has been now revived and issued against the petitioner on 7.2.97 which is also under challenge in this OA along with another contemplated disciplinary proceedings, on the basis of which the petitioner was placed under suspension by an order dt 14.1.97.

1.5 It was further submitted by the petitioner that aggrieved by the fact of issuing charge sheet against the petitioner on the basis of the same set of allegations contained in the cancelled FIR, the petitioner made a detailed representation to the then Hon'ble Governor of the State (since 15.12.92 the State of HP was under President Rule) who in his wisdom referred the matter to the Law Department for dropping the proceedings and directed the respondent 4 to release promotions which were due to him in 1990. Accordingly by an order dt 24.4.93, the respondent 4 issued the order promoting the applicant to the post of Sr. SP Selection Grade retrospectively, with effect from July 1990. But the recommendation for dropping the proceedings was further got delayed at the instance of respondent 4 and through its officers, which according to the

(1)

petitioner, never took place, rather he was proceeded against, and the inquiry officer detailed for the purpose, absolved him from all the charges but it was re-started by the impugned order dt 7.2.1997.

1.6 In spite of the recommendation from the Hon'ble Governor to drop the proceedings, the then Director General of Police on 6.9.93 and 10.9.93, managed to communicate certain adverse remarks to the petitioner said to be for the period from 1.4.91 to 31.3.92 and 17.8.92 to 31.3.93 respectively. It was further pointed out by the petitioner that communication of these adverse remarks on 6.9.93 and 10.9.93 belatedly was after the respondent themselves had issued promotion order on 24.4.93 and the petitioner submits that he has every reason to believe that had the said adverse remarks existed in the file at the time when the promotion order was issued, the said promotion would not have taken place. His apprehension is that these remarks were subsequently entered by altering the records at the instance of some of the officers of respondent 4 only for the purpose of inflicting harassment and humiliation. Aggrieved by the belated communication of adverse remarks under suspicious circumstances, the petitioner submitted a representation to the Additional Chief Secretary who after finding substance in the representation recommended for expunction of the adverse remarks. But it is alleged by the petitioner that the said recommendation to expunge the said adverse remarks by the Addl. Chief Secretary was forwarded to the accepting authority, namely, the Chief Minister. Ignoring the fact that the then Chief Minister Shri Virbhadra Singh, was not the CM at the relevant time, namely 1990-93, occupying the post of CM and under the rules the said CM could not have been his accepting authority as far as the ACRs of 1991-92 are concerned, yet the same were wrongly forwarded to the CM in his capacity as the accepting authority. It was further

✓ (11)

alleged that the CM, as if he was holding some grudge against the petitioner, added some more severe adverse remarks by himself and sent the file back.

1.7 The said turn of events made the petitioner to approach the Hon'ble Tribunal at Chandigarh by OA No 643 and 644 of 1994 and unfortunately the said Bench of the Tribunal recorded a finding that late communication of adverse remarks is per se not fatal and rejected the OAS.

1.8 In the meantime inspite of the recommendation of the Governor to drop the pending disciplinary proceedings and inspite of the fact that the concerned inquiry officer had also recommended to the Home Department on 28.11.92 to reconsider the case of dropping the disciplinary proceedings in the light of the order passed by the High Court and that of the special judge vide the order dt 20.5.92 which had resulted in cancellation of FIR containing the same set of facts, the charge sheet remained without being dropped. Accordingly the petitioner filed yet another OA 1446/92 for the purpose of quashing the said charge and the Tribunal did not agree to quash the charge sheet rather directed to complete the proceedings within a period of 4 weeks by their order dt 12.8.94. Infact, the inquiry officer submitted his report after 14 months namely on 30.12.95, exonerating the applicant of all the charges.

1.9 It was further submitted that the petitioner in the meantime filed a complaint before the special judge against various state authorities stating that the ordeal that he has been subjected to amounts to atrocities within the meaning of SC/ST Prevention of Atrocities Act, 1989, but the said special judge rejected the private complaint, and when the petitioner approached the High Court and the Hon'ble High Court as well

(2)

dismissed the petition against which the petitioner filed an SLP before the SC vide SLP No 2680/95 wherein the Hon'ble Supreme Court passed an order and the same is reproduced in para 7 above.

1.10 It was submitted by the petitioner that the respondents 1 and 2 rejected the suggestion of the Supreme Court inspite of a representation by the petitioner which he made on 23.5.96 to the concerned authorities as per the said order.

1.11 The petitioner also made a representation on 28.9.96 stating that in view of the findings of the inquiry officer exonerating the petitioner of all the charges, the charge sheet may be dropped but the respondents did not do so and maintained the chargesheet as pending only to inflict further harm to the career of the petitioner and to deny due promotion to the petitioner on the ground of pendency of disciplinary proceedings. Finding no other way to vindicate his right and that the private complaint against the officers of respondent 4 was rejected and the suggestion of the SC was also not heeded to by the respondents, the petitioner proceeded to file 3 FIRs vide Nos 9/96, 10/96, and 11/96 on 18.12.96 again under the Prevention of Atrocities Act and under IPC. It was alleged that once the fact of filing of FIR was known to the respondents, the respondent 4 through his officers is said to have let hell loose against him/. The petitioner submitted that he was haunted in all possible manner and tried to implicate him in false cases, his telephone was tapped, water supply disconnected, surveillance around the house was fortified, ordered to surrender the service revolver and finally placed him under suspension by the impugned order dt 14.1.97. But some how the petitioner happened to come to Delhi and approached the respondent 3 who came to his rescue and passed different orders against the respondent 4 and some are

(9)

yet to be implemented and one of the reliefs sought in this OA is the implementation of the said orders.

1.12 Finally, inspite of prosecuting the FIRs lodged by the petitioner, the Respondent 4 and their agents were bent upon harassing the petitioner, the petitioner approached the Hon'ble Supreme Court by way of a writ petition No 29/97 seeking intervention of the Supreme Court in the case of the petitioner. The Supreme Court issued a show cause notice to respondent 4 and after hearing the parties on 5.5.97, passed certain orders which were also dealt with respect by the respondent Nos 1 and 2.

1.13 The allegation of the petitioner is that respondents 1 and 2 have not headed the direction and suggestion of the Supreme Court dt 5.5.97 and has dismissed his representation, and the rejection order is nothing but a flagrant disrespect to the orders of the Supreme Court. In the meantime when the petitioner was prosecuting his case in Delhi, the special public prosecutor moved an application for cancellation of FIRs, and thereafter by an order dt 7.2.97 the erstwhile buried up charge sheet was brought to life and the proceedings were continued against the petitioner, even though on 14.7.95 the inquiry officer had exonerated him from all the charges. Respondents issued a suspension order on 14.1.97 on the ground of contemplated inquiry which was finally issued on 28.1.97. It is also alleged that the continuation of the said suspension order after six months without being submitted to review in accordance with rules and without payment of subsistence allowance during the suspension period is wrong and contrary to the rules and needs to be set aside.

