

10

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

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OA No. 503/93

New Delhi, this the 30th November, 1994.

HON'BLE SHRI J.P. SHARMA, MEMBER (J)

HON'BLE SHRI S.R. ADIGE, MEMBER (A)

Shri V.N. Manoo,
s/o Shri V.G. Narayanan
r/o E-96, Nanakpura,
New Delhi- 110 021.

Applicant

(By advocate Shri J.P. Verghese)

Versus

Union of India through

1. Secretary,
Deptt. of Economic Affairs,
Ministry of Finance,
New Delhi.
 2. Secretary,
Deptt. of Agriculture & Cooperation,
Krishi Bhawan,
New Delhi.
 3. Director,
Ministry of Labour,
Shram Shakti Bhawan,
New Delhi.
 4. Shri J.S. Sahwney,
Additional Economic Adviser,
Ministry of Commerce,
Udyog Bhawan,
New Delhi.
 5. Shri O.P. Bhardwaj,
Addl. Economic Adviser,
Directorate of Economics & Statistics,
Ministry of Agriculture,
Krishi Bhawan,
New Delhi.
 6. Shri S.R.S. Gill,
Director, SISI,
Ludhiana,
Punjab.
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7. Shri Vir Chandra,
Planning Commission,
Yojna Bhawan,
New Delhi.

8. Shri P.P.P. Babu,
Labour & Employment Adviser,
Ministry of Labour,
Shram Shakti Bhawan,
New Delhi.

... Respondents

(By advocate Shri P.H. Ramchandani).

JUDGEMENT (oral)

HON'BLE SHRI J.P. SHARMA, MEMBER(J)

The applicant belongs to Indian Economic Service, Ministry of Labour and he has a grievance against non promotion to the post of S.A.G. in the scale of pay 5900-6700/- w.e.f. 1.5.92. After making certain representations the applicant filed the O.A. on 24.2.1993 praying for the grant of relief that the direction be issued to the respondent no. 1 to promote the applicant w.e.f. 1.5.92 the date from which his junior had been promoted to the post of S.A.G. with all consequential benefits such as seniority, higher pay scale, arrears of pay etc. While admitting this application on 26.2.1993, an interim relief was granted that any promotion made shall be subject to the outcome of this O.A.

2. A notice was issued to the respondents No. 1 and the private respondents but they did not file any reply but contested the original application. Respondent No. 3 Director Ministry of Labour is being represented by Shri P.H. Ramchandani, advocate. The learned counsel stated that the relief prayed for by the applicant is only with respect to respondent No. 1 i.e. with the Union of India through Secretary, Department of Economic Affairs.

3. Shri J.P.Verghese appeared for the applicant. The case taken up by the applicant in the application is that in October, 1989 two already existing SAG post (Ex-cadre) were encadred to I.E.S.. The criteria for promotion to the post as indicated in the order of encadring of those posts are merit with due regard to seniority and annexure-'C' notification dated 5.10.89 which lays down the instructions in this respect.
4. That subsequently there was a cadre review in February, 1991 and 23 existing Grade-I of IES posts were upgraded to SAG level. No criteria including additional qualification for promotion to these twenty three posts were prescribed in the order of upgradation and no additional responsibilities were assigned to these posts in the order. It is revealed by OM dated 19.2.1991 in Annexure-'D'. However a DPC was held in September, 1991 and a list was prepared and some officers junior to the applicant were enlisted. Subsequently the DOPT issued a circular dated 4.2.1992 laying down the guidelines for consideration for the upgraded post of SAG.
5. The grievance of the applicant as already referred to above is that even after the issuance of this circular of 4th February, 1992 the panel prepared by DPC in September, 1991 was operated and juniors to the applicant were promoted in May, 1992.
6. We heard the learned counsel for the parties and perused the records. The first contention of the applicant counsel is that 23 posts approved for upgradation to S.A.G. level by the order of the Ministry of Finance dated 19.2.91 has to be filled up on the basis of seniority and fitness/suitability. His contention is that the amendment to I.E.S. Rules, 1961 by the notification dated 5.10.89 lays down that the promotion shall be made on the basis of merit with due regard to seniority by the controlling authority on the recommendations of the Departmental Promotion Committee cannot apply to the post approved for upgradation by the order dated 19.2.91. Since Respondent No.1 has not filed

