IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

(4)

AHMEDABAD BENCH

O.A. 169 of 1987
O.A. 138 of 1987
O.A. 445 of 1987
O.A. 452 of 1987

DATE OF DECISION 11-04-1989.

Shri N.D.Desai
Shri Z.C.Chavda
Shri N.M.Kamdar
Shri V. J. Patel
_____ Petitioner

Mr. S. Tripathy _____ Advocate for the Petitioner(s)

Versus

State of Gujarat & Others _____ Respondent

Mr.Anil Dave for Res.No.1
Mr.J.D.Ajmera for Res.No.2 & 3 _____ Advocate for the Respondent(s)
(In all four cases)

CORAM :

The Hon'ble Mr. P. H. Trivedi : Vice Chairman

The Hon'ble Mr. P. M. Joshi : Judicial Member

(5)

OA/169/87

Shri N. D. Desai,
Officer on Special Duty &
Ex-Officio Deputy Secretary
to Government,
Panchayat & Rural Housing
Department, New Sachivalaya,
Gandhinagar. ..... Petitioner

(Adv. : Mr. S. Tripathy)

Versus

1. State of Gujarat,
though the Chief Secretary,
Government of Gujarat,
General Administration Deptt.,
Sachivalya, Gandhinagar.

2. The Union of India, through
the Secretary, Department
of Personnel & Training,
New Delhi.

3. The Union Public Service
Commission, through
the Secretary, U.P.S.C.,
Dholpur House,
New Delhi. ..... Respondents

(Adv. : Mr. Anil Dave for Res.No.1
and Mr. J. D. Ajmera for
Respondents Nos. 2 & 3)

OA/138/87

1. Shri Z. C. Chavda,
Deputy Secretary to Govt.
of Gujarat, Agriculture
& Rural Development Deptt.,
Sachivalaya, Gandhinagar. ..... Petitioner

(Adv. : Mr. S. Tripathy)

Versus

1. State of Gujarat, through,
The Chief Secretary,
General Administration Deptt.,
Sachivalaya, Gandhinagar.

2. The Union of India, through,
The Secretary, Department of
Personnel & Training,
New Delhi.

3. The Union Public Service
Commission, through, the
Secretary, U.P.S.C.,
Dholpur House, New Delhi ..... Respondents

(Adv. : Mr.Anil Dave for Res.No.1
and Mr. J. D. Ajmera for
respondents Nos. 2 & 3)

....3/-

OA/445/87

Shri N. M. Kamdar,
7, Anandmai Society,
Opp.Sardar Patel Institute
of Social Science,
Drive-in-Cinema Road,
Ahmedabad-380 054. ..... Petitioner

(Adv. : Mr. S. Tripathy)

Versus

1. State of Gujarat, through,
The Chief Secretary to
Government of Gujarat,
General Administration Dept.,
New Sachivalaya, Gandhinagar.

2. The Union of India, through,
The Secretary, Department of
Personnel & Training,
New Delhi.

3. The Union Public Service
Commission, through, the
Secretary, U.P.S.C.,
Dholpur House, New Delhi. ..... Respondents

(Adv. : Mr. Anil Dave for Res.
No.1 & Mr. J.D.Ajmera
for Res.Nos. 2 & 3)

OA/452/87

Shri Vadibhai Joitabhai Patel,
B-2, New Girdhar Park Co-opera.
Society, Opp.C.N.Vidya Vihar,
Ahmedabad - 380 006. ..... Petitioner

(Adv. : Mr. S. Tripathy)

Versus

1. State of Gujarat, through,
the Chief Secretary to
Govt. of Gujarat, General
Administration Department,
New Sachivalaya,
Gandhinagar.

2. The Union of India, through,
The Secretary, Department
of Personnel & Training,
New Delhi.

3. The Union Public Service
Commission, through, the
Secretary, U.P.S.C.,
Dholpur House, New Delhi. ..... Respondents

(Adv. : Mr.Anil Dave for Res.No.1
and Mr.J.D.Ajmera for
Res.Nos. 2 & 3)

....4/-

(6)

JUDGEMENT

OA/169/87
OA/138/87
OA/445/87
OA/452/87

Date : 11-04-1989.