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1.14 The petitioner is also challenging the order dt 28.1.97 by which a fresh disciplinary proceedings were initiated against the petitioner as well as the second order dt 7.2.97 whereby the already completed disciplinary proceedings wherein the petitioner was exonerated by the inquiry officer of all the charges, are being revived are sought to be set aside on various grounds stated in the petition.

1.15 The petitioner is also challenging the vires of OM dt 21.9.88 and 13.8.97 and the said OMs were purportedly issued for implementation of provisions contained in Article 16(4) of the Constitution of India and consequently having no statutory force, on the ground of as ultra vires to the Constitution itself. Similarly the petitioner is also challenging the rule 3(1) of the All India Services (Disciplinary and Appeal) Rules, 1959, as ultra vires and there needs to be quashed.

1.16 The petitioner in para 8 of the petition has sought a relief that various actions by respondent 4 against the petitioner is only to deprive him from the due promotion in the meantime and the same being achieving by keeping one or the other proceedings pending against him and accordingly a direction is being sought that the promotion to the rank of DIG, IGP and Addltional DGP from 1.1.91, 1.5.94 and October 1996 may be directed to be given to the petitioner.

(15)

1.17 It was also sought by the petitioner that respondent 3 being part of respondent 1 within Union of India and being a separate entity within the Union of India, the orders of respondent 3 are binding on respondent 4 and the orders of the respondent 3 being service matters of the petitioner, a direction is sought from this Tribunal to issue appropriate direction to implement the orders of respondent 3 at the instance of respondent 4.

1.18 And Finally the petitioner has also sought a direction from this court that the two orders passed by the SC and suggestion made by the SC even assuming the same has been passed obiter dicta is to be respected in accordance with the provisions of Articles 141 and 142 of the Constitution of India and appropriate direction may be issued to the respondents to respect the said suggestion / direction of the Hon'ble Supreme Court.

2.1 After notice the respondents had filed reply stating that in pursuance to the orders of the Hon'ble Supreme Court dt 5.5.97 referred to above, the petitioner had made a representation and the same was duly forwarded by the respondent 4 to respondent 2 and appropriate orders have been passed on 5.1.98. It was further stated that the said respondent considered the question of inter cadre transfer in the light of the direction of the Hon'ble Supreme Court and the same was rejected on the ground that the request of the petitioner was not covered under the existing guidelines of the Govt. Of India, obtaining inter cadre transfer. It was also further stated that cadre transfer of All India Service Officers is usually allowed on the ground of marriage

(6)

between the members of the two All India Services borne on different cadres, or in extreme hardship cases. Accordingly the respondent Central Government did not find any discrimination against the petitioner on the caste consideration by the State Government as such he was not recommended for the promotion to the rank of DIG by the DPC by the State Govt., based on his record.

2.2 The respondents on the other hand had filed a reply in great detail. It was stated by the respondents that the pleas raised by the petitioner with respect to the ACRs are barred by the principles of res judicata since he has raised almost all the points in the earlier cases filed in different courts and tribunals unsuccessfully. It was also further submitted that in the light of long history of litigation between the petitioner and the State Government. There is no scope for this Tribunal to entertain and the same may amount to multiplicity of litigation between the parties and the petitioner had approached almost all the known forums and he is habitual litigant and as such this petition needs to be rejected as an abuse of process. It was further submitted that even otherwise the petition has become infructuous to the extent that the inquiry which was initiated against the petitioner has now been concluded and the charge sheet framed against him have been proved and for the purpose of imposition the State Govt has forwarded the case to the Central Govt and the same is under consideration.

2.3 It was further submitted by the respondents that since the present applicant does not disclose any infringement of any right of the petitioner much less his

42 (X)

fundamental rights which warrants invocation of jurisdiction of this tribunal under Article 226 of the Constitution of India. It was stated that the applicant sought to invoke the jurisdiction of this court on the one pretext or the other while the truth is that the petitioner's performance has been found to be unsatisfactory all along and in the circumstances the petition deserves to be dismissed. It was further submitted that the petitioner has wrongly alleged tampering/forging of ACRs in question and it was specifically averred that none of the ACRs were ever put up to the Hon'ble CM Shri Virbhadra Singh nor he has any opportunity to deal with his ACR. The above said facts coupled with the fact that the applicant did not resort to normal appellate process, the petition invoking this extraordinary jurisdiction of this Tribunal should not be permitted to at the instance of the petitioner.

2.4 The main contention of the petitioner that requires consideration therefore is whether the suspension order issued against the petitioner on 14.1.97 is in accordance with the law and the continuance of the order can be justified in accordance with the existing rules or not and in the absence of the same, the same requires to be quashed. The second question that requires to be resolved is whether the order dt 28.1.97 whereby fresh disciplinary proceedings exonerating the applicant are sought to have been initiated against the applicant is illegal and the same requires to be quashed or not. Similarly the disciplinary proceedings now being restarted by an order dt 7.2.97 after the inquiry officer had exonerating the applicant in the year 1995, is illegal and whether the same can be sustained in law or not. The petitioner has also challenged the OMs dt 21.9.88 and 13.8.97 as well as Rule 3(1) of the All India Services Disciplinary & Appeal Rules 1969 is ultra vires to the constitution of India since this

12 (9)

Tribunal has the jurisdiction to go into the vires of the rule vis-à-vis constitutional provisions whether a declaration can be issued in favour of the petitioner or not is the next question. The petitioner has also sought a relief of issuing a direction to the respondent 4 to promote the applicant from the relevant date with consequential benefits on the ground that promotions have been wrongly and illegally withheld by the respondents. Whether such direction can be issued is the question to be considered in this OA. And Finally the petitioner has also sought a direction from this court stating that the orders of the Hon'ble Supreme Court has not been honoured by the respondents who are duty bound to honour the same and the impugned order now passed on 5.1.98 is not with full respect to the orders of the Hon'ble Supreme Court so to the orders passed by the Chairman, National Commission for the Scheduled Castes and Scheduled Tribes, being one of the authorities within the Union of India are orders binding and the same needs to be directed for implementation. Whether such relief can be granted by this court or not are the questions specifically to be decided by us. We shall revert to these questions one by one.

3.1 The first and the foremost question to be decided is whether this court has jurisdiction to try this matter. The respondents have not disputed the question of jurisdiction and in para 6 at page 4 of the reply, it was stated that the present OA does not disclose any infringement of any right of the petitioner, much less the fundamental right, that had warranted invocation of jurisdiction of this Tribunal under Article 226 of the Constitution of India. It was also stated therein that the applicant has frivolously sought to invoke the jurisdiction of this court on the one pretext or the other. Apart from this, there is no reference to the jurisdiction of this Tribunal now raised by the

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respondent 4, nor any submission in this regard was made on behalf of the respondents during the arguments.

