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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

Registration No. O.A. 321 of 1989

Date of Decision:- 29.11.1991

Hari Shankar Upadhyaya
and Another

.. Petitioners

Versus

Union of India & Others

.. Respondents

Counsel for the applicant .. M/s A.Patnaik
L.Pangari

Counsel for the respondents.. Mr. K.C.Mohanty,
Government Advocate (State)

M/s J.Das,
B.S.Tripathy
K.P.Misra,
B.Sahoo
S.Mallik

Coram: Hon'ble Shri K.P.Acharya ..Vice Chairman
Hon'ble Shri I.P. Gupta ..Member(A)

J U D G M E N T

Hon'ble Shri I.P.Gupta, Member(A):-

This is an application filed under section 19
of the Administrative Tribunals Act, 1985.

2. Applicant No.1 was selected by the Competitive
Examination under Rule 4(2) (a) of the Indian Forest
Service (Recruitment) Rules, 1966 and appointed to the
Indian Forest Service, Orissa Cadre, in May, 1985 and
after completing his training has been working in
different posts in Junior Time Scale of Pay in the
Orissa Cadre of Indian Forest Service. Along with the
applicant, 5 other persons were appointed as Direct
Recruits to the Orissa cadre of IFS in May, 1985.

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3. The requirements to be satisfied by a direct recruit for appointment to a Senior time scale post has been laid down in Sub-rule 2 of Rule 6(A) of the Indian Forest Service (Recruitment) Rules 1966, relevant portion of which is quoted below:-

2. An Officer shall be appointed to a post in the Senior Time Scale of pay, if having regard to his length of service and experience, the State Government is satisfied that he is suitable for appointment to a post in the senior time scale of pay.

Provided that, if he is under suspension or disciplinary proceedings are instituted against him, he shall not be appointed to a post in the senior time scale of pay, until he is reinstated in the service, or disciplinary proceedings are concluded and final orders are passed thereon, as the case may be. Sub-Rule 3 of Rule-6(A) of the IFS (Recruitment) Rules reads as follows:-

3. Notwithstanding anything contained in sub-rule (2), the State Government may:-

- (i) till he is confirmed in the service, or
- (ii) till he passes the prescribed departmental examination or examinations, and appoint, to such a post an officer junior to him.

4. According to the Government of India's instruction contained in letter dated 23.8.1982 (Annexure-2), 'the direct recruits' to the Indian Forest Service may be considered for promotion to Senior Time Scale on completion of 4 years of service, including the period of their training.

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5. The applicant contends that despite the aforesaid instruction of the Government of India the respondents have not been considering direct recruits appointed to the Junior Time Scale of pay in the Indian Forest Service for promotion to Senior Time Scale on completion of such 4 years of service although at the appropriate time there had been vacancies in the Senior Time Scale post of the Orissa cadre of the Indian Forest Service and have instead filled up the said vacancies in the Senior Time Scale cadre post by posting non-cadre officers.

6. The applicant further contends that ^{according to} the strength _{to be} and composition fixed by the Indian Forest Service (Fixation of Cadre) Regulation, 1966 as amended by the Notification dated 16.10.1987, a total number of 28 posts of Deputy Conservator of Forest are included in the Orissa cadre of the Indian Forest Service. The aforesaid 28 posts of Deputy conservator of Forest represent 27 posts of Divisional Forest Officers of the 27 territorial Forest Divisions of the State of Orissa and one post of Deputy Conservator of Forest (Vigilance). The applicant alleges that 27 posts of Divisional Forest Officers of the territorial Forest Divisions, although cadre posts, have been filled in by non-cadre officers despite the fact that cadre officers both in the senior time scale and in the junior time scale with more than 4 years of service have been available to fill the said posts. The applicant has enclosed at Annexure-4 a statement showing postings of non-cadre officers to the cadre posts of the Divisional Forest Officers of different territorial Forest Divisions.

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Such posting of non-cadre officers in cadre posts, according to the applicant is contrary to Rules 8 & 9 of the Indian Forest Service(Cadre) Rules, 1966 and in consequence direct recruits in the junior time scale, including the applicant have suffered as they could not be promoted to the senior time scale of pay on completion of four years.

