

12 (v)

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No. 97 of 1989.

Date of decision : March 19, 1990.

S.D. Raiguru

...

Applicant

Versus

Union of India and others ...

Respondents.

For the applicant

...

M/s. Ashok Mohanty
B.K. Bal, Advocates

For the respondents

Nos. 2, 3 and 4

...

Mr. K.C. Mohanty,
Government Advocate (State)

C O R A M:

THE HON'BLE MR. B.R. PATEL, VICE-CHAIRMAN

A N D

THE HON'BLE MR. N. SENGUPTA, MEMBER (JUDICIAL)

1. Whether reporters of local papers may be allowed to see the judgment ? Yes.
2. To be referred to the Reporters or not ? *yes.*
3. Whether Their Lordships wish to see the fair copy of the judgment ? Yes.

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J U D G M E N T

N. SENGUPTA, MEMBER (J)

In this application under section 19 of the Administrative Tribunals Act, 1989, the prayer, in substance, is for an appropriate direction to Central and the Orissa State Government for promoting the applicant to the I.P.S. Cadre.

The case of the applicant is that he was appointed to O.P.S. Class II and in due course was promoted to I.P.S. Since June 1982 he has been officiating in posts in Orissa Cadre of I.P.S. Persons belonging to the State Police Service are promoted to I.P.S. cadre under the provisions of I.P.S. (Appointment by promotion) Regulation. An annual list of officers, within the zone of consideration, fit to be promoted is prepared by a Committee who assign ranks to the selected persons. This list is to be approved by the U.P.S.C. and would remain valid till the next one is approved by the U.P.S.C. The I.P.S. cadre Rules provide for a triennial review of the cadre strength by the Central Government, of course the Central Government may review the cadre strength even before elapse of 3 years from the date of the last review. This review is to be done in consultation with the State Government. In all the select lists for the years 1982 to 1988 his name appeared, but due to certain circumstances beyond his control and for failure of the Central and State Governments to act in time, he could not be promoted to the I.P.S. Cadre. The State Government made a proposal in 1979 for increasing the cadre strength and this was accepted by the Central Government in November, 1981. The next proposal for review of the cadre strength was sent by the State Government on 30.6.1983 and the Central Government by

18/4
N. Sengupta
19/3

Notification No. 11051/3/84/A.I.S.-II-A dated 17.4.1984 increased the promotional quota from 26 to 29 but as in 1984 he was not considered, he filed O.J.C. 216 of 1984 which on transfer to this Tribunal was registered as T.A. 90 of 1987 and is pending for disposal. The next triennial review was also not made in time for which he could not be promoted, so he filed O.A. 146 of 1986. Again the State Government delayed the sending of proposal for review of the strength of the Orissa cadre of I.P.S. and the proposal for augmentation was sent by the State Government on 12.4.1988 to the Central Government. The Central Government by their notification dated 5.1.1989 increased the promotional quota from 29 to 31. The select list for 1989, prepared in December, 1988, was approved by the U.P.S.C. on 10.3.1989 and one S.C.Panda, a promotee, retired on 31.1.1989 thus there were 3 vacancies. In the list for 1988, prepared in December, 1987, his position was 3rd, therefore he became entitled to be promoted to the I.P.S. cadre but he has not been promoted. By the inaction of the State Government he has been denied the benefit of promotion, so on the analogy of the principles decided in Arjun Behera's case (OA 32 of 1987), as there was sufficient time to process the matter before the list for the year 1989 was approved by the U.P.S.C. directions to Central & the State Governments for treating him as promoted to IPS may be issued. In the rejoinder filed by him, it is alleged that infact 5 more posts were also available as persons from outside the cadre were officiating in Orissa Cadre of I.P.S.