3.2 On the one hand we found that the petitioner has challenged the vires of OM dt 21.9.88 and 13.8.97 apart from challenging the vires of Rule 3(1) of the Rules of 1969 as ultra vires to the Constitution of India. In view of the challenges to these regulations of Central Govt., there is no doubt that the Principal Bench of this Tribunal has jurisdiction to entertain this petition at the instance of the petitioner. There was a justification made at one time by the counsel for the respondents that the petition should have been filed at Chandigarh Bench of this tribunal, to this the submission of the petitioner was that he had to escape the jurisdiction of the Chandigarh bench under very serious circumstances mentioned in the petition and accordingly he came over to the jurisdiction of this court and filed the petition before respondent 3 and this court and also before the Hon'ble Supreme Court. Filing of petition under Article 32 of the Constitution that itself being a fundamental right, the respondent could not have stopped the petitioner from doing so. In any event, the respondents seems to have suspended the petitioner for that action of coming over to Delhi and inquiry is being held ex parte awaiting final orders indicating thereby that the petitioner has come over to the jurisdiction of this court with impunity.

4.1 Turning towards the question whether the suspension order dt 14.1.97 is in accordance with law or whether the continuation of the same is in accordance with law. The order of suspension dt 14.1.97 is annexed as Annexure 8 and the same is available at page 92 of the paper book. On the face of the order it was stated that the

75 (20)

said order of suspension was issued by the respondent 4 in exercise of the powers conferred by sub rule 1 of 3 of All India Services Disciplinary & Appeal Rules 1969.

A quick perusal of the orders itself shows that the same has been issued on the ground of disciplinary proceedings being contemplated and the same on the face of it shows that it is in accordance with the said sub rule of 1 of Rule 3 of 1969 Rules.

4.2 The allegation of the petitioner that the order of suspension issued is contrary to rules has not been replied to by the respondents to the extent that the rule 3 of the All India D & A Rules 1969 has not been complied with to the extent that no intimation or confirmation of the jurisdiction of the petitioner has been obtained from the Central Govt in accordance with the rules.

4.3 Moreover rules do permit the respondents to place the petitioner under suspension during the pendency of the disciplinary proceedings is contemplated. But the respondents at page 29 of the reply have stated that the applicant was suspended by the respondent 4 by order dt 14.1.97 for misconduct committed by him while posted as AIG(R&T) Shimla. To quote:

"The applicant was suspended by Government vide order dt 14.1.97 for misconduct committed by him while posted as AIG(R&T) Shimla."

4.4 Even though the rules permit that the petitioner being All India service personnel could be kept under suspension during the pendency of the disciplinary proceedings or when the disciplinary proceedings are contemplated, the power to suspend an All India service personnel cannot be exercised to punish such an employee

16 (2)

and that amount to be a punitive order and suspension order issued is a punishment and the same is contrary to the rules empowering the respondents to issue suspension order against the petitioner. On the face of the admission by the respondents in the counter affidavit that the order of suspension has been issued for misconduct committed by him there is no option left with this court to conclude that the order of suspension has been issued not in accordance with the rules, rather as a punishment as such the same needs to be set aside on that ground alone.

4.5 Moreover, it was stated that under the rules the respondents were to review the orders passed by way of suspension after six months of its issuance and in the present case, no review has taken place and in the absence of the same, continued suspension after six months of issuing the order of suspension is illegal and contrary to rules and that ground as well the present suspension order cannot be retained as the one issued in conformity with law.

4.6 Further again the respondents have not paid subsistence allowance available to the petitioner under the rules and in the absence of the same there may arise a presumption that the suspension order issued against the petitioner without payment of subsistence allowance may amount to be punitive on that ground as well and as such this court is of the firm opinion that the suspension order issued against the petitioner on 14.1.97 even though it states on the face of the same it is permissible under the rules but by lifting the veil we find that the same has been issued contrary to the rules and the same amount to be punitive.

17 (2)

5.1 The petitioner has also claimed a relief of setting aside the inquiry initiated against the petitioner by the order of the respondents dt 28.1.97 and subsequently here also revived an already concluded inquiry in which applicant was exonerated by the respondents by their order dt 7.2.97 for the purpose of inquiry and the inquiry being held against the petitioner ex-parte in the circumstances is alleged to be illegal and a direction is sought to set aside the same. It was submitted by the petitioner that the additional inquiry now being handed over to the inquiry officer by the present impugned order dt 7.2.98 is the same which was the corner stone of all the inquiries. This was the same subject matter on the basis of which he was originally transferred to a post lower to his status which was subsequently set aside by the Chandigarh Bench of this Tribunal after the same was assailed by the petitioner in the said OA stating that the same inquiry was pending at the time when the impugned order in the said petition was passed. Subsequently the same inquiry referred to by the respondents had turned out to be the subject matter of FIR 1/98 filed on 20.2.88. The purpose of this FIR was to stop the petitioner from obtaining further promotions which was due to the petitioner then. The charge sheet involved in the said case was that the petitioner in his capacity as ex-officio in-charge of the Canteen run for the recruits, was said to have conspired with the canteen in charge and had bought desi ghee with higher price and misappropriated the difference, causing monetary loss to the recruits. The said FIR was cancelled after the petitioner filed a petition in the High Court and by non-compliance of the order, High Court had to proceed suo motu further to a contempt of court proceedings. After the FIR was cancelled by the appropriate judicial magistrate(Special Judge), the respondent did not abandon the allegations rather proceeded with disciplinary proceedings which was ended up in a report by the Inquiry Officer that none of the charges were proved, but that report came finally in the year

78 (3)

1995 and in the meantime all promotions due to the petitioner between 1988 and 1995 were denied to him. It is this very report of the Inquiry Officer now being revived by the impugned order dt 7.2.98; we have no doubt of any sort to find the evil designs of the respondents initiated the proceedings firstly on suspicion, subsequently an FIR and then disciplinary proceedings during 1987-1997, are nothing but flimsy and conducted with extraneous purposes.

5.2 The respondents in their reply on the other hand stated that the inquiry initiated by an order dt 28.1.97 has now been completed and all the charges levelled against him were proved against the petitioner and for the purpose of imposition of penalty, State Govt has forwarded the case to the Central Govt and the same is stated to be under consideration. On the other hand the respondents stated in their counter affidavit in page 3 that all the charges levelled against the petitioner have been proved against him and on the other hand it was stated at page 29 of the reply that the order dt 7.2.97 has been withdrawn by the Govt. by an order dt 20.12.97 i.e. to say after the present petition was filed on 27.11.97 and just before the present reply was filed in this court by the respondent 4. No explanation is forthcoming as to why the proceedings initiated by the order dt. 28.1.97, were held ex parte by the inquiry officer and the charges were held to be proved and the matter is pending before the respondent 1 for further approval, of the proposed punishment and under what circumstances the part of the charges entrusted to inquiry officer have been withdrawn after the inquiry has been conducted and applicant exonerated and charges not proved, on 20.12.97 are all without any explanation. The inquiry officer was to enquire the charges entrusted to him as per the order dt 28.1.97 and another inquiry officer to reinquire the charges (not proved earlier) vide order dated 7.2.97. As such the orders passed for such inquiry

79 (X)
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and the proposed punishment for approval of the respondent 1 is on the face of it are illegal and done with extraneous considerations without application of mind and the same need to be set aside.

