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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

Regn. Nos. (1) OA 1006/1989
(2) OA 1140/1989

Date of decision: 04.03.92.

Shri P.C. Misra

...Applicant

Vs.

Union of India through
Secretary, Ministry of Home
Affairs & Another

...Respondents

For the Applicant

...In person

For the Respondents

...Shri M.L. Verma,
Counsel

CORAM:

THE HON'BLE MR. P.K. KARTHA, VICE CHAIRMAN(J)

THE HON'BLE MR. B.N. DHUNDIYAL, ADMINISTRATIVE MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgment? *Yes*
2. To be referred to the Reporters or not? *No*

JUDGMENT

(of the Bench delivered by Hon'ble Shri P.K.
Kartha, Vice Chairman(J))

The applicant is aggrieved by his non-appointment to Junior Administrative Grade of the Delhi and Andaman and Nicobar Islands Civil Service (DANICS, for short).

OA 1033/1989 filed by Mrs. Asha Nayar and OA 1202/1989 filed by Shri M.N. Mathur also relate to the same issue.

As the facts of each case are different, it is not proposed to deal with these cases in a common judgment, though all these applications were heard together.

2. The applicant had filed OA 1006/89 praying for a declaration that Rules 8 and 9 of the Delhi and Andaman and Nicobar Islands Civil Service (Amendment) Rules, 1988

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are unconstitutional and that the Office Memorandum dated 10.03.1989 issued by the Department of Personnel & Training be declared void. By judgment dated 15.5.1989, the Tribunal held that the impugned amendments and office Memorandum did not suffer from any illegality or unconstitutionality, as alleged by the applicant. In view thereof, the application was dismissed in limine.

3. The applicant thereafter filed RA 82 of 1989 in which he stated that similar matters have been raised in OA 907/89 (Rajinder Singh Vs. Union of India & Others) and in OA 1033/89 (Mrs. Asha Nayyar Vs. Union of India & Others) and that OA 1033/89 had been admitted by the Tribunal on 18.5.1989. The Tribunal considered it appropriate to hear OA 1006/89 also on the merits. By order dated 28.8.1989, RA 82/89 was allowed and OA 1006/89 was directed to be heard afresh.

4. In OA 1140/89, the applicant has prayed for a declaration that he is deemed to be appointed to the Junior Administrative Grade of DANICS from the date his juniors were appointed with effect from 17.5.1989.

5. The applicant belongs to Delhi and Andaman and Nicobar Islands Civil Service Cadre. He was appointed to Selection Grade (Grade-I) of the service with effect from 16.7.1984. He has been holding the post of Joint Director (Agriculture & Marketing) prior to 17.5.1989. He was appointed to the said post with effect from 4.2.88. The post of Joint Director of Agriculture and Marketing

is included in the Schedule of the Delhi and Andaman and Nicobar Islands Civil Service Rule 1971 (1971 Rules, for short) as amended in 1988 and 1989, in the list of posts in the Junior Administrative Grade.

6. At the outset, we may briefly mention the relevant rules. Initially, rules were made called the Delhi, Himachal Pradesh and Andaman and Nicobar Islands Civil Service, 1965. They were replaced by the rules made in 1971 which were again amended in 1988 and 1989. The issue arising for consideration relates to the implementation of these rules.

7. Under the 1971 Rules, the service consisted of only two grades, namely, Grade-I (Selection Grade) in the scale of pay of Rs.1200-50-1600 and Grade-II in the scale of pay of Rs.650-1200. By the 1988 amendment, it was provided for one more grade, called Junior Administrative Grade, above Grade-I and the pay scales of the three Grades were as follows:-

Junior Administrative Grade

Rs.3700-125-4700-150-5000

Grade-I

Rs.3000-100-3500-125-4500

Grade-II

Rs.2000-60-2300-EB-75-3200-100-3500.

8. Prior to the amendment of the rules in 1988, appointment to the Selection Grade was to be made in consultation with the Union Public Service Commission

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on the basis of seniority subject to fitness. After the amendment, it was provided that appointment to the Junior Administrative Grade shall be made by promotion on selection basis on the recommendation of a Selection Committee of which the Chairman or a Member of the UPSC will be the Chairman. An officer with a minimum of five years service in Grade-I shall be eligible for being considered for promotion to Junior Administrative Grade.

9. The schedule to the rules were amended in 1988 and 1989 wherein the posts included in the Junior Administrative Grade have been mentioned.