Per : Hon'ble Mr. P. H. Trivedi : Vice Chairman

The main questions to be decided in these cases are whether the petitioners can make out any cause out of a select list drawn up under Regulation 9 of the Indian Administrative Services (Appointment by Promotion) Regulation, 1955 which if in force and when vacancies exist, the respondents are required to give effect to all persons finding a place in it and that doing so for some persons in the order of their seniority but not for others constitutes arbitrary and illegal discrimination.

2. These cases filed under Section 19 of the Administrative Tribunals Act, 1985 have analogous facts and, therefore, have been heard together for a common judgement. The petitioners were included in the select list prepared in 1979 for 42 persons against 21 vacancies in the promotion quota. The Government appointed 14 persons in the order from that list which brought them upto 29 in the list after allowing for death and retirement and other circumstances explaining why the persons upto that number were not available for appointment and about which such persons have not made any grievance. The Government did not fill up the vacancies thereafter upto 1986. The Selection Committee met and drew up a list of 58 officers among whom the

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petitioners were not included. The challenge of the petitioners is mainly on the following grounds:

3. The respondents are obliged to treat the select list drawn up in 1979 as continuing to be in force until it is reviewed by the Selection Board in any subsequent meeting which has only taken place in 1986 and, therefore, under the relevant regulations the select list of 1979 remaining in force, the respondents are obliged to fill up the vacancies from such a list in the order of the placement of the petitioners in the list. If this is not done, the respondents would be guilty of acting ~~xb~~ arbitrarily attracting the violation of Articles 14 & 16 of the Constitution. The petitioners have taken us through various provisions of the relevant regulations. It is not disputed that the petitioners found a place in the select list prepared by the Selection Board in 1979. The relevant provision regarding the period of validity for which the select list is to be in force is as under:

> "(4) The Select List shall ordinarily be in force until its review and revision, effected under sub-regulation (1) or, ~~xk~~ as the case may be, finally approved under sub-regulation(2)."

4. It is also laid down under para 5(1) that the Selection Committee shall ordinarily meet at an interval not exceeding one year. In this case the Committee did not meet after 1979 until December, 1986 when a fresh list was drawn up of 58 persons against 29 vacancies but the petitioners did not find a place in it. Until the bringing ~~x~~ into effect of this select list, however, there were vacancies and the select list of 1979 was in force and the petitioners were in that select list and,

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therefore, had a right to be appointed against such vacancies. Further because the respondents had appointed 14 persons out of that select list they could not discriminate against the petitioners or against other persons in that select list by not appointing them on the plea that, that select list could be operated only for 21 vacancies against which double that number was prepared for inclusion in the select list.

5. At what stage does a list become select list under the provisions of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955? This is clearly laid down in Regulation 7(3) as follows :

> "The list as finally approved by the Commission shall from the Select List of the members of the State Civil Service.
>
> Prior to the approval of the Commission there are various stages which have been laid down under the title "preparation of a list of Suitable Officers" in paragraph 5. This paragraph requires that the Committee shall ordinarily meet at intervals not exceeding one year and prepare a list of such member of the State Civil Service as are held by it to be suitable for promotion to the Services. The list drawn up in 1979 was approved by the U.P.S.C. on 20-7-1979 and the petitioner's name was included at Sl. No.31. Until the select list approved by the U.P.S.C. emerging from the meeting of the committee in December, 1986 in terms of the Rule, therefore, the earlier list of 1979 holds sway as laid down in sub-para 4 of paragraph-7 of the said regulation."

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"(4) The Select List shall ordinarily be in force until its review and revision, effected under sub-regulation (4) of regulation 5, is approved under sub-regulation (1), or as the case may be, finally approved under Sub-regulation (2)."

6. At no stage has the petitioner's name been omitted from the Select List and he has no grievance on that count. The respondents have explained why they appointed only 14 officers on 26-11-1986 out of the list prepared by the Selection Committee in 1979. The respondents-Government of Gujarat has stated as follows:

"After considering the State Government's proposal, the Government of India decided to nominate only 14 officers who were actually in Government service and officiating on IAS posts. The rest of the 7 officers who could be considered for appointment to IAS against 21 vacancies available at the time when select list was prepared in 1979, had already retired from Government service by then. These 14 officers were appointed to the IAS on 26-11-1986. As the name of the applicant was at Sl.No.31 in the provisional select list of 1979, he was not promoted to the IAS by the Government of India."