6.1 The next question to be considered is whether this court can issue a direction to the respondents to implement the orders passed by the respondent 3 or not. The respondent 3 is a constitutional body exercising the powers of the civil court and constituted under Article 338 of the Constitution of India and 3 orders that have been brought to our notice are said to have been passed by the said authority are the one issued on 9.1.97, 6.2.97 and 13.2.97. By the order dt 9.1.97 the respondent 3 has stated that the protection to the life, property and his family is of utmost importance and there exist a confrontation between the State Govt and the petitioner. A copy of the said order is reproduced herebelow for ready reference:

"Shri G.C. Kaushal, an IPS officer working as AIG(Police Railways & Traffic), Himachal Pradesh has submitted a petition stating that he has booked several cases against the Chief Minister and former Director General of Police and other senior officers of the Himachal State under PCR Act and Prevention of Atrocities Act along with IPC sections. Because of these cases, according to him, the Chief Minister and the Government are taking retaliatives steps by booking counter cases and withdrawing the legitimate security given to him in his official discharge of the duties besides preventing his movements to seek protection under law and lawful agencies. He also apprehends that his as well as his family members and relatives' lives are in danger since the confrontation is between the Chief Minister and himself.

23

While considering this case, the copy of the Press Statement issued by Shri RK Anand, the then Chief Secretary on 20th December 1996 has also been in the hands of the Commission wherein while denying of all the allegations of Shri Kaushal, it has been brought to the notice of the Commission that he has made similar attempts through courts of law including the highest judicial authority of Supreme court and has failed to establish his allegations against the Chief Minister and the higher officials. However, the press statement submitted by the former Chief Secretary states "in order to give a fair play, the Government has decided to investigate the cases booked by Shri Kaushal are being referred to the Special Cell in the CID specially created for investigating the cases pertaining to the atrocities on Scs and Sts". However, the question of protection to the life and properties of the incumbent, his family and relatives is most important.

Hence it is necessary in the interest of justice that the state Govt. Should desist from withdrawing the security provided to his official capacity, if it is true as alleged by him, and not to prevent his movements to seek protection under law and lawful agencies and provide the required protection to him, his family and his near relatives.

Since it is a confrontation between the State Government and a subordinate officer, utmost caution is required in proceeding in the matter. The Commission is seized of the matter it is expected that the actions taken should be brought to the notice of the Commission time and again."

6.2 Subsequently respondent 3 passed an order dt 6.2.97 reiterating the same facts of the case and it was stated that it has been brought to the notice of the Commission

and that no protection is given to the petitioner so far and the respondents had been directed to report compliance by the next date. The respondents in their reply has made only a reference that they are in communication with the respondents 3 and nothing concrete has been stated in the counter affidavit. But by an order dt 13.2.97 the respondent 3 has passed an order and office has intimated the respondent 4 to enquire into the matter and take necessary action in registering the case and report the proceedings to the commission.

6.3 It is further pertinent to mention that what is referred to in the order of the commission was infact the subject matter of complaint made by the petitioner against the respondents and thereafter the same was set aside, 3 FIRs were filed by the petitioner on 18.12.96 but order dt 13.2.97 of the Commission is for registration of another criminal case different from those in 3 FIRs.

6.4 The sum and substance of the complaint of the petitioner is that ever since 1987 through 1997, the petitioner has been continuously subjected to victimization. In the year 1987 the respondents had attempted to push him down on his posting contrary to the rules and the petition filed by the petitioner vide 4455/87 before the Chandigarh Bench of this Tribunal which was decided on 14.7.88 wherein the Division Bench of the Tribunal had held that the action of the State Government in ignoring the just claim of the applicant for appointment to one of the cadre posts, when the same are available in plenty, in utter violation of rule 9 of the cadre rules, was not only unfair and unjust but also smacks arbitrariness, and caprice, if not malafide. Having regard to the totality of the circumstances, the court had ordered that the applicant was entitled to cost of RS.2000/- from the respondent 2. Subsequently a criminal case was filed

27

against the petitioner and after several proceedings, the same was finally withdrawn by the respondents themselves. But on the same charges disciplinary proceedings initiated against the petitioner was ended up in the final report of the inquiry officer that none of the charges were proved and the said report submitted in 1995 was not followed up by any action till 7.2.97 where by fresh order was passed to revive the same. Thus that a criminal proceeding and disciplinary proceedings were kept alive against the petitioner since 1987 till December 1997 and the allegation is that the same has been done to deprive the petitioner from ensuing promotions which were available to him in accordance with the rules and his status. It was further alleged that the alterations and manipulations in the ACRs was only an additional act resorted to by the respondents against the petitioner for the same purpose as stated above.

6.5 The petitioner had filed a criminal complaint against the respondents on 12.7.94 and the respondents at page 9 and 10 of their reply admits that the same was dismissed by the Special Judge and thereafter the petitioner went to the High Court and the High court had dismissed the same and to which no SLP was filed. Since the copies of these orders were annexed along with the reply, we thought it fit to examine them in a little more detail.

6.6 The Hon'ble High Court in the said order dt 18.4.95 passed in Criminal Revision No 124/94 has stated that the case of the petitioner was with reference to offences under Clause (viii) and (x) of Sub section 1 of section 3 of the Atrocities Act, committed against the petitioner at the instance of the respondents. These two clauses were reproduced in the judgement itself:

28

"(viii) institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe;

x x x x

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;"

6.7 At was further submitted that in the said Judgement that the court has dealt with the complaint after recording evidence of the complainant and two other witnesses and elaborately dealt with, before coming to the conclusion that the complaint petition and the evidence on record do not make out a prima facie case. It was further stated that it is not necessary for the court in this revision petition to re-study what has been stated by the learned Special Judge since the court is entirely agreeing with the reasoning given by the Special Judge. The revision petition was finally dismissed on 18.4.95. We were further looking into the prima facie evidence recorded by the Special Judge as stated in the above said judgement. It was stated in para 10 of the said decision of the Special Judge that in order to find out the truth of the complaint, he examined the preliminary evidence. Thus the petitioner was examined along with two other witnesses. The evidence of one Shri RP Kureel, IGP who had stated that during his posting as LCP Vigilance there was a complaint against the petitioner regarding some irregularities committed at Dharmasala and had ordered for registration of the case. It was also stated that the same complaint had also brought another complaint wherein Rs.28,000 was stated to have been recovered from the petitioner from the vehicle out of which Rs.18,000 was snatched away by the

