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CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD

Registration No. 1422 of 1986 (T)

A shwani Kumar Sharma Applicant
Versus
Union of India Respondent.

Hon'ble Ajay Johri, A.M.

Hon'ble G.S. Sharma, I.M.

(Delivered by Hon. Ajay Johri, A.M.)

Case No.1422 of 1986 has been received under Section 19 of the Administrative Tribunal Act No.13 of 1985. On perusal of the file we find that the case has not yet been admitted though the case has been heard finally. We are, therefore, admitting the case at this stage.

2. The applicant is challenging the order dated 16.8.1985 issued by the Army Headquarters and communicated to him on 4.9.1985. The order is regarding his demotion from the post of U.D.C. to that of L.D.C. on the allegation that promotion was not in order as he had not rendered the requisite service for promotion. According to the applicant, after having joined the Indian Military Academy on 7.1.1974 on being declared surplus he was offered alternative employment as a L.D.C. in the C.O.D., Agra and he joined duty there on 9.4.1975. He was posted back to Dehradun on compassionate posting on the transfer of the Army Cadet College which was shifted from Pune to Dehradun. He joined the Army Cadet College, Dehradun on 8.8.1977. On joining this College he was assigned his seniority in the said

establishment. In May, 1978 some vacancies in the U.D.C. grade in the Army Cadet College occurred and the applicant was promoted as U.D.C. ~~in~~ the said Unit on 1.5.1978. According to him this promotion came as a matter of course and in accordance with his normal entitlement. He possessed the requisite three years of minimum service in the L.D.C. Grade, as required in the Recruitment Rules vide SRO 205, dated 18.6.1969.

~~3 was~~ On 1.5.1979 the Army Cadet College, merged with the Indian Military Academy, Dehradun. The applicant was surprised to receive an order of his reversion with effect from 1.3.1980. He represented against the said order and according to him he was again declared to have been rightly promoted and the order of reversion was recalled on 6.2.1981. On 21.2.1981, however, he was again reverted to the post of L.D.C. His matter was referred to the Army Headquarters for decision. The Army Headquarters turned down his case and their decision was communicated to him on 4.9.1985, which he has impugned in this application, on the grounds that his reversion was against law and facts of record and his promotion was granted in due course according to his seniority and entitlement and he had completed three years' service in the L.D.C. Grade prior to his promotion and the reversion was not simplicitor and ~~3~~ ^{penal} ~~his career~~ in consequences reducing the applicant in rank ~~3~~ ^{entailing} ~~and bearing~~ financial and other losses and since no opportunity was given to show-cause against the impugned deduction and that the applicant should have been fixed in proper seniority on the merger of the two cadres he fell discriminated. He has filed this application for

issue of a decree quashing the order of the Army Headquarters dated 16.8.1985 communicated to him on 4.9.1985 and for up-holding his promotion with effect from 1.5.1978 as an U.D.C. with consequential benefits and costs of his application.

3. The respondent's case is that the applicant was erroneously promoted as officiating U.D.C. in May, 1978. He had not completed three years' minimum service as L.D.C. in the Army Cadet College Wing as required under the Recruitment Rules. Upon the merger of the Army Cadet College with the Indian Military Academy the whole civilian staff was placed at appropriate level of seniority. During the scrutiny of the service record it came to light that the applicant had joined the Army Cadet College on 8.8.1977 on ~~compassionate~~ grounds. This entailed ^{3V} forfeiture of his past service for promotion on the basis of CPRO 73/73 and 11/75. The applicant was, therefore, reverted to the post of L.D.C. on 1.3.1980. His representation for restoration of his seniority was rejected on 4.8.1980. The respondent have reported that since the applicant had not served in the same unit for three years, he was not entitled for any promotion and the final orders of the Army Headquarters were ^{3V in} conveyed to him on 16.8.1985 where his reversion was up-held and the decision conveyed to him on 4.8.1980 was confirmed. According to the respondent the applicant had no right to claim promotion. He was not qualified for the same as he had not completed three years' minimum service in the same unit and it was an error that he was asked to officiate as U.D.C. The applicant was paid the pay and allowances for the period he remained as

officiating U.D.C. and his demotion was effected on receipt of the direction from the Army Headquarters.

The respondents have further stated that the applicant had earlier represented in 1980 and his representation was rejected in August, 1980 and after a lapse of four years he again represented in 1985 which was also rejected on 16.8.1985 and since Article 311 of the Constitution was not attracted as the applicant was wrongly asked to officiate, he had no right to the post of U.D.C. It is not a question of penalty being imposed upon him. In his rejoinder affidavit the applicant has only pressed the point that he was put to officiate on his due seniority position and that the Recruitment Rules lay down eligibility on the basis of three years' service in the grade and not in a particular office.