any reply, in what manner the criterion was adopted for filling up of the upgraded posts in S.A.G. level. The contention of the learned counsel therefore that the promotion of J.A.G. level officers of I.E.S. to S.A.G. grade by the order dated 11.5.92 ignoring the applicant and promoting his juniors is not fair and is unjust. We have considered this contention. Firstly the statutory rules had the force of law. By the amendment of 5th October, 1989 clause (f) was added to sub-rule(1) of rule 8 of the rules which is quoted below:-

"Senior Administrative Grade: (All the vacancies in the Senior Administrative Grade shall be filled by promotion from amongst Grade I officers(Rs.3700-5000) of the service with 8 years regular service in the Grade (including service if any, in the selection grade) of 17 years regular service in Group 'A' posts out of which at least 4 years regular service should be in Grade I(Rs.3700-5000) of the service. Promotion shall be made on the basis of merit with due regard to seniority by the controlling authority on the recommendations of the Departmental Promotion Committee presided over by the Chairman/Member of the Union Public Service Commission.")

The criterion cannot be different unless it is specifically laid down for award of S.A.G. to eligible J.A.G. on the basis of seniority. A D.P.C. therefore was convened, as averred in the O.A. /ⁱⁿ September 1991. Though during the course of the arguments it is said that the DPC was convened in May, 1991. The mistake typographically otherwise has not been amended and since Union of India has not filed any reply the exact picture is not before us as to when the DPC was held. Even the contest by the Ministry of Labour is notional as no reply has been filed to the various averments made in the O.A. Shri P.H. Ramchandani argued on the legal point. By that as it may, these 23 upgraded posts were filled by following the clause (f) of the I.E.S. Rules 1961 as added by the notification of 5th October, 1989. - Administrative

14

instructions cannot be in conflict with the statutory rules. If the basis of merit is the criterion for upgradation then the DPC has to consider that aspect. Even if we take merit as suitability as it is said that the applicant belongs to the S.C. category even then the panel prepared for filling these posts in 1991 on 11.5.92 cannot be disturbed as the only challenge is that the upgraded post of S.A.G. has not been filled up solely on the basis of seniority and fitness.

The applicant in para 4.4 of the application has admitted that the DPC meeting was held in September 1991 for preparation of select list for promotion to SAG level posts.

It is also admitted to the applicant that the DPC prepared a select list of SAG level officers. The applicant in his representation dated 7.1.92 has also admitted that one of the criteria for promotion to SAG is merit with due regard to seniority for cadre posts generally in all the services seniority is the main criteria and no supersession is allowed and all officers who are within the vacancy position are promoted. At the same time it is admitted in the same representation while writing CRs his reporting officer^{not} being from the organised service and since the applicant is from different discipline he might not have appreciated his works which were mainly of economics and planning. He has also referred to the fact that since the applicant is from S.C. category the bias and prejudices prevailing in the area might have prevented the reporting officer in assessing him objectively. It is also admitted by him that the applicant has not been given benefit of dilution of merit element in the criterion and as the DPC had diluted merit for the benefit of all officers the applicant has been wrongly left out of the select list and the action of the DPC was unethical, unjustified and arbitrary. He might