driver and Rs.10,000 was said to have been a cooked up case and the petitioner was in no way connected with the commission of the alleged crime. The evidence of the said offence do indicate that there were attempts to file false cases against the petitioner and the Special Judge had ignored these complaints appearing in the file of the Special Judge. Similarly, BS Thind deposed that Mr. Malick, the then IG Enforcement and Vigilance, had called to his office and handed over a complaint and it was stated that the DGP had decided that inquiry be instituted in this complaint immediately and raid be conducted in the office premises. It was further stated that the said witness had read the contents of the complaint and the same was anonymous and this was with regard to some purchases mad in 1990 and he told Mr. Malick that in his opinion there was no need to raid or search the premises. Similarly at para 21 of the order it was stated that another allegation in the complaint that a false case was instituted against the petitioner at Dharmasala but later on the FIR was got cancelled. Presumably the complainant filed Writ petition in the Hon'ble High Court and thereafter the Government filed cancellation report. It was further stated in the order that by cancelling the said report at the instance of the High Court, the complainant got the relief. The sum and substance of these above stated observations as well as the recordings of evidence available from the two witnesses, do indicate that there were false cases to be filed and actually filed and the same has come on record by way of evidence and yet the Special Judge seems to have, in his esteemed opinion, come to the conclusion that the complaint has no substance. It is this opinion of the Special Judge arrived at prima facie which was accepted by the High Court by dismissing the revision application to which the respondents stated at para 10 of the reply that no SLP had been filed whereas SLP had been filed and the Hon'ble Supreme Court had passed

25 (20)

another order dt 16.8.95 suggesting transfer of applicant outside the State which was rejected by Respondents 1 and 2.

6.8 Subsequently on 18.12.96, the petitioner had again filed 3 FIRs against the respondents finding that the respondents had made alterations in his ACRs and no relief was being given under the circumstances stated above. These facts were admitted in paras 11 and 12 of the reply wherein it was stated that the said FIR was filed on 18.12.96 were investigated upon by the appropriate authorities of the respondents. It was stated that the investigating agency was DSP(CID) and the petitioner found that instead of investigating the contents of the complaint, the respondents were interesting in getting some other details and the petitioner seriously apprehended danger to his life and that of his relatives and to the property. Accordingly he proceeded to Delhi against the like of the respondent, 4 in order to approach the constitutionally constituted authority for the purpose of dealing with the similar grievances pertaining to the members of the Scheduled Caste. Accordingly he made representation before the said Commission and several orders passed by the Commission upon his representation, were already dealt with herein above.

6.9 The important question that needs to be considered now therefore is whether the petitioner has the right to approach respondent 3 to air his grievances and whether the respondent 3 has jurisdiction to pass orders as they have done in the present case and if so whether the respondent 4 is duty bound to implement the orders of respondent 3 or not.

26 (31)

6.10 The Respondent 3 Commission is constituted under Article 338 of the Constitution of India. Originally the said article had provided for appointment of special officer for protection of the SC/ST members, subsequently by way of 65th Amendment Act of 1990, the said Article was substituted by a new Article whereby the respondent 3 was constituted.

6.11 The duties and functions assigned to the National Commission under Article 338 relevant in this regard are three fold.

- To investigate all matters relating to the safeguard provided for the SC/ST members under any law for the time being in force or under any order of the Govt;
- to enquire into the specific complaint with respect to the deprivation of rights and safeguards of the SC/STs; and
- to monitor all matters relating to the safeguards provided for SC/ST etc.

6.12 For the purpose of investigating any matter, the Commission has been given the power of a civil court trying a suit including the power to issue summons, require discovery, requisition public record or any other matter which can be determined under the rules. It is pertinent to mention under clause 4, the Commission will have the power to regulate its own procedure. The Hon'ble Supreme Court in the matter of State of MP vs. Balothia reported in 1995 1 UJSC 514 had held that for the purpose of protection and welfare of the SC/ST, the legislature has power to exclude the provision of anticipatory bail contained in section 438 of CrPC from any person accused of any offence under SC/ST Prevention of Atrocities Act, 1989, indicating thereby the power given by the legislative to the SC/ST under the said Act is also the

27 (32)

subject matter which the Commission constituted under Article 338 could investigate, enquire or monitor.

6.13 It goes without saying that the National Commission appointed in accordance with Article 338 is a special authority to whom the members of SC/ST could approach in case there was any infraction of any law including that of the SC/ST Atrocities Act 1989. For the purpose of an application under section 19 of the CAT Act, respondent 3 therefore is nothing but an authority within the Union of India and any order passed by the respondent 3 will have to be considered to be an order passed by the Union of India and as such the same are binding on respondent 4. We must make it clear that the authorities specified as respondent 3 is a constitutional authority and the petitioner is seeking a remedy against such constitutional authority, is a member of the SC community and the SC as such cannot be deemed to be a member belonging to a particular backward class only, rather he belongs to the protected class of persons under the constitution. Scheduled Caste is a constitutional concept may be it is drawn up from among different backward classes; but once constituted in accordance with the provisions of the Constitution by the Governor or the President, the scheduled caste ceases to be a member of a particular caste in the ordinary sense, rather he becomes a member of a particular class constitutionally protected. It is due to this membership that he gets an overwhelming right to approach the respondent 3, again an authority constituted under the Constitutional provisions. Obstruction of any kind therefore by the respondent 4, inflicted upon the petitioner in the circumstances, cannot be permitted under ordinary rules, since such protection being a constitutional protection, will have to be treated as having priority, over the other rules passed by the respondent 4. Petitioner will have a constitutionally protected right for the purpose of getting

28 (37)

redressal his grievance, the orders that are passed, by Respondent 3 directing the respondent 4 to give protection to the petitioner's family and his property and finally the orders passed to enquire into and take necessary action in registering the case and report the proceedings to the commission addressed to the respondent 4 are all part of this constitutional obligation. The first and second relates to the functioning of the respondent 3 to investigate and enquire into the specific complaints, for which the Commission has the power of a civil court trying a suit and the third one is in accordance with the functioning of the respondent 3 to monitor all matters relating to the safeguards provided to the SC/ST contained in clause 5A of Article 338. As such the respondent 4 cannot escape obligation's under these provisions, and in the circumstances, priority will have to be given to the directions now being given by the Commission. This court would procede to impress upon the respondent 4 that they shall enquire into all the matters as referred to in the order of the Commission dt 13.2.97, passed on the basis of the complaint made by the petitioner on 10.2.97, copy of which is available in the paper book at pages 112-114, and immediately proceed to register cases against whom the petitioner has made the complaint and report the same to the Commission in accordance with the law.

6.14 It was stated by the respondents that the petitioner has been suspended for a misconduct of leaving the hqrs without permission and thereafter an inquiry in this regard has been conducted ex parte on the basis of impugned order passed on 28.1.97, those orders being now passed at the instance of the respondents ignoring the right of the petitioner to approach respondent 3 referred to above, and the same will have to be considered only after the direction of the respondent 3 is implemented in the first instance. In the circumstances the respondents will have to be restrained from passing

29 (X)

any order on the basis of the ex parte inquiry now held against the petitioner as well as the respondents also will have to be restrained from passing any order or suspension in the circumstances of the petitioner has approached the respondent 3 in Delhi until the orders of respondent 3 are implemented in the first instance.