10. The post of Joint Director (Agriculture & Marketing) to which the applicant was posted w.e.f. 4.2.88 is included in the schedule under the heading posts in the Junior Administrative Grade after the amendment of the rules in 1988 and 1989. The applicant has contended that he is automatically entitled to placement in the Junior Administrative Grade, that it was not a case of creation of separate posts but was one of upgradation and the incumbents must, therefore, be deemed to have gone with the posts. According to him, the amendments made in 1988 to the 1971 Rules are only prospective and till the amended rules of 1988 came into force, all the

posts shown in Schedule-I to the amended Rules~~st~~ stood upgraded with effect from 1986, the date of creation of Junior Administrative Grade, without any provision for promotion. After the upgradation of the posts, the seniormost officers in Grade-I (Selection Grade) became entitled to the benefit of upgradation of their posts. The amendment made to Rule 31 being prospective, they have no application to placement in Junior Administrative Grade to be made prior to the said amendments.

11. Respondent No.1 (Ministry of Home Affairs) issued an Office Memorandum dated 10.3.1989 laying down the procedure to be followed by the Departmental Promotion Committee. The applicant has challenged its validity and applicability to his case. He apprehends that by applying the procedure contained in the said OM, he is sought to be removed from the post of Jt. Director ~~of Agriculture and~~ Marketing, a post which has now been upgraded in the cadre of Junior Administrative Grade. According to him, this amounts to reduction to a lower rank and grade.

12. The respondents have stated in their counter-affidavit that the applicant has no right to continue to function on a particular post which has been identified for inclusion in the JAG of the service, that the Selection Grade posts and JAG posts are different in as much as the Selection Grade is personal to the officer whereas the appointment to the JAG is functional, that the posts in the JAG carry higher responsibilities and the

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appointment to these posts is made out of the officers who have been approved for empanelment as JAG officers after following the procedure laid down under Rule 31 of the 1971 Rules, that appointment to JAG is not on the basis of selection and that the applicant was considered by the Selection Committee along with other eligible officers but he was not found fit for inclusion in the panel prepared by the Selection Committee for appointment to JAG. The respondents have also contended that the rules were amended for betterment of the conditions of service of the members and to provide them better promotional avenues.

13. By order dated 17.5.1989, appointments were made to the Junior Administrative Grade of DANICS. The applicant was not appointed to the said Grade while some of the juniors were so appointed.

14. We have gone through the records of the case carefully and have considered the rival contentions. We have also considered the case law relied upon by both sides*.

15. The first question arising for consideration is whether upgradation of a post per se amounts to promotion to a higher post.

* Decisions cited by the applicant:-

1973(3) SCC 1; AIR 1970 Pat 432; AIR 1976 SC 404; AIR 1972 Pat 247; 1987(3) SCC 622; AIR 1983 SC 852; AIR 1988 SC 2068; AIR 1970 SC 77

Decisions cited by the respondents:-

AIR 1953 SC 10; 1989(9) ATC 633; AIR 1967 SC 1989; AIR 1986 SC 737; AIR 1990 SC 251.

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16. A Full Bench of the Kerala High Court in N.G.

Prabhu Vs. Chief Justice, Kerala, 1973 (2) SLR 251 has held that as a result of upgradation, persons continue to hold the same posts but get a higher scale of pay and that it cannot be called a promotion. The following observations contained in Para 16 are pertinent:-

" In other words, if the upgradation relates to all the posts in a category naturally there is no sense in calling it a promotion of all the persons in that category. That is because there is no question of appointment from one post to another. Parties continue to hold the same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgraded but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category, a higher scale of pay is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the higher grade which has been so created by upgradation. The phenomenon does not differ from the case where all the posts are upgraded, and it appears to us that those who get the higher grade cannot be said to have been 'promoted' because here again there is no question of appointment from one post to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay".

17. The Allahabad Bench of the Tribunal in its judgment

o (V.K. Sirothia Vs. Union of India)
dated 1.10.1986 in OA 384 of 1986/ has held in the case of

upgradation of Railway Guards as follows:-

" The restructuring of posts was done to provide relief in terms of promotional avenues. No additional posts were created. Some posts out of existing total were placed in higher grade to provide these avenues to the staff who were stagnating. The placement of these posts cannot be termed as creation of additional posts. There were definite number of posts and the total remained the same. The only difference was that some of these were in a higher grade. It was deliberate exercise of redistribution with the primary object of betterment of chance of promotion and removal of stagnation".

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" Upgradation of cadre by redistribution of posts will lose its primary objective if it is taken on generation of additional posts in the upgraded posts which it rightly is not. There has to be rationality in the implementation of directions and instructions. The criterion has to be formulated keeping the aims and safeguards in view. The key note thought behind the exercise should not be lost sight of. It is to improve prospects, remove stagnation and provide avenues. The very purpose is defeated if the end result is anything else*.