7. The respondents-U. P. S. C. has the following to say on this question:

"It is submitted that out of this Select List only officers who were appearing at Sl.Nos.1, 7, 8, 10 to 21 were appointed to the Indian Administrative Service cadre of Gujarat by the Government of India, Department of Personnel & Administrative Reforms on 5-4-1982 and 26-11-1986 respectively. It is submitted that as the litigation was pending, the

department was not in a position to appoint persons upto 1986 and during that time 7 persons out of that list of 1979 retired from the first 21 listed person. So, the department decided to appoint the remaining 14 persons out of 21 State Civil Service Officers to the Indian Administrative Service."

8. The respondents-Union Government has explained in paragraph-5 of their reply that :

"It is submitted that the Selection Committee which met in 1979 for preparation of a list of suitable Gujarat State Civil Service Officers for appointment to IAS by promotion had prepared a list of 42 officers, as 21 substantive vacancies were anticipated during the course of next 12 months from the date of the meeting. The name of the applicant was included at Sl.No.31 in the list. However, as there were certain litigations pertaining to the seniority of State Civil Service Officers of Gujarat, no appointments could be made from that select list upto 27th November, 1986. By that time, 9 select list officers had already retired from the State Civil Service and, therefore, 33 select list officers were in position when the State Government sent a proposal for appointment of all of them, because in the meantime the number of vacancies in the cadre had also increased. Since the Selection Committee had prepared a select list of 42 officers in 1979 keeping in view 21 substantive vacancies which were to become available during the next 12 months, it was decided to appoint such select list officers who were in position and whose names figured upto Sl.No.21 in that Select List. As 7 select list officers upto Sl.No.21 of that list had already retired from the service by that time, the remaining 14 officers were appointed to IAS, vide Notification dated 27th November, 1986. The name of the applicant was at Sl.No.31 and he was as such not appointed to IAS."

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9. It is admitted that no person below the petitioner in the select list in 1979 was picked up and chosen for appointment. The only restriction which the rules impose upon the Government is that the Government should not travel out-side the field of the select list in making the appointment and should strictly follow the order laid down in that list in making these appointments. The respondents have forcefully urged that there is no obligation upon them to make appointments or to fill up vacancies. There is no vested legal right on the ground that their names are in the select list for any appointment or promotion merely because the vacancy exists and the period of validity of the select list has not expired. The respondents have cited the Central Administrative Tribunal's order in Application No.1719 of 1986 (T) dated 19th November, 1986. Learned advocate for the respondents has also drawn our attention to AIR 1973 S.C. 2216 State of Haryana V/s. Subhash Chander in which the Supreme Court has dealt with this question and observed :

> "The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 in part C is that if and when the State Government proposed to make appointments of

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Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list and (ii) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government."

In AIR 1984 S.C. 1850 Jatinder Kumar V/s. State of Punjab it is held that :

"This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus."

10. Our judgement in TA/371/86 dated 15-2-1988 in Shri Balvantsingh U. Parmar & Another V/s. Union of India has also been cited by the respondents. A close reading of the Rules and Regulations and the judgement on the subject yields the proposition beyond any qualification or ambiguity that the petitioners' right only extends to

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being retained on the select list until a new select list is made effective and that the respondents have not passed any order cancelling that select list and that the action of the respondents in not filling up the vacancies or does not violate any legal right vested in the petitioner.

11. The next ground taken by the petitioner is that the State Government had allowed him to officiate in the cadre post of the I.A.S. since 28-2-1981 and as his name was already on the select list since 1979 he should have been given appointment by the promotion to the I.A.S. giving retrospective effect instead of subjecting him to a fresh selection process in December, 1986. The petitioner has produced record of his meritorious service. He also draws his support from the Government of India instructions dated 26-11-1986 at number 6 as follows:

> "Appointment of select list officers to the service can be notified against the vacancies in promotion post retrospectively from the date they have been holding cadre post is only continuously in accordance with only the cadre rules."

This is an enabling provision for guidence of the Government and does not in any way cast any obligation on the respondents or create any right in favour of the petitioners.