7.1 The petitioner in this case has also sought a relief that the OM dt 21.9.88 and 13.8.97 be quashed as the same are ultra vires to the Constitution. Further a declaration has been sought that the Rule 3(1) of the All India Services (Disciplinary and Appeal) Rules, 1969 is ultra vires to the Constitution. On the basis of the submissions made in the petition as well as the reply, and on the basis of arguments advanced, the relief of declaration that Rule 3(1) of the All India Services (Disciplinary and Appeal) Rules, 1969 as ultra vires to the Constitution is to be rejected. Besides, OM dt 13.8.97 also need not be quashed in view of the finding of this court herebelow in this para. The said OM will be read down in the light of the finding recorded by this court. On the other hand the challenge to the rules and the OM will have to be confined to the OM dt 21.9.88 by which the respondents have held that in promotions by selection to posts within Gp A(Class I) which carry an ultimate salary of Rs.5700, there is no reservation. In fact the question of reservation was the subject matter of the decision of the Hon'ble Supreme Court in Indira Sahney case wherein it was stated that the reservation in promotions is not constitutional but in the circumstances of the case yet had allowed the reservation in promotions to continue for a period of five years from 16.11.1992 and the same was to expire on 15.11.1997. The legislature in its wisdom in the meantime introduced the 77th Amendment to the Constitution and by the said Constitution (77th Amendment) Act, 1997, Article 16(4A) was incorporated in the Constitution which would go to enable the State to provide

3P (S)

reservation in matters of promotion in favour of the SC/ST which in the opinion of the State are not adequately represented. In pursuance to the said Amendment to the Constitution, the respondent 1 promulgated an OM dt 13.8.97 and stated that in view of the amendment to Article 16(4A), it has been decided to continue the reservation in promotion as at present for SC/STs in the services /posts under the Central Government from 15.11.97 till such time as representation of the each of the above two categories in each cadre or service reach the prescribed percentage of reservation where after the reservation in promotion shall continue to maintain the representation to the extent of the prescribed percentages for respective categories. The petitioner is therefore aggrieved by the fact that inspite of the constitutional amendment by which Article 16(4A) was added and thereafter the said notification dt 13.8.97 was issued, the OM dt 21.9.88 as described above, are still being maintained, and no reservation is made in promotion by selection to posts within the Gp A(Class I) which carry an ultimate salary of Rs.5700/- and above.

7.2 The main contention of the petitioner is that after the Constitution has provided protective and possible discrimination by providing reservation in promotion as a part of the equality of opportunity, status, social and economic justice and dignity of the person which are given effect to by the said 77th Amendment to the Constitution, reservation in promotion itself has become a fundamental right as far as the dalits and tribes are concerned. Thus their claim for equality of opportunity is applicable to all levels of promotion to the respective grade/cadre/categories of posts.

7.3 We have given considerable thought to the issue raised by the petitioner. We were in the first place considering whether this court can in exercise of its powers

37 (36)

given to it for judicial review, decide the vires of this OM vis-à-vis constitutional provisions. In view of the categorical finding and law laid down by the Hon'ble Supreme Court in L Chandra Kumar's case we are of the opinion that the said case has widened the power of this tribunal to test the vires of rule vis-à-vis constitutional provision confined to service matters only. To quote:

"95. Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settle principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislation (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal."

4 7.4 Thus we proceed to consider whether the OM under challenge needs to be reviewed and set aside vis-à-vis constitutional provisions.

7.5 There is no doubt that our constitution is a growing instrument and the Hon'ble Supreme Court in a number of decisions has stated that the growth of the living

34 (X)
constitution dependence upon the interpretative capacity of the superior courts entrusted with the function of the judicial review. In State of Karnataka vs. Appabalu

Inagale, reported in 1995 Suppl 4 SCC 469, the Hon'ble Supreme Court has summarised this function of the court stating that the power of judicial review is conferred upon the judiciary and the same is one of the most important and potent weapons to protect the citizens against violations of social, legal, or constitutional rights. It was further stated that power to judicial review must therefore be exercised with insight into social values to supplement the changing social needs and that the existing inequalities or imbalances are to be removed and the social order re-adjusted through rule of law, lest the force of violent cult gain ugly triumph. To quote:

“Judiciary acts as a bastion of the freedom and of the rights of the people. Jawaharlal Nehru, the architect of Modern India as early as in 1944 stated that the spirit of the age is in favour of equality though the practice denies it almost everywhere, yet the spirit of the age triumphs. The Judge must be attune with the spirit of his/her times. Power of judicial review, a constituent power has, therefore been conferred upon the judiciary which constitutes one of the most important and potent weapons to protect the citizens against violation of social, legal or constitutional rights. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other hand in the seamless web of life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the Judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, the Judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. The Judge must also bear in mind that social legislation is not a document for fastidious dialects but a means of ordering the life of the people. To construe law one must enter into its spirit; its setting and history. Law should be capable of expanding freedoms of the people and the legal order can, weighed with utmost equal care, be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law, lest the force of

33 (38)

violent cult gain ugly triumph. Judges are summoned to the duty of shaping the progress of the law to consolidate society and grant access to the Dalits the Tribes to public means or places dedicated to public use or places of amenities open to public etc. The law which is the resultant product is not found but made. Public policy of law, as determined by new conditions, would enable the courts to recast the changing conceptions of social values of yesteryears yielding place to the changed conditions and environment to the common good. The courts are to search for light from among the social elements of every kind that are the living forces behind the factors they deal with. By judicial review, the glorious contents and the trite realization in the constitutional words of width must be made vocal and audible giving them continuity of life, expression and force when they might otherwise be forgotten or ignored in the heat of the moment or under sway of passions or emotions remain aroused, that the rational faculties get befogged and the people are addicted to take immediate for eternal, the transitory for the permanent and the ephemeral for the timeless. It is in such surging situation the presence and consciousness and the restraining external force by judicial review ensures stability and progress of the society. Judiciary does not forsake the ideals enshrined in the Constitution, but makes them meaningful and makes the people realize and enjoy the rights."

7.6 In a number of decisions the Hon'ble Supreme Court has categorically held that the right to promotion is available only under the rules prescribed for the purpose to give promotions. A chance of promotion is not a justifiable right nor the condition of service, rather no employee can claim promotion as a right, but he has only right to be considered for promotion. In service jurisprudence, therefore, right to promotion is not ordinarily recognised except in accordance with rules, but the interest to promotion and seniority as an incidence of service is a recognised right.

