

Central Administrative Tribunal
Principal Bench, New Delhi.

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O.A.No.1634/89

New Delhi this the 5th Day of May, 1995.

Hon'ble Sh. J.P. Sharma, Member(J)
Hon'ble Sh. B.K. Singh, Member(A).

Shri B.P. Srivastava,
S/o Sh. Baldev Prasad Srivastava,
R/o K-43, Sector-XI,
Noida-201 301.
Distt. Ghaziabad(UP).

Applicant

(through G.D. Gupta, advocate)

1. Union of India,
through Secretary to the
Government of India,
Ministry of Information and
Broadcasting,
New Delhi.

2. The Director General,
All India Radio,
Akashwani Bhawan,
Parliament Street,
New Delhi.

Respondents

(through Sh. V.S.R. Krishna, advocate)

ORDER

delivered by Hon'ble Sh. B.K. Singh, Member(A)

This O.A.No.1634/89 has been filed under Section 19 of the Administrative Tribunals Act, 1985 challenging, inter alia, the act of the respondents in holding the D.P.C. in August, 1986 for only 10 vacancies of Chief Engineer, All India Radio, whereas there were 11 vacancies, thereby depriving the applicant of the right of promotion to the 11th vacancy in as much as he was not only the next senior most Director of Engineering/Superintending Engineer, the feeder post for the post of Chief Engineer, but he, as reliably understood, was the next person in the grading made by the UPSC according to merit and, had there been 11 vacancies, there would have been no question of his non-selection and the act of the respondents in not promoting the applicant to the post of Chief Engineer

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inspite of the fact that he was not only considered by the 1987 D.P.C. but also selected and was borne at serial No.1 of the panel on the alleged ground that he had been left only with less than three months before retirement and, therefore, was not liable to be promoted on that ground, thereby, in turn, rendering the act of the respondents not only illegal, but arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution.

The admitted facts are that the applicant was employed as Director (Engineering) in the scale of Rs. 3700-5000/- in All India Radio. He retired from service on 30.04.1988. The next higher post of promotion from the rank of Director is that of Chief Engineer in the scale of Rs. 5900-6700/-. The recruitment/promotion to the said post is governed by the Indian Broadcasting (Engineers) Service Rules, 1981. According to the rules of 1981, the post of Chief Engineer being a Senior Administrative post is required to be filled up by promotion from amongst officers of Junior Administrative grade with 7 years service. The post of Chief Engineer is required to be filled by promotion through selection merit taking precedence over seniority. The rules are enclosed with O.A. and marked as Annexure-B of the paperbook.

In order to make promotion to the post of Chief Engineer, a D.P.C. was held in April, 1986 for filling up of vacancies falling in the year 1986, counting the year from 1st January, 1986 to 31st December, 1986. In the O.A. it has been averred that

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16 vacancies were available for the full year 1986. The seniority list has been enclosed as Annexure-C with the O.A. The D.P.C. which met in April, 1986 was required to fill up only 6 vacancies presumably because applicant was not considered eligible at that time. These 6 eligible officers were ultimately selected and empanelled but before the order of promotion could be issued, one person retired from service on 30.04.1986 resulting in promotion of only 5 persons vide Annexure-C-1 of the paperbook. Another D.P.C. was held some time in August, 1986 to fill up the remaining vacancies. According to the applicant this D.P.C. should have considered 11 vacancies for empanelment of officers but the Ministry communicated only 10 vacancies to the Union Public Service Commission and accordingly a panel of 12 persons was recommended by the Commission and the said 12 names were included and the additional 2 names were included on account of the impending retirement of 2 officers. The applicant has stated that a mistake in the calculation of vacancies occurred because of not counting of a vacancy caused by the superannuation of Sh. R.N. Khapre in September, 1986. If this vacancy according to the applicant had been counted then the total number of vacancies would have been 16 and not 15. The Ministry took up the stand that Shri. Khapre's vacancy had been included. The applicant drew the attention of the court to the letter written by the Engineer-in-Chief that the said vacancy was not taken into consideration for purposes of promotion of the requisite number of officers. If the calculation of the vacancies had been done correctly the applicant was likely to be promoted even

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by D.P.C. which met in April, 1986. The applicant's grievance is that he was duly considered by the 1987 D.P.C. and was selected and empanelled at S.No.1 of the panel but he was not promoted on the ground that he was left with less than 3 months service before superannuation.