7. The relief sought by the applicant is as follows:-

- (i) to declare that cadre posts of the Indian Forest Service, Orissa cadre, cannot be filled in by Respondent Nos 2 and 3 by non-cadre officers except in accordance with and under the special circumstances specified in Rule 9 of the Indian Forest Service(Cadre) Rules, 1966;
- (ii) to direct the Respondents Nos.2 & 3 to specify by a notification or an order the posts under them which are cadre posts covered under the Schedule to the Indian Forest Service(Fixation of Cadre Strength) Regulation, 1966 relating to Orissa as amended from time to time and in particular as amended by a Notification dated 16.10.87 (Annexure-3).
- (iii) to direct the Respondents Nos. 2 and 3 to consider the applicant No.1 along with other direct recruits appointed to the Junior Time Scale of pay of Indian Forest Service, Orissa Cadre in May, 1985 for promotion and appointment to the senior time scale posts of the Orissa Cadre including the post of Divisional Forest Officer, Ghumsur South Division;
- (iv) to quash the impugned order No.15535/FFAH dated 6th July 1989 (Annexure-7) of the Respondent No.3 posting the Respondent No.4 a non-cadre officer, in the cadre post of Divisional Forest Officer, Ghumsur South Division."

8. In the course of hearing the learned counsel for the applicant said that he would not press for relief at item (iv). Therefore, the reliefs from (i) to (iii) have been sought.

9. The learned counsel for the applicant also pointed out the discrepancy in the statement of the respondents in respect of identification of 28 cadre posts of Divisional Forest Officers. In paragraph 5 of the counter the respondents have stated that 'the IFS cadre posts have been identified. The 28 unspecified posts in the IFS cadre have also been identified.' Further in paragraph 7 the respondents have stated that 'the 28 posts of Deputy Conservator of Forest' i.e. the posts in 27 territorial Divisions and one post of Deputy Conservator of Forests (Vigilance) are meant for suitable IFS officers in senior scale'. However, later respondents have taken the position that 'these 28 posts' are not to be claimed as being meant for 27 territorial divisions and one vigilance organisation as has been claimed by the applicant. The later statement has been made in the Memorandum of Information by the State.

10. In the Counter filed by the respondents Nos. 2 and 3 the following points have been brought out:-

(i) An officer shall be eligible for appointment to the Senior Time Scale at any time after 1st April of the year in which he completes four years of service depending on availability of the vacancy and subject to the provision of IFS (Recruitment) Rules, 1966;

(ii) the promotion is subject to condition of confirmation as provided in Rule 6(A) of IFS (Recruitment)

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Rules, 1966. The confirmation again depends upon assessment of his performance, passing of departmental examination, character roll, etc. Accordingly the applicant No.1 becomes eligible for promotion to senior duty post after 1.4.1989. Since the applicant has not fulfilled the pre-condition provided in Rule 6(A) of the IFS (Recruitment) Rules, 1966 as he has not been confirmed in IFS cadre he has not been promoted to ^athe senior time _{scale} scale post\$;

(iii) In the total authorised strength of the IFS including 71 senior duty posts there are 28 unspecified posts of Deputy Conservator of Forest. A cadre post may be filled by a non-cadre officer if no suitable cadre officer is available. Non-cadre officers were holding 'IFS cadre posts' during 1986, 1987, 1988 when adequate suitable IFS officer were not available. On their availability non-cadre officers have been transferred from IFS cadre posts and suitable IFS officers posted. All the three non-cadre officers holding IFS cadre posts in 1989 have been transferred to accommodate IFS officers and one of them has also handed over charge already. But the three non-cadre officers along with the General Secretary of the Orissa Forest Service Officers filed a petition in the Orissa State Administrative Tribunal against the transfer of non-cadre Officers from unspecified posts in the IFS cadre. The Tribunal had granted stay on their transfer and had extended the stay till 21.12.1990. The Tribunal has since passed the following orders:-

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'it is for the Government to decide whether IFS Officers will be posted to territorial Divisions or OFS officers depending upon the need of the situation and the exigency of the Government work and availability of suitable officers belonging to IFS or OFS.'

(iv) Copies of posting orders of a non-cadre officer against a Cadre post as and when made are sent to the Government of India.

(v) Applicant No.1 became eligible for appointment to Senior Time Scale of pay after 1.4.89 and though he has not been promoted to the Senior Time Scale as he has not been confirmed he was posted to function as Deputy Conservator of Forest, Resources Survey Division which is a Senior time scale post of the IFS cadre.