18. In a case where 300 posts of Assistant Divisional Medical Officers in the Central Railway were upgraded to those of District Medical Officers, the Jabalpur Bench of this Tribunal in Ashok Kumar Shrivastava Vs. Union of India, 1987(4) ATC 385 has observed that upgradation of ADMOs to DMOs involves neither a selection nor a promotion. It is simply nomination or placing of some seniors to the upgraded posts with better pay scale, on the basis of seniority subject to suitability. In the circumstances of this case placing of these few seniors to their upgraded posts with better pay scale does not amount to any fresh appointment by promotion and, moreover, these persons, so nominated to the higher grade, do not leave behind vacant their earlier posts.

19. A Full Bench of the Patna High Court in Madan Mohan Prasad and Others Vs. State of Bihar, AIR 1970 Pat. 432 has upheld the upgrading of the posts of Deputy Registrar, Patna High Court and the Secretary, Bihar Legislative Assembly and the appointment of the incumbents of those posts. This was also upheld by the Supreme Court in State of Bihar Vs. Madan Mohan, AIR 1976

20. In Bishan Sarup Gupta Vs. Union of India, 1973

SCC (I&S) I at 14, which dealt with the seniority of

Income Tax Officer, a Constitution Bench of the

Supreme Court upheld the upgrading to Class I of

100 temporary posts of Income Tax Officers, Class-II.

The Supreme Court observed that "upgrading of a post

involves the transfer of a post from the lower grade

to the higher grade and the promotion of one of the

incumbents of that job to the upgraded post*.

21. In view of the above, we are of the opinion that

the applicant who has been holding the posts which have

been included in the Junior Administrative Grade by the

1988 Rules must be deemed to have been appointed to the

upgraded posts without requiring any fresh process of

selection to be undergone by him. ✓

22. The matter may also be viewed from another angle.

The 1988 amendments providing for promotion to the Junior

Administrative Grade from Grade I (Selection Grade) being

prospective, could only govern vacancies arising after the

coming into force of the 1988 Rules. In Y.V. Ranjithiah Vs.

J. Sreenivasa Rao, AIR 1983 SC 852, the Supreme Court held

that "the vacancies which occurred prior to the amended

rules would be governed by the old rules and not by the

amended rules*. To the same effect is the decision of

the Supreme Court in P. Ganeshwar Rao Vs. State of U.P.,

AIR 1988 SC 2068. ✓

23. Yet another aspect of the matter is that the vested rights and legitimate expectations of the applicant could not be taken away by retrospective amendment of the Rules and by providing for a fresh selection to the upgraded post in the Junior Administrative Grade by adopting new criteria.

24. In P.D. Aggarwal Vs. State of U.P., 1987 SCC (I&S) 310, the Supreme Court has held that though the Govt. has power under proviso to Article 309 to make rules and to amend them giving retrospective effect, if the rules purport to take away the vested rights and are arbitrary and not reasonable, such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution. The Supreme Court followed its earlier decision in T.R. Kapur Vs. State of Haryana, 1986 Supp. SCC 584 at 595, wherein it was observed as follows:-

" It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is, however, subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective amendment, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights. Therefore, unless it is specially provided in the rules, the employees who are already promoted before the amendment of the rules, cannot be reverted and their promotion cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Articles 14 and 16 of the Constitution".

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25. In P. Mahendran Vs. State of Karnataka, 1990(12) ATC 727(SC), the Supreme Court has observed that "the Rules which are prospective in nature cannot take away or impair the right of candidates holding Diploma in Mechanical Engineering as on the date of making appointment ~~as well as on the scrutiny by the Commission they were qualified for selection and appointment.~~ (Karnataka Public Service)"

26. In the conspectus of the facts and circumstances, we hold that the applicant and those similarly situated who were holding posts which have been upgraded in the Junior Administrative Grade should be deemed to have been regularly appointed to the Junior Administrative Grade with effect from 1.1.1986. We have been informed by ~~the~~ ~~xxxxxxxxxxxxxx~~ the applicant at the time of final hearing that there are enough vacancies to accommodate the applicant and those similarly situated. The respondents are also directed to create supernumerary posts in case need for the same arises. In this view of the matter, we do not consider it necessary to strike down the OM dated 10.3.1989 or to declare the panel prepared under Rule 31 and the recommendations made by the DPC held on 13/14.4.1989 in so far as they apply to the persons other than the applicant and those similarly situated.

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27. The respondents are directed to issue appropriate orders on the lines indicated above/within a period of three months from the date of communication of this order.

There will be no order as to costs. Let a copy of this order be placed in both case files.

B.N. DHOUDIYAL

(B.N. DHOUDIYAL)

MEMBER (A)

4/3/92

(P.K. KARTHA)

VICE CHAIRMAN (J)

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