The following reliefs have been sought for by the applicant:-

- "(A) to allow this application of the applicant with costs;
- (B) to issue appropriate order or orders, direction or directions;
 - (i) declaring that there were 16 vacancies and not 15 and in other words there were 11 vacancies and not 10 so far as the D.P.C. of August, 1986 was concerned;
 - (ii) directing the respondents to promote the applicant, as he was already graded as 'Very Good' by the DPC of August, 1986 and he happened to be the next senior person in the seniority list with effect from 2nd June, 1987 when 8 persons were orders to be promoted on the basis of the recommendations of DPC held in August, 1986 with all consequential benefits;
 - (iii) declaring the acts of the respondents in not promoting the applicant as Chief Engineer inspite of his selection by the DPC of 1987 inspite of the fact that his name was borne at serial No.1 of the panel of the said DPC on the alleged ground that he had been left with less than three months for retirement;
 - (iv) declaring and striking down as illegal the rule, if any, that a person is not entitled to be promoted to a post if he is left

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with less than three months for retirement especially in a case like the present one where the vacancies against which the applicant was considered was of 1986 and the DPC had been held late at the fag end of concerned year and that too for no fault of the applicant;

(v) declaring applicant entitled to be promoted to the post of Chief Engineer on the basis of his selection by 1987 DPC from the dates from which his juniors in the panel prepared by the 1987 DPC had been promoted;

(vi) directing the respondents to promote the applicant as Chief Engineer on the basis of his selection by the 1987 DPC and on the basis that his name was borne at S.No.1 on the panel prepared by 1987 DPC from the dates from which his juniors were promoted with all consequential benefits;

(vii) also directing the respondents to treat the applicant actually having been promoted with effect from 2.6.1987 considering the history of the case where injustice had been done to applicant consecutively for the two years."

A notice was issued to the respondents who filed their reply contesting the application and the grant of reliefs prayed for. We heard the learned counsel for the parties and perused the record of the case and also summoned the ACC file from the Department of Personnel.

The learned counsel for the applicant argued that the D.P.C. which met in December, 1987 placed the applicant at Serial No.1 and that the ACC did not consider him fit for promotion since he was left with only three months to attain the age of superannuation and according to him this act was arbitrary and violative of Articles 14 & 16 of the Constitution. It

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was further pointed out that ACC did not give any reason for its decision in not appointing the applicant to the post of Chief Engineer in the Ministry of Information & Broadcasting. Though there are no rules to effect that if an officer is retiring within three months he will not be promoted and even if such a rule existed, it was liable to be struck down as being arbitrary and violative of Articles 14 & 16 of the Constitution. He further stated that the applicant had an unblemished record of service and he also pointed out that he never got any adverse remarks during his service career and it was further pointed out that though the respondents denied him the promotion to the grade of Chief Engineer but after retirement he was appointed as Consultant by the Information and Broadcasting because of his meritorious and commendable service. Whatever the delay in recommending the case of the applicant was on the part of the respondents and that is the reason why certain candidates who were retiring were not recommended for promotion to the rank of Chief Engineer. In this connection, he relied on two judgements delivered by the Madras Bench of the Central Administrative Tribunal. In case of K. Palanivelu Vs. Union of India & Ors. (OA-531/87) decided on 4.11.1988 the points which arose for consideration were whether a person whose name has been recommended by D.P.C. presided over by a Member of U.P.S.C. can be rejected and some other person junior to him whose grading was no better than that of his senior can be approved on the ground that senior person

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does not have adequate service left before attainment of the age of superannuation. In this case, the operative para reads as follows:-

"Accordingly, we direct the respondents to consider the grant of proforma promotion to the applicant as Chief Engineer(Bridges) from the date on which the promotion of his junior was approved by the Appointments Committee of the Cabinet. This will be without payment of any arrears of pay till his retirement on 28.2.1987, and will be only for the purpose of calculation of the applicant's pension and death-cum-retirement gratuity.

The application is allowed as above."

The second judgement on which he relied is M. Durai Raj Vs. U.O.I. & Ors. (OA-107/89) decided on 17.04.1990. The operative para of this judgement reads as follows:-

"Therefore, in the interest of justice, we would direct the respondents to place the applicant's case before the competent authority again, in the light of this judgement, with a proposal for reconsidering the case of the applicant, if not for retrospective promotion at least for regulating the pensionary benefits on the basis of deemed promotion. Action in this regard may be taken within a period of three months from the date of receipt of this order.