11. Let the issues raised in the application be considered now. So far as filling of cadre posts by cadre officers is concerned, the IFS (cadre) Rules 1966 are clear. Rule 8 says that 'save as otherwise provided in these rules every cadre post shall be filled by a cadre officer'. The temporary appointment of non-cadre officers to cadre posts is provided for in Rule 9 which is reproduced below:-

"9. Temporary appointment of non-cadre officers to cadre posts.

(1) A cadre post in a State may be filled by a person who is not a cadre officer if the State Government "or any of its Heads of Department to whom the State Government may delegate its powers of making appointments to cadre posts" is satisfied—

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- (a) that the vacancy is not likely to last for more than three months; or
- (b) that there is no suitable cadre officer available for filling the vacancy.

Provided that where a cadre post is filled by a non-select list officer, or a select list officer who is not next in order in the select list, under this sub-rule, the State Government shall forthwith report the fact to the Central Government together with the reasons therefor.

(2) Where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

Provided that a non-select list officer or a select list officer who is not next in order in the select list, shall be appointed to a cadre post only with the prior concurrence of the Central Government.

(3) On receipt of a report under sub-rule (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable direction to the State Government concerned."

and

12. One of the important objects of the procedure laid down in the aforesaid rule is to ensure that a non-cadre officer is not appointed to a cadre post, if a suitable cadre officer is available. Thus, while the suitability of an officer included in the Select List for officiation in a cadre post cannot ordinarily be in doubt, the question to be examined in making all appointments to cadre posts is, whether a suitable cadre officer is available or not. In other words even in a case where an officer included in the Select List and next in order in Select List is appointed in an officiating capacity for more than 3 months against a cadre post, the requirements of the rules should be fully complied with. The posts included in the cadre acquire the character of permanency and the non-cadre (ex-cadre) posts to which cadre officers are appointed would not result in the posts becoming cadre posts or even becoming temporary addition to the cadre.

13. If no cadre officer is available a temporary post created with whatever designation should not be added to the IFS(Cadre). If the post is held by a State Service Officer whether in the Select List or not it will be a temporary addition to State Service Cadre.

14. Neither a post which is declared equivalent in status and responsibilities to a post included in cadre nor a post as respects which such declaration has been dispensed with is a cadre post.

(Observations based on instructions of Govt. of India as contained in AIS Manual).

15. Rule 10 of the IFS (cadre) Rules 1966 further stipulates:-

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"10. Report to the Central Government of
Vacant cadre posts.

Cadre posts shall not be kept vacant or held in abeyance for periods exceeding six months without the approval of the Central Government. For this purpose, the State Government shall make a report to the Central Government in respect of the following matters, namely:-

- (a) the reasons for the proposal
- (b) the period for which the State Government proposes to keep the post vacant or hold in the abeyance,
- (c) the provision, if any, made for the existing incumbent of the post; and
- (d) whether it is proposed to make any arrangements for the performance of the duties of the post to be kept vacant or held in abeyance, and if so, the particulars of such arrangements."

16. The above protections are offered to prevent non-cadre officers from being appointed to cadre posts of IFS, or to equivalent non-cadre posts by keeping cadre posts in abeyance. The protections have to be duly observed.

17. Thus we direct that cadre posts of IFS, Orissa cadre be filled by cadre officers only and non-cadre officers cannot be appointed against cadre posts except in accordance with and under the special circumstances specified in Rule 9 of the IFS (Cadre) Rules, 1966.

18. Coming to the second issue, namely cadre posts in the Schedule to the Indian Forest Service (Fixation of Cadre Strength) Regulations, 1966, it may be mentioned that in the cadre strength of Orissa cadre of IFS, there are 124 posts; of them 52 posts are in the rank of Deputy Conservator of Forests. These posts are:-

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1.	Deputy Conservator of Forests	28
2.	Deputy Conservator of Forests Resource Survey	1
3.	Principal, Forest Rangers Training College	1
4.	Working Plan Officer	4
5.	Forest Utilisation Officer	1
6.	Planning Officer	1
7.	Silviculturist	1
8.	Assistant Chief Conservator of Forests	2
9.	Wild Life Conservation Officer	2
10.	Deputy Conservator of Forests Kendu Leaf	6
11.	Deputy Conservator of Forests Social Forestry	5
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19. Against these 52 posts, IFS officers, if available have to be posted. Of them 28 should have the designation and functions of Deputy Conservator of Forests and the others should have designations as indicated above and functions according to their designations. It is not enough to say that there are more than 52 IFS officers in the State in the rank of Deputy Conservator of Forests. The non-cadre (ex-cadre) posts to which cadre officers are appointed could not result in the posts becoming cadre posts.