not have obtained good C.R. for the last few years and that may be reasons for which his name has not been brought in the select list. He also represented that the observations of the accepting officer in his C.R. for 1990-91 may be expunged and accordingly a review DPC meeting may please be held to reconsider his case. All this goes to show that the applicant was duly considered by the DPC. The applicant has not challenged composition of the DPC. The function of the DPC is to ensure suitability of candidates for promotion in objective and impartial manner. In para 4.3 of the O.A. the applicant harboured an idea that there are 2 different modes of preparing the select list of SAG level officers but it is not so by virtue of the amendment to Rule 8(1) of IES Rules 1961 where clause (f) has been added by the notification dated 5.10.89. In fact the applicant has wrongly entertained an idea that this amendment in clause(f) only covers the post of post mentioned in Schedule I of Economic Advisor. However, this is not so. The learned counsel for the applicant Shri J.P. Verghese has dealt with at a considerable length that when posts are upgraded, the criterion for grant of SAG level promotion should not be the same as in the existing vacancies not due to upgradation. This concept cannot be accepted as otherwise it would be discriminatory when the DPC met for preparation of list of SAG officers the clause (f) added by the notification dated 5.10.89 in Rule 8(1) of IES Rules 1961 has the force. The DPC has to consider the same on the basis of amended rules. Though in the application the applicant has not referred to any objective assessment in giving ACR but the representation preferred by the applicant in January, 1992 clearly goes to show that the applicant was aware of the relative assessment given to the applicant and which was duly considered by the DPC. In this application the applicant has not prayed for

grant of any relief regarding his assessment by the reporting officer of the accepting officer for the previous years when the DPC was held. If the DPC has considered the CC roll of the applicant and has made a proper assessment and there are no allegations mala fide against the DPC it has to be presumed that official acts were performed in due course. Though Evidence Act itself is not applicable but under section 114 of the Evidence Act presumption can be drawn that the official acts are performed in due course unless the same is challenged and assailed. In view of this we find that the select list prepared by the DPC of SAG level officers by the notification dated 11.5.92 cannot be faulted with.

7. The next contention of the counsel for the applicant is that the applicant had never been conveyed any reply to his representation which he has been making successively to the respondents. He has also argued that no reply has been filed in this case by any of the respondents particularly Secretary, Department of Economic Affairs to apprise about the actual state of affairs which came in the way of exclusion of the name of the applicant from the select list of SAG level officers. It is a fact that the respondents have not taken the matter seriously and in spite of opportunities afforded, no reply has been filed by the respondents. At the same time the case has to be decided on the extant rules holding of DPC and the preparation of select list of SAG level officers according to statutory rules. On scrutiny of the extant rules we do find that merit criterion has been taken into account by the DPC as has been invoked when the DPC met. It was only in February 1992 that the DOPT has laid down certain guidelines but this will be prospective in operation and cannot supplant the statutory rules of IES 1961 as amended by notification dated 5.10.89. The counsel for the applicant has not shown any rule, notification or circular where any

such instructions has been laid down by the DOPT when solely on the basis of seniority disregard of merit/suitability SAG level promotion can be granted from JAG. The non action on the part of the prescribed authorities in the Department of Economic Affairs of Ministry of Labour will not by itself be taken to grant the relief to the applicant if it is otherwise cannot be granted. The application was admitted on 26.2.93 and inspite of service on the respondents no reply was filed. The applicant filed M.A. 649/94 praying that since the respondents are not filing the reply, the right of the respondents to file the reply be forfeited. By the order dated 27.4.94 this M.A. was allowed. In view of this, no further notice was issued to the respondents particularly Secretary, Ministry of Economic Affairs and the case has to be decided on the basis of pleadings and arguments of the learned counsel for the applicant who has since retired on 31.5.94. Though we do not approve non action of the respondents in not filing the reply and also not giving an indefinite order on the representation filed by the applicant. But this cannot by itself be taken to grant the relief to the applicant as prayed for.

8. The learned counsel for the applicant forcefully argued that certain promotions have been effected in December 1992 and in this connection he has filed before the Bench the order dated 11.12.92. This order shows the names of S/Shri S.R.S. Gill, Vir Chandra and P.P.P. Babu. The applicant has filed the seniority list of IES officers (Annexure 'G'). The names of the above mentioned officers are at Serial Nos.33, 36 and 37. The name of the applicant is at Serial No. 26 of the seniority list. In para 4.9. of the O.A. the applicant has stated.