7.7 The law as stated above, is the general law applicable to service jurisprudence but the right to promotion under the general law is only a statutory right. If the statute provides, a citizen will have a right to enforce the same in accordance with the rules. but such right can never be said to be a fundamental right. On the other hand Article 16(4A) read with Article 16(1) and 14 guarantees a right to promotion to dalits and tribes as a fundamental right, where they have upward representation.

consistent with the efficiency of administration. This proposition of law has been reiterated by the Hon'ble Supreme Court in Ashok Kumar Gupta vs. State of UP reported in 1997 5 SCC at 201 at 239.

43. It would thus be clear that right to promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16(4-A) read with Articles 16(1) and 14 guarantees a right to promotion to Dalits and Tribes as fundamental right where they do not have adequate representation consistently with the efficiency in administration. The Mandal case has prospectively overruled the ratio in Rangachari case, i.e., directed the decision to be operative upto 5 years from the date of the judgement; however, before expiry thereof, Article 16(4-A) has come into force from 17-6-1995. Therefore, the right to promotion continues as a constitutionally guaranteed fundamental right. In adjusting the competing rights of the Dalits and Tribes on the one hand and the employees belonging to the general category on the other, the balance is required to be struck by applying the egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the constitutional goals, policy and objectives referred to hereinbefore.

7.8 The said fundamental right available to the SC/STs can be circumscribed by article 335 of the Constitution. Under the said provision, the claim of the members of the SC/ST shall be taken into consideration consistently with the maintenance of efficiency of administration in making appointment to services and posts, in

25

connection with the affairs of the Union of State. The fundamental rights now conferred upon the SC/ST by the present amendment to Article 16 is only circumscribed by the mandatory provision contained in Article 335 i.e. it will have to be shown to be consistent with the maintenance of efficiency of administration. But it does not mean that the respondents can by issuing the OM in the nature of the one impugned states that no reservation is applicable to the service or grade of Rs 5700 without looking into each cadre or category whether reservation can be provided or denied on the ground that it is inconsistent or consistent with the maintenance of efficiency of administration. The wholesale ban from certain level upwards therefore is contrary to both the mandatory provisions contained in Article 335 as referred to above as well as the fundamental rights available to the members of the SC/ST under Article 16(4A) of the Constitution.

7.9 The Article 16(4A) has come into force with effect from 17.6.95 and the statement of objectives and reasons would clarify the extent and the nature of fundamental right now conferred upon the members of the SC/ST and the statement of objectives and reasons would clarify the extent and nature of fundamental rights now conferred upon the members of the SC/ST against reservation in promotion is concerned. To quote:

“The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgement dated 16th November, 1992 in the case of Indra Sawhney v. Union of India, however, observed that reservation of appointments or posts under Article 16(4) of the Constitution is confined to initial appointment and cannot extend to reservation in the matter of promotion. This ruling of the Supreme

36 (10)

Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since the representation of the Scheduled Castes and the scheduled Tribes in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes. In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the Government have decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this, it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes."

7.10 Thus, the OM dt 21-9-1988 intend to deny reservation in promotion without mandatory provision contained in Article 335 of the Constitution as such the said OM is therefore ultra vires to both Article 335 as well as Article 16(4A).

7.11 The question of looking into the consistence with the maintenance of efficiency of the administration has been subject matter of judicial pronouncements. The Hon'ble Supreme Court in DTC vs. DTC Mazdoor Congress reported in 1991 Suppl SCC 600 stated that the term efficiency is the most illusive and irrelevant one to the adept capabilities

"The term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. If a superior officer develops liking towards sycophant, though corrupt, he would tolerate him and find him to be efficient

24

and pay encomiums and corruption in such cases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing to be 'not up to the mark' 'wanting public relations' etc. At times they may be termed to be 'security risk' (to their activities). Thus they spoil the career of the honest, sincere and devoted officers. Instances either way are galore in this regard. Therefore, one would be circumspect, pragmatic and realistic to these actualities of life while angulating constitutional validity of wide, arbitrary, uncanalised and unbridled discretionary power of dismissal..."

7.12 Again Justice OP Chennpa Reddy in KL Vasant Kumar vs State of Karnataka 1985 Suppl SCC 714 had stated that efficiency is very much on the lips of the privileged whenever reservation is mentioned. According to him, efficiency is not a mantra which is whispered by the guru in the sishya's ears. Mere securing higher marks at examination many not necessarily mark out a good administrator. An efficient administrator must be one who possess among other qualities, the capacity to understand with sympathy and tackle the problems of weaker sections To quote:

"Efficiency is very much on the lips of the privileged whenever reservation is mentioned. Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the 'carry-forward' rule is adopted; efficiency, it seems, will be injured if the rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry-forward rule, one would think that the civil service is a Heavenly Paradise into which only the archangels, the chosen of the elite, the very best may enter and

28 (29)

may be allowed to go higher up the ladder. But the truth is otherwise. The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are not necessarily models of efficiency. The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes. There is neither statistical basis nor expert evidence to support these assumptions that efficiency will necessarily be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts. Arguments are advanced and opinions are expressed entirely on an ad hoc presumptive basis. The age-long contempt with which the 'superior' or 'forward' castes have treated the 'interior' or 'backward' castes is now transforming and crystallizing itself into an unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means, for the 'superior' castes, parting with a bit of it. Although in actual practice their virtual monopoly on elite occupation and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the profession. It is so difficult for the 'superior' castes to understand and rise above their prejudice and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at

38 (23)

every stage. Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded. 'Efficiency' is not a Mantra which is whispered by the Guru in the Shishya's ear. The mere securing of high marks at an examination may not necessarily mark out a good administrator. An efficient administrator, one takes it, must be one whoa possesses among other qualities the capacity to understand with sympathy and, therefore, to tackle bravely the problems of a large segment of population constituting the weaker sections of the people. And, who better than the ones belonging to those very sections? Why not ask ourselves why 35 years after independence, the position of the Scheduled Castes, etc. Has not greatly improved? Is it not a legitimate question to ask whether things might have been different, had the District Administrators and the State and Central Bureaucrats been drawn in larger numbers from these classes? Courts are not equipped to answer these questions, but the courts may not interfere with the honest endeavours of the Government to find answers and solutions. We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that one need not make a fastidious fetish of it. It may be that for certain posts, only the best may be appointed and for certain courses of study only the best may be admitted. If so, rules may provide for reservation for appointment to such posts and for admission to such courses. The rules may provide for no appropriate method of selection. It may be that certain posts require a very high degree of skill or efficiency and certain courses of study require a high degree of industry and intelligence. If so, the rules may prescribe a high minimum qualifying standard and an appropriate method of

4/8 (X)

selection. Different minimum standards and different modes of selection may be prescribed for different posts and for admission to different courses of study having regard to the requirements of the posts and the courses of study. No one will suggest that the degree of efficiency required of a cardiac or a neurosurgeon is the same as the degree of efficiency required a general medical practitioner. Similarly, no one will suggest that the degree of industry and intelligence expected of a candidate seeking admission to a research degree course need be the same as that of a chaprasi."