4. We have heard the learned counsel for both the sides. The contention of Sri G.D. Mukerji, learned counsel for the applicant, was that the applicant was duly tested by the Departmental Promotion Committee and after the merger, the Indian Military Academy had no authority to revert him. He had already completed three years' of service though not in a particular establishment which was not the condition of the Recruitment Rules. He has relied on the case of Abdul Rashid Qadiri v. State of Jammu & Kashmir and another reported in Services Law Cases 1973 (4) 388, a judgment of the Hon'ble Jammu and Kashmir High Court. In this case it was held that the power of the Government to review the order may be there but the power could not be exercised and a decision made to the prejudice and

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detiment of the petitioner, ^{or} civil consequences as such decision involved for the petitioner ~~the~~ loss of pay, pension, status and position, without complying with the principles of natural justice which required that he should have been informed of the grounds on which earlier order was proposed to be reviewed and his objections considered before his reversion was made. In this case the order of reversion of the petitioner was made with a view to rectify the mistake resulting from a mistaken view about his seniority taken earlier which excluded from consideration some of his colleagues otherwise senior to him. The Hon'ble High Court had held that since the respondents were not competent to make the order ^{or with} without complying ^{or} the principles of natural justice the order of reversion was a nullity in the eye of law. In the instant case the petitioner was not given a wrong seniority when he got ^{or} transferred back to Dehradun on ~~compassionate~~ grounds. The rules provided that he will be the junior-most person in the establishment and he will forfeit all his previous service for purposes of seniority. According to his own showing the applicant has given the vacancies in the cadre of U.D.Cs. on 1.5.1978. The posted strength of U.D.Cs. was 3 and L.D.Cs. 10 while there was a vacancy of 3 U.D.Cs. which was to be made good. He was posted to the Army Cadet College Wing on 8.8.1977. At the time of his posting it was a separate entity and establishment and there were already some L.D.Cs. on its roll and the applicant's position in the seniority though it has not been indicated could not be at the top of the 10 L.D.Cs. who were on roll on 1.5.1978. The applicant has said that his promotion was on account of clear vacancy and

promotion was not in supersession of any junior. He has however, not enclosed the seniority list and, therefore, his statement that no junior was superseded is not supported by any documentary evidence. As already stated above he could not have been the senior-most and, therefore, when he was considered for promotion ~~to~~ ^{as} U.D.C. it was under the wrong impression that he had completed three years of service having joined the Indian Military Academy on 7.1.1974. While as a matter of fact on his transfer back to Dehradun from Agra he was the junior-most or amongst the junior-most clerks available in the A.C.C. Wing. The facts in the Jammu & Kashmir case (supra) are not the same as in the case of the applicant.

5. The second case which the learned counsel for the applicant has relied on is the case of S.S. Karir v. Delhi Administration and another reported in 1973 S.L.C. (3) 285. This was a case in which the Hon'ble Delhi High Court had held that the promotion was based on selection and not on seniority. The eligibility for promotion was eight years of service as a Section Officer and the rule does not say that the service would be under the Administration of Delhi and not under the Central Government. The Hon'ble Delhi High Court had observed that the service under the Delhi Administration is also service under the Central Government. The Hon'ble High Court had further held that non-completion of eight years of service as a Section Officer was alone sufficient justification for the non-consideration of the petitioner by the Departmental Promotion Committee for promotion. The facts of the case of the applicant are not parallel to the facts in regard

to the petitioner in the above case decided by the Hon'ble Delhi High Court. In that case there was no question of loss of seniority on account of transfer on compassionate account. What was not counted in that case was that the service under the Delhi Administration for computing the eligibility period of eight years.

The reliance placed on this case by the learned counsel for the applicant is, therefore, not on sound footing.

6. There is no dispute about what happens on a compassionate posting. Those individuals who applied for transfer on compassionate grounds have their seniority in the new unit counted in accordance with the instructions contained in Ministry of Defence Memorandum no.28(6)/67/D(Appts), dated 29.6.1973. They do not get the benefit of their previous service on their reporting to the new unit. These rules are not under dispute. What is being challenged by the petitioner is the fact that though he lost his seniority and became junior-most in the new unit, when the question came for consideration of his promotion as U.D.C. his service in the grade of L.D.C. from the date of his joining should be taken into consideration. It would be a different matter if in the new unit according to his seniority he is amongst the eligible candidates on the basis of seniority but not on the basis of length of service in that unit. The purpose of a person losing his previous service for purposes of seniority is to protect the interest of those who are already in the establishment where the compassionate appointee reports. Evidently the persons, who are senior to the applicant had also not completed three years of service otherwise

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they would have been considered for promotion as U.D.C. in accordance with the seniority amongst the 10 L.D.Cs. available in the A.C.C. Wing on 1.5.1978. The calling of the applicant for promotion by the D.P.C. did not appear to be correct as he was amongst the junior-most and there was no question of his seniors being called unless the respondent chose to relax the condition of minimum three years service in the L.D.Cs. grade which evidently was not the position in this case.