12. The next ground is regarding certain cases against the petitioner Shri N. D. Desai which has resulted in warning. The petitioners Messrs Kamdar & Patel have retired on 31-3-1986 and 31-1-1983 respectively. The petitioners have also alleged mala fide arising from the long delay in calling the Selection Committee so

that junior members of the Gujarat Administrative Service become eligible to be included in the zone of consideration against a larger number of vacancies and for that reason artificially the vacancies available after 1979 have not been filled up. The respondents on the other hand have shown how the process of holding the Selection Committee meeting was bogged down due to the tortuous course of litigation and different interpretations of the interim orders given for which clarification had to be obtained. While there may be two opinions on the question whether the Government could have acted with greater celerity, we do not find any substance in the allegations that the respondents had any mala fide.

13. All parties have extensively dealt with how the vacancies were calculated but, we have decided not to deal with the matter in detail in our judgement because the question of availability of vacancies against which the petitioners could have been appointed is not in dispute.

14. Finally, the question in these cases is whether there was any discrimination practiced on the petitioners and others included in the list of 1979 when some of the others were appointed against vacancies and although ~~th~~ such vacancies were also available for others including the petitioners, the petitioners were not so appointed. We have earlier observed that the respondents cannot be upheld in dividing the select list of 1979 into two parts, one upto No.21 and another from that number to

42 and to hold that the list upto No.21 can be effective and the list No.2 is not to be operated. The respondents' plea in this regard is only against the rationale and the standard that they adopted in making appointments of a certain number of officers against some of the vacancies. There is no order cancelling any part of the list or stating that only a part of the list of 1979 was to be regarded as valid. There is, therefore, no force in the plea that the list was artificially cut up into two parts. So far as the right of the petitioners and others in the list of 1979 to be appointed against vacancies is concerned, the respondents were at liberty to decide which of the vacancies should be filled up and when, and the petitioners have no right to such an appointment by the mere fact of inclusion in the list. The petitioners have sought to derive much support from paragraph 9 of the regulations which reads as follows:

> "(1) Appointment of members of the State Civil Service to the Service shall be made by the Central Government on the recommendation of the State Government in the order in which the names of members of the State Civil Service appear in the Select List for the time being in force.
>
> 2.2 Regulation 9, which is mandatory, requires appointments to the service to be made in the order in which the names appear in the Select List for the time being in force. It is independent of regulation 8, which deals with temporary appointments of Select List Officers against cadre post. In the circumstances, X cannot be appointed to the service in preference to Y. The fact that he was holding a cadre in an officiating capacity from a date earlier than Y or that he was placed above Y in the earlier select lists is not a relevant consideration."

and that under the Ministry's decisions referred to in notes thereunder in paragraph 2.2 the regulation 9 is regarded as mandatory. As stated earlier the mandatory nature of the instructions is only regarding the right of a person included in the select list to be appointed against a vacancy in the order in which his name appears in it while it is in force as and when the Government decides to fill up the vacancy. This means that no person outside the select list can be appointed in a vacancy, that no person below the petitioner in the select list can be appointed in a vacancy, until he is appointed but, it does not mean that he has to be appointed in a vacancy merely because the vacancy is available and the select list in which his name is placed is in force. The petitioners have asked for the relief that by an order to deem a their appointment by promotion in the Indian Administrative Service from the date of the ~~xxxxxx~~ vacancy because they were holding the cadre post and they were placed on the select list which was in force and because the vacancy was available. Even if the petitioners had established their case, the Tribunal could not have made orders regarding deemed promotion as settled in AIR 1988 SC 1069.