7.13 The learned counsel for the respondents had argued that the petitioner is indulging in multiplicity of proceedings and the same is vexatious and abuse of process of court and he had already approached 6 different forums such as, criminal court, CAT, HC NC for SC/ST, SC. According to him the effort of the petitioner is nothing but blatant forum shopping. Further it was stated by the respondents relying on the decision of the Hon 'ble SC reported in 1977 2 SCC 288, and the decision of the SC in Nand Kishore vs State of Punjab reported in JT 95 7 SCC page 69, stated that all the issues related to the entry into the ACRs have been subject matter of various litigations and the same should be treated as res judicata. The contention of the counsel for the respondent seems to be that the principle of estoppel may be applicable with respect to the consideration of the ACRs of the petitioner is concerned. and on the same principle, a repeated petition like the present one should be rejected outright. The argument of the counsel for the petitioner on the other hand that though some of the ACRs now being challenged in this petition was subject matter of previous OAs, there were additional ACR adverse remarks communicated to the petitioner subsequently and there were alterations made on the previous ACRs which gives the

4/ (X)

A petitioner a fresh cause of action, and neither the principle of res judicata nor that of issue estoppel as applicable to the case of the petitioner on the ground that the petitioner gets fresh cause of action to file the present petition.

7.14 Since these issues were already directly an issue in another OA 2790/97 and since we do not dispose of the said OA 2791/97, we do not intend to record any finding in this regard. Let the said OA be tagged with this case by listing for further hearing on 27-2-98 in view of the fact that the records of the ACRs inspite of directions of this court for production, were not produced to verify the extent of alteration in relation to other claims made by the petitioner in his OA.

8.1 Finally during the process of entire "confrontation of the petitioner with respondent 4", to borrow the expression used by the respondent 3 in one of their orders, the petitioner had approached the Hon'ble Supreme Court on two occasions, The first order passed by the Supreme Court was in SLP 2680/95 against the dismissal of the High Court of his criminal revision petition when the Special Judge Shimla had dismissed his complaint against the respondents. The details of which are given in para.. above. When the said petition came up for hearing before the Supreme Court on 16.8.95 the court passed an order dismissing the said SLP and at the same time making an observation to the following effect:

✓ "We are not inclined to interfere with the impugned order but in view of the special facts of the case we feel that if the petitioner makes a representation to the Centre or his transfer outside the State for the time being, the same may be considered sympathetically. The SLP is dismissed."

47 (10)

8.2 The observations of the Hon'ble Supreme Court was to consider the case of the transfer of the petitioner to the cadre outside the state and the same was considered sympathetically after considering the entire circumstances of the case. The petitioner accordingly made a representation to respondent 1 namely the Central Government on 16.2.96 but the allegation of the petitioner is that as observed by the Supreme Court his case was not considered sympathetically by the respondents 1 and 2 and finally the same was rejected by the said respondent on 23.5.96.

8.3 Subsequently the petitioner had filed a WP(Cr.) No 29/97 and the same came up for hearing on 5.5.97. The Hon'ble Supreme Court has passed the following order:

"Mr. G.Ramaswamy, learned senior counsel appearing for the State of Himachal Pradesh, candidly states that should the petitioner move for a transfer of cadre from Himachal Pradesh to another, the State of HP shall support the case of the petitioner whole heartedly and would relieve him without any hitch. On that basis, Mr. Jain, the learned Senior Counsel appearing for the petitioner, withdraws this petition with liberty to avail of the remedies known to law. Ordered accordingly."

8.4 In pursuance to the above said observations, that the respondent 4 shall support the case of the petitioner, the petitioner made a representation and the respondent namely the Govt of India passed order on 5.1.98 stating that the request of the

4/3 (14/3)

petitioner is not covered under the existing guidelines of the Govt of India for inter cadre transfer and as such the request has been found not possible to accede. It was further stated that inter cadre transfer could be done only on the ground of marriage between two members of All India Services borne on different cadres or in extreme hardship cases. It was further stated that the Central Govt did not find any discrimination against him on caste consideration by the State Govt.

8.5 We have considered the submissions made by the respondents 1 and 2 and affidavit submitted by them in this regard and perused orders of the Hon'ble SC and we are of the opinion that the respondent did not give due respect to the orders of the Supreme Court passed on 16.8.95 as well as on 5.5.97. It was stated that these orders do not contain any directions at the instance of the Supreme Court. We are afraid that even observations of the apex Court of this nation should not have been taken lightly and it should have been taken as if it was more than a command with due respect to the Supreme Court. In the circumstances we do not hesitate to direct the respondents to consider both the directions of the Supreme Court contained in their orders dt 16.8.95 and 5.5.97 and pass fresh orders after giving due respect to those orders even though the same are only observations but coming from the highest judicial body of this country and reconsider the case of the petitioner for cadre transfer dispassionately.

9 In the circumstances, the following directions are issued:

- 44 (28)
- A) ✓ Order dt 14.1.97 is hereby set aside granting liberty to the respondents to pass fresh order of suspension only after the orders of the respondent 3 are complied with;
- B) ✓ The order dt 28.1.97 whereby the disciplinary proceedings have been initiated and in the circumstances that final orders have not yet been passed, the respondents are restrained forthwith from proceeding further with the inquiry and from passing the final order until the full compliance of the orders of the respondent 3 is reported to the Commission.
- C) No order is required to be passed against the impugned order dt 7.2.97 quashing the same in the circumstances that the respondent have now stated that on 20.12.97 the said orders have been withdrawn and in the circumstances the continuance of proceedings till 7.12.97 from the year 1987, declared as lapsed by effect of time.
- D) With regard to the vires of OM dt 21.9.88 and dt 13.8.97, and rule 3(1) of the All India Services (Discipline & Appeal) Rules, 1969, left open for the reasons stated in the body of this decision.
- E) ✓ The relief sought by the petitioner for promotion to the respective cadres which has been held up due to illegal filing and continuation of various criminal and departmental proceedings, is directed to be considered in accordance with law as if none of those proceedings were held or continued. The said proceedings can be continued only as per the directions now being issued but the same was not in any manner affect the consideration of the respondents for promoting the petitioner in accordance with the rules.


49


F) The respondents shall also pass fresh orders as per the directions of the Supreme Court stated above, within one month from the date of the receipt of a copy of the order and communicate the same to the petitioner.

G) The respondents are directed to issue appropriate orders in accordance with the directions issued by the respondent 3 forthwith as if the same has been issued by an authority within the Union of India and binding on all other respondents.

H) No specific relief has been sought in this OA with respect to ACRs of the petitioner, and that being the subject matter of OA 2790/97 and the same is not decided along with this OA. The registry is directed to list the same on for further adjudication of the said OA.

With this the OA has been allowed to the extent stated above with no order as to cost.


(S.P. Biswas)
Member (A)


(Dr. Jose P. Verghese)
Vice Chairman (J)