7. The applicant's is not a case where there is any imputation of misconduct or words attaching a stigma to the character or reputation of the applicant and therefore, there is nothing to discover in the attendant circumstances leading to the reversion of the petitioner as it cannot be said that it has been made by way of punishment. The order is not merely a cloak or camouflage for an order founded on misconduct. We also do not find that it is an order which is innocuous on the face and is a circumstance or piece of evidence for finding whether it was made by way of punishment or administrative routine. In the circumstances we do not find any force in the argument that Article 311 of the Constitution is attracted in the case of the petitioner.

8. The petitioner had joined as L.D.C. in 1974 though he had done three years in the lower grade and would have been eligible for being considered for the U.D.Cs. post, ³² on the basis of Recruitment Rules the facts remains that in seniority he was ~~not~~ ³² below others who could not be considered for promotion as they had not completed three years of service and, therefore, his being called for the selection was incorrect and ~~against~~ ³² the rules. He could not have been considered

for promotion by superseding his seniors who were not eligible. He also did not have a right to the post from which he was reverted subsequently by the impugned order. He has not been reverted in a manner which shows that the intention was to punish him.

9. It is therefore not a case where the applicant's case improves itself by the fact that the Recruitment Rules provide a minimum of three years of service as a Lower Division Clerk. Though the applicant had served as Lower Division Clerk since 1974, that is since his appointment, yet his move from Agra to Dehradun on compassionate account resulted in his seniority being fixed below all the permanent and temporary employees who were already working in the establishment. He has not ^{been} able to prove his case that amongst the ten Lower Division Clerks who are on role at the particular time he was ^{the} senior most. If he was the senior most amongst the group he would have had a legitimate right for being considered for promotion to the post of Upper, ^{with due relaxation} Division Clerk on the basis of his past service. Alternatively, if the administration has exercised ~~the~~ powers for relaxation they could have promoted those who did not have requisite service in the Lower Division Clerks grade to be called for selection for Upper Division Clerk and considered them on the basis of seniority. ^{But} this does not appear to be the situation. We, therefore, do not see any

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force in the argument put forward by the applicant that it was ~~his~~ ^{as a} ~~for him~~ due promotion and he had a right for the same by virtue of his seniority. On the point that once he had been promoted his reversion would entail the provisions of Article 311, when he did not have a right to the post and when he was wrongly called in violation of all the existing rules, the respondent had the right to correct the mistake. The learned counsel for the respondent has relied on the Hon'ble High Court of Judicature at Allahabad observation in paras 8 and 9 of the Special Appeal No. 1073 of 1968 Arya Kanya Pathshala & Another Versus Smt. Manorama Devi Agnihotri and Others which read as follows :

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"8. Considering the language and object of Section 16-F(1) and its context, we are of opinion that it is mandatory. If a person is appointed as the Principal of an institution without prior approval of the Regional Deputy Director, Education, the appointment is, in the eye of law, no appointment at all. In the State of Punjab V. Jagdip Singh* certain persons were appointed as Tahsildars in the State of Pepsu. Later they were confirmed as Tahsildars although there were no posts on which they could be confirmed. The State of Pepsu was subsequently merged in the State of Punjab. The State of Punjab then cancelled the order of confirmation. The order was challenged in court. By majority the Supreme Court sustained the order. It was held that as there were no posts to which there could be an appointment, the appointment was

illegal. It was further held that when, on account of the appointment being illegal, the order is subsequently cancelled there would be no breach of the provisions of Article 311 (2) of the Constitution.

9. At page 524 of the report the Supreme Court observed : "The order..... confirming the respondents as permanent Tahsildars must, therefore, be held to be wholly void." At page 525 of the report, the Supreme Court further observed:-

"In our opinion where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give he will not in law be deemed to have been validly appointed to the post or given the particular status."

In the instant case the first respondent was appointed without prior approval. Accordingly the appointment was void. Although he has been acting as Head Mistress of the institution without prior approval, it cannot be deemed that she was holding office of the Head Mistress. Her appointment without the prior approval of the Regional Deputy Director, Education will not, in view of the Supreme Court's observation, be deemed to confer the status of the Head Mistress on her."

^{38 above}
In the ~~the~~ case the first respondent was appointed without prior approval and the appointment was void. In the case of the applicant he was promoted on a wrong promise and therefore his promotion was wrong.

The ratio of the judgement in the case supra is equally applicable to the applicant's case. Under the circumstances, the request made by the applicant that the Army HQrs. order dated 16.8.1985 withholding his promotion w.e.f. 1.5.1978 as an Upper Division Clerk may be quashed is liable to be rejected.

10. In view of the observations and considerations indicated above, the application is dismissed. Parties will bear their own costs.

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A.M.

Surarao
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J.M.

Dated the 4th March, 1987

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