The application is disposed of as above."

The learned counsel for the respondents quoted the judgement of the Hon'ble Supreme Court in the case of Dr. H. Mukherjee Vs. Union of India & Ors. decided on 28.09.93 in C.A.No.3668/93. This was heard by a Full Bench comprising Hon'ble Mr. Justice A.M. Ahmadi, the Hon'ble Mr. Justice M.M. Punchhi and the Hon'ble Mr. Justice K. Ramaswamy. In this judgement, the Hon'ble Supreme Court considered, the

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question whether the ACC was required to record reasons when it does not accept the recommendations of the DPC presided over by a Member of UPSC. The question is whether the selection of a candidate by the Selection Board confers an unfettered right to be appointed on the recommendation made by the said Board. Dealing with this contention, the Hon'ble Supreme Court referred to the duties to be performed by the Union or State Public Service Commission under Article 320 and observed that the establishment of an independent body like Public Service Commission is to ensure selection of best available candidates. The selection by the Commission is only a recommendation and the final authority for appointment is the Government. The Hon'ble Supreme Court pointed out that the Government may accept the recommendation or may decline to do so but if it chooses not to accept the recommendation of the Commission, the Constitution only enjoins the Government to place on the table of both the Houses of Parliament its reason for so doing. The Government is accountable only to the Houses of Parliament and that this does not clothe the candidate with any right to appointment pursuant to the recommendation of the Commission. If was further stipulated that if the Government decides to make the appointment, it must make the appointment in the order of merit fixed by the Commission. The Government cannot appoint a person whose name does not appear in the list but it is always open to the Government to decide how many appointments it will make. Thus the Hon'ble Supreme Court clearly laid down that the selection by the Commission is only recommendatory in nature and the Government may or may

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not accept the same and if it chooses not to accept the same, it is under an obligation to place its reasons before the two Houses of Parliament under Section 323 of the Constitution. While dealing with Dr. Mukherjee's case, the Full Bench of the Hon'ble Supreme Court also examined the ratio of the judgement in case of Jatinder Kumar and recorded its view that the selection made by the Commission was only recommendatory in nature and it was open to the Government to either accept the recommendation or to depart therefrom. While dealing with Mukherjee's case, the Hon'ble Supreme Court also disagreed with the contention of the learned counsel for the respondents that if delay occurred on the part of the Appointment Authority, the crucial date which should be taken into consideration should be the date on which the recommendation is made and not the date on which the matter is put up before the ACC. The Hon'ble Supreme Court felt that no hard and fast line can be drawn in this connection and in the relevant case the Hon'ble Supreme Court did not find any deliberate delay in regard to the decision of the Hon'ble Supreme Court. The Hon'ble Supreme Court also examined the case of Mrs. Asha Kaul and Anr. Vs. State of Jammu & Kashmir & Ors. reported in JT 1993(2) 688 and Jagtar Singh Vs. The Director, Central Bureau of Investigation & Ors. reported in JT 1993(2) 703. The Hon'ble Supreme Court finally held that the function of the Public Service Commission being advisory, the Government may for valid reasons to be recorded on the file, disapprove of the advice or recommendation tendered by the Commission, which decision can, if at all, be tested on the limited

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ground of it being thoroughly arbitrary, malafide or capricious. In the case of Union of India, etc.etc. Vs. Shri N.P. Dhamania, etc.etc. reported in JT 1994(7) SC 465, a Division Bench comprising of Hon'ble Mr. J.S. Verma and Hon'ble Mr. S.Mohan set aside the order of the Principal Bench of the Tribunal and held the view that the Tribunal had exceeded in its jurisdiction by granting deemed promotion. The Hon'ble Supreme Court did not support the finding of the Tribunal and held that it would be an exercise in futility to make a reference back and seek further consultation with the UPSC in the matter. On those score, 'deemed promotion' cannot be accorded. Still the ACC will have to consider the case of the respondent on merits with reference to the records. The deemed promotion order was set aside and it was stated that the Appointing Authority shall consult the UPSC once again by making reference back to them indicating the reasons for making a departure from the panel recommended by the Commission and also forward the material on which it has reached the conclusion not to appoint the respondent and obtain their views before taking final decision in the matter. In this judgement also the case of Jatinder Kumar and Other Vs. State of Punjab and others (1985(1)SCC 122 was discussed.