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that Shri J.N. Aggarwal retired on 30.10.92. Besides Shri Aggarwal who was junior to the applicant five more officers were junior to the applicant in the feeder grade were promoted to SAG level. These officers are Shri J.S. Sawhney and Shri O.P. Bhardwaj besides the 3 officers named above. There is no explanation from the side of the respondents as to when any DPC was held for consideration of promotion of these officers and whether the applicant was considered and not found fit. No select list has been filed either by the applicant or by the contesting respondents regarding the promotion to SAG level and whether the promotion was undertaken as per modified guidelines notified by DOPT in its circular dated 4.2.92. In view of this, it is not evident from the record whether the applicant has been considered or not. In the select list of 11.5.92 only one junior Shri J.N. Aggarwal was enlisted in SAG level but he vacated that post on 30.10.92. The grievance of the applicant therefore appears to be justified to this extent.

9. We further find that Shri Vir Chander, Deputy Advisor, Planning Commission has been promoted from Grade I to SAG level against the upgraded post in Planning Commission. As said above in the seniority list filed by the applicant the serial number of Shri Vir Chander is 36 and that of the applicant is 26. After the issue of the notification dated 5.2.93 by the DOPT it was mandatory on the part of the respondents to consider his case for promotion to SAG level. The notification of 4.2.92 shows that where the upgradation involves only a higher replacement scale without any additional responsibility/higher qualification/higher eligibility service, the suitability of the incumbents need not be assessed and they may be appointed to the post with the higher replacement

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scale with effect from the date notified by the Government, giving effect to the recommendations of the Pay Commission or similar bodies etc. Further where the upgradation involves a higher replacement scale without higher responsibilities or higher qualifications but with a higher eligibility service, the incumbents need not be assessed for their suitability but it should be ensured that they have completed the requisite qualifying service for appointments to the upgraded post. In case they had completed the qualifying service on or before the date notified by the Government, they may be appointed to the upgraded post from that date. In the case of others who fulfil the qualifying service on a later date, they should be appointed to the upgraded post from the date on which they complete the qualifying service. This would be subject to the condition that irrespective of the date of appointment, the original seniority of the incumbent in the grade prior to upgradation will be maintained for appointment to the upgraded post. The above O.M. issued by the DOPT is binding effect on the respondents. It is not evident from the record that after the select list was drawn on 11.5.92 as a result of the DPC held in 1991 on any subsequent occasion the case of the applicant was considered for grant of SAG level. We are handicapped by non filing of a reply by the respondents or giving a correct position vis-a-vis the applicant regarding his promotion to SAG level. Whether the applicant had been found unfit or not suitable is not evident from the submissions placed by the learned counsel for the respondent No.3 Shri P.H. Ramchandani. Further this O.A. of February 1992 lays down the criterion for giving benefit of SAG level on the basis of seniority and not judging the suitability in that respect atleast with regard to upgraded post. The promotion order filed by the

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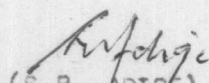
applicant counsel dated 11.12.92 showed that Shri Vir Chander has been given the benefit of upgraded post in Planning Commission. Not only this Shri P.P.P. Babu has also been given SAG level vice Shri J.N. Aggarwal who retired from the upgraded post on 31.10.92.

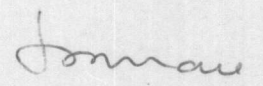
10. In view of the above facts and circumstances of the case the present application is partly allowed with the following directions:-

The respondents shall consider the case of promotion of the applicant to SAG level by constituting a Review DPC and if so recommended by the DPC he should be given the benefit of SAG level grade either on one of the upgraded posts or in any of the vacancies existing thereafter.

The applicant will be entitled to all consequential benefits of refixation of pay and will also be entitled to the arrears and also revised pensionary benefits according to refixed pay if he has been cleared and recommended by the Review DPC.

The respondents are directed to comply with the directions within a period of 3 months from the date of receipt of this judgement. Parties to bear their own cost.


(S.R. ADIGE)
Member(A)


(J.P. SHARMA)
Member(J)

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