15. The petitioners have taken the ground that the Selection Committee meetings in 1986 were not properly constituted because officers who participated in its meeting were not members of it according to the rules for the composition of the Committee. The respondents have explained the circumstances for which the

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composition of the Selection Committee as required by the rules and the officers who participated in the meeting are harmoneous. The petitioners have also stated the near impossibility of the Committee having graded the officers in the zone of consideration by pointing out the volume of the record that they would have to consider for doing so. The respondents have not only controverted the figures on the basis of which the petitioners have drawn the surmise and stated that the record was much less in volume but have also stated that before the Committee met, the record was made available and the meeting of the Committee was only for discussions to arrive at agreed conclusions. We do not find that the petitioners have made out their case in that regard. Out of the petitioners Mr. Kamdar and Mr.Vijay Patel's cases were not considered by the Selection Committee which met in December, 1986 because Mr.Kamdar retired on 31-7-1986 and Mr. Patel had retired in 1983. The petitioners' case is that had they been considered their names should have been included because vacancies had existed prior to the date of the meeting in 1986 and during the period when they were in service. The rules prescribe that each Selection Committee has to act independently of the previous Committees and has to consider officers in the zone of consideration in respedt of the relevant dates for each Committee. It cannot be disputed that these officers could not have been within the zone of consideration when its meeting in December, 1986 was called. There is an express stipulation in sub-para 3 of paragraph-5, that the Committee is not to consider the case of a member of the State Civil Service who

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has attained the age of 55 years on the first day of January in the year it meets. On this ground applicants Mr.Kamdar and Mr.Vijay Patel have no case. Learned advocate for the petitioners has forcefully pointed out that when a Selection Committee meeting is not held for successive years the right of persons who are eligible for consideration by Selection Committee in previous years if the meeting had been held should not be adversely affected by taking up the case of those who become subsequently eligible or by taking into account the record of such officers which is subsequent to the period. Learned advocate for the respondents has forcefully urged that it was not the petitioners' point that is not established the Court's orders properly interpreted did not bears the construction that holding of the Selection Committee meetings was mandatory. The petitioners contend that if the respondents had any reservations regarding the petitioners to be given promotions the proper course would have been to hold the Selection Committee meetings every year and place their cases before them. Even when this was not done or was not possible to be done according to the contention of the respondents, the procedure followed in the case of Central Service when D.P.C. fails to meet for successive years should have been adopted because it embodies sound principles by which by reasons of delay in holding the meeting of D.P.C. persons who were eligible in earlier years do not suffer any jeopardy by being club bed together with those who were not eligible for then or by having their subsequent record taken into

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account to their detriment. This procedure is out-lined in the Government Memo dated 24-12-1980. Briefly put this obliges, the D.P.C. in a subsequent meeting to take into account only such officers who were eligible and the record which can be considered on the basis only of the relevant date. In other words D.P.C. in a subsequent meeting has normally to convert itself into the D.P.C. meeting for due date and make a selection from the zone of consideration on the basis of the officers in it as on that date. Learned advocate for the petitioners argued that the principles of this memorandum apply to the case of the petitioners also because it is the same Government of India which has adopted it for its services and there can normally be no different yard-sticks for dealing with the same kind of problem for different categories of officers. We appreciate the force of this arguments but must observe that the Government of India's instructions referred to lays down the principles for promotion to selection post in the same service. Here the question is of induction from one service to another and the principles laid down clearly are not applicable. There is a valid distinction between the criteria applied for promotion to selection posts and the procedure required to be followed therein and the judging of the suitability for promotion to All India Services. The legislative intent has to be embodied clearly in the regulations and this has been done in the case of the Indian Administrative Services(Promotions Regulations).We do not make any comment on the desirability of incorporating the principles embodied in Memo on 24-12-1980 for the procedure out-lined for the Indian Administrative Services (Promotion Regulations) because this is a matter clearly of a legislative nature.

16. Before parting with the cases we must observe that the respondents have taken their plea that the petitioners have not exhausted their remedy under Section 20 of the Administrative Tribunals Act, 1985. In terms of the relief sought, we are unable to ascertain whether the statutory remedy by way of appeal prescribed ~~xhx~~ under the rules is available to the petitioners which they have not exhausted but, there may be some basis for the petitioners to expert that if they make a representation to the respondents by taking the plea which they have, the respondents will consider their representations for such relief as could be given to them. We must also observe that as the petitioners have officiated in the cadre post, all the financial benefits of promotion have been made available to them and in this regard, there is no more to be done.

17. We, therefore, do not find that the applicants have established their case for the relief they have sought and reject their applications. There shall be no order as to costs.

Sd/-
(P.H.TRIVEDI)
VICE CHAIRMAN

Sd/-
(P.M.JOSHI)
JUDICIAL MEMBER