20. To elucidate further, the posting of following IFS officers amongst others done by the State Govt. in their orders dated 12.12.1989 and 14.5.1990 (Annexures-R 3/5 and R 3/6) cannot be treated against cadre posts:-

(1) Shri T.H.S. Bonney IFS (RR 1985) as Deputy Coordinator, World Food programme against post created by State Government by order dated 31.10.1988.

and

(2) Shri J.Sahoo IFS whose services have been placed at the disposal of Orissa Plantation Development Corporation.

(3) Shri P.Mohapatra IFS whose services are placed at disposal of Similipahar Forest Development Corporation.

(4) Shri Gadadhar Sahu, IFS as Deputy Director, Social Forestry Project (Publicity).

(5) Shri D.Sahu, IFS as Deputy Director, Social Forestry Project, Puri Division.

(6) Shri S.Padhi, IFS whose services have been placed at the disposal of Orissa Plantation Development Corporation Ltd.

(7) Shri S.Raghavan, IFS whose services are placed at the disposal of Orissa Plantation Development Corporation Ltd.

21. The above postings being not against cadre posts, the IFS officers holding these posts cannot be counted towards 52 posts. This has been mentioned by way of illustration. There may be other ex-cadre posts in the State Govt. against which IFS officers may or may not have been posted. IFS officers against excadre posts are to be counted against State Deputation Reserve of 18 and not against 52 listed in para 18. Any over utilisation of deputation reserve may be the fault of the State Govt. but an employee cannot be made to suffer on this count ^{either} in any manner.

22. Through we do not intend to direct respondents nos 2 and 3 as requested by the applicant, to specify by notification or order the posts under them which

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are cadre posts, since it is for the Central Govt. and not the State Govt. to determine the strength and composition of the cadre at any time under Rule 5 of IFS (cadre) Rules 1966, yet we do feel that for effective implementation of Rules 8 and 9 of the IFS (cadre) Rules 1966 the cadre posts should better be identified. For example, if 28 posts are of Deputy Conservator of Forests, it should be known which are they. May be that the number of posts of Deputy Conservator of Forests in the State Govt. is more than 28 and due to need and expediency of work the State Govt. may post IFS ^{or} ~~of~~ DFO officer against a particular post of DFO while ensuring that 28 IFS officers, subject to availability of IFS officers, hold at least 28 posts of Deputy Conservator of forests, as enjoined by Rules. Yet we feel that the flexibility in the situation should not extend to a point where the cadre rules are likely to be bypassed and the consideration that posts are encadred depending upon the administrative experience of the standard of All India Service is lost sight of. Therefore, we hope that the Central Govt. in consultation with the State Govt. will consider spelling out in some form or the other the nature of these 28 posts of Deputy Conservator of Forests if not as a matter of legal necessity yet as an important concomitant to the Cadre Rules framed by the Govt. of India.

23. As regards the relief at point (iii) Viz promoting the applicant and his batchmates to senior scale of IFS as they belong to 85 batch and have

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completed well over four^{or} years service, it is pointed out that the rules of promotion are clear in Rule 6(A) of the IFS (Recruitment) Rules as reproduced earlier in this order. The promotion will depend on consideration of suitability of the officer. However, the argument of the learned counsel of the respondent that it was obligatory to consider the applicant before^{or} deciding his promotion or otherwise even through he had not passed the prescribed departmental examination nor been confirmed would not be quite valid since the word 'notwithstanding' is a non-obstante and an overriding clause. The implication of the word is to preclude in advance any interpretation contrary to certain declared objects or purposes. Therefore, if an IFS officer has not been confirmed or if he has not passed the prescribed departmental examination or examinations the State Govt. may withhold his promotion. If, however, an officer has been confirmed and has passed the prescribed departmental examination or examinations, he has to be considered, subject to availability of vacancy, for suitability for promotion after four years, the reference date being 1st April, 1989 for the officers of 1985 batch.

24. The case is disposed of with the direction as in para 17 and observations in para 22. There is no order as to costs.

I. P. Gupta
(I. P. Gupta)
Member(A)

K. P. Acharya
(K. P. Acharya)
Vice Chairman.