The crucial question is whether the Tribunal is competent to pass an order in the manner it has been done in the two cases cited by the learned counsel for the applicant. Those two judgement were delivered much before the judgement in case of Dr. H. Mukherjee Vs.

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U.O.I. & Ors. and before the judgement of the Hon'ble Supreme Court in case of U.O.I., etc. etc. Vs. Sh. N.P. Dhamania, etc. etc. The Dhamania's case was decided by a Division Bench of the Hon'ble Supreme Court whereas the case of Dr. H. Mukherjee Vs. U.O.I. & Ors. was decided by three Hon'ble Judges of the Hon'ble Supreme Court headed by the present Chief Justice of India Justice A.M. Ahmadi who was then the senior most Judge of the Hon'ble Supreme Court of India after Chief Justice of India. The law laid down in Dhamania's case is that if the Tribunal feels that injustice had been done to an officer, it will refer to the ACC to record its reasons and to consult UPSC again. But in the case of Dr. H. Mukherjee the law laid down is that the ACC can accept or reject recommendation of the UPSC or a Selection Meeting presided over by a Member of UPSC and it is not under an obligation to communicate its reasons to the UPSC or the applicant. The Government is accountable only to both the Houses of Parliament and when UPSC refers case in which reasons are not accepted to the President of India. This is placed under orders of President alongwith a memorandum submitted by Government before the two Houses. The Government under Article 323 of the Constitution is required to place its reasons before the two Houses of Parliament. Since it is accountable to the Parliament, the Government can record the reasons in the relevant file dealing with the subject of promotion why it did not choose to promote a few people. The relevant ACC file has been produced before us and we have perused the same. The file deals with the proposal of appointment of 9

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officers to Senior Administrative Grade of the Indian Broadcasting (Engineers) Service from Junior Administrative Grade. 12 out of 14 officers who were considered were graded as very good. The first 9 were proposed against the vacancies. The serial No.1, 3 & 7 were not approved; firstly on the ground that they had less than three months to retire from service. The 9 candidates were required to fill up 8 existing vacancies and one likely to arise on 31.01.1988. It was further pointed out that Serial No.1 and 8 were graded as good only. Thus in case of applicant there are two reasons one that he had less than three months to retire and the other that his over all assessment was good instead of being very good. Recommendation thus in case of Serial Nos.1, 3 & 7 were not accepted by the ACC because they had three months to retire. The applicant had two disadvantages (a) that he was graded as good only and (b) that he had less than three months to retire. The serial Nos. 3 & 7 were graded as very good and they were not considered fit for promotion because they had three months to retire from service. Serial No.8 was superseded by Sh. Lakhre because he was assessed as good only. The reasons have been recorded in the file and since the Hon'ble Supreme Court have laid down the ratio that the ACC is not required to communicate its reasons to UPSC or the applicant in the case of Dr. Mukherjee decided on 28.9.93 it has fulfilled the obligation cast on it by communicating the reasons only to the Houses of Parliament and that it is under no obligation to communicate its reasons either to the DPC or UPSC or the candidate, were not inclined to interfere with the

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decision of the Government in view of the law laid down by the Hon'ble Supreme Court in case of Dr. H. Mukherjee decided on 28.9.93 by a three Member Bench of the Hon'ble Supreme Court wherein all the cases of Jatinder Kumar & Ors. (supra) and Mrs. Asha Kaul & Ors. have been discussed. In view of the law laid down by the Hon'ble Supreme Court it would be difficult for the Tribunal to rely on the decisions of the C.A.T. Madras Bench in case of K. Palanivelu vs. U.O.I. & Ors. decided on 4.11.1988, the operative part of which has been quoted above or on the decision in the case of M. Durai Raj Vs. U.O.I. & Anr. (OA-107/89) decided on 17.4.90, the operative para of which has been extracted and quoted above. The ratio of the judgement of the Hon'ble Supreme Court in case of Jatinder Kumar (supra) reiterated in case of Dr. H. Mukherjee (supra) by a Full Bench will hold good.

In the conspectus of the facts and circumstances of the case, the O.A. is dismissed as devoid of any merit, leaving the parties to bear their own costs.

The ACC file is returned to the Ministry of Personnel, Public Grievances & Pension in a sealed cover.

(B.K. Singh)

Member(A)

J. P. Sharma

(J.P. Sharma)

Member(J)

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