3. Though at the hearing arguments have been addressed by the Counsel for the Central Government no counter has been filed on its behalf. Respondents 2, 3 and 4 who represent

Manoj Kumar
17/3/90

the State Government have not disputed the allegations regarding the dates of proposals made by the State Government for review and of the notifications made by the Central Government nor have they disputed the increasing of the promotional quota from 26 to 29 in 1984 and subsequent increase of 2 more posts in promotional quota by the Government of India notification dated 5.1.1989, but their case is that the provisions in the IPS cadre Rules for a triennial review are not mandatory and the word 'shall' as used in the rule regarding triennial review really means 'may' so the Central and the State Governments may not make a review of the cadre strength regularly ^{- at -} by intervals of 3 years and that non-review at the end of 3 years from the last one cannot confer a right on any member of the OPS. Their case further is that the list for 1989 was drawn up in December, 1988 and according Government of India instruction conveyed in DP & A.R. letter No. 14015/2/84-A.I.S.(I) dated 31.5.1984 (Annexure - R/3), the validity of the list prepared in December, 1987 ceased before the chance of the applicant for promotion came. By mere notification increasing the cadre strength and promotional quota, no additional post is created so as to say that a vacancy has occurred to be filled up. According to the rules of business of the State Government before any post in class I or above is created, the approval of the cabinet should be obtained. By the time the list for 1989 was prepared by the Selection Committee or of approval by the U.P.S.C. on 10.3.1989 the Cabinet approval for the additional posts had not been given. As the applicant was not the first in the list, the man at the top of the list for 1988 was promoted in the vacancy due to retirement on

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superannuation of S.C. Panda . The decision in Arjun Behera case being under challenge before the Supreme Court, the applicant can not call in aid the principles decided by ~~this~~ Tribunal in that case. Apart from that, the applicant having rushed to this Tribunal without exhausting departmental remedies, the application is premature.

4. We have heard Mr. Ganeswar Rath, Standing Counsel for the Central Government, Mr. K.C. Mohanty the learned Government Advocate for the State of Orissa and Mr. Ashok Mohanty, the learned Counsel for the petitioner. We have also perused the relevant ~~papers~~ ^{papers} in the two files called for by the applicant and produced by the learned Government Advocate, besides the annextures to the petition & the counter.

5. From the facts narrated above it would be apparent that the applicant so far as the present application is concerned, confines his case to the select list of 1988 prepared in December, 1987 and his grievance, put in brief, relates to a deliberate tardiness in processing his case which resulted in ultimate denial of ~~his~~ being promoted to the Indian Police Service Cadre. Learned Government Advocate (State) Mr. K.C. Mohanty has urged that unless the applicant is able to show any malafide on the part of any of the persons connected in the matter of processing, the applicant cannot have any grievance. On the other hand, it has been very strenuously urged by Mr. Ashok Mohanty that as was held in Arjun Behera's case, if there was time enough and the processing was not done, a right could accrue to the applicant for being promoted to the I.P.S. cadre. In order to

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find if really there was any unusual and deliberate delay in the matter of processing, we have referred to the relevant papers in files AIR/11-7/89 and AIR/11-14/88. The two files are interconnected. It has been urged by Mr. K.C. Mohanty, that though in the I.P.S. (Cadre) Rules there is a provision that the Central Government shall make a triennial review, the rule is not a mandatory direction but only recommendation and the Central Government could make a review as and when it felt necessary. We are unable to agree with this contention of Mr. K.C. Mohanty and the reason for this are two fold, firstly on going through the cadre Rules, it would be apparent that a direction for a Triennial review has been given in the rules keeping in view the necessities that may arise either to augment or reduce the cadre by which the administration would not suffer either for want of adequate number of persons or for being overcrowded with persons whose services should not be necessary. The second ground is that the Central Government really understood that provision to be mandatory and this would be found from the letter of the Government of India, Ministry of Home Affairs bearing No. 11013/8/86-IPS dated 6.11.1986. In that letter it was made clear by the Government of India to the Chief Secretary to the Government of Orissa that the Triennial cadre review is a mandatory requirement under the I.P.S. (Cadre) Rules. Such being the position, we have absolutely no difficulty in repelling the contention of Mr. K.C. Mohanty that the word 'shall' as used in the I.P.S. (Cadre) Rules, could be read as 'may'.

6. As about the delay said to have been made in processing certain facts need notice. In the letter just quoted

above the Central Government asked the State Government to send their proposal for a cadre review latest by the 15th January, 1987. This letter was received by the State Government on 10.11.1986. As no proposal was received by the Central Government, a reminder was sent by the Ministry of Home Affairs Government of India on 24.6.1987. It appears that the Government of India letter dated 6.11.1986 was first dealt in the General Administration Department, Government of Orissa on 29.1.1987. The file was endorsed to the Home Department on 6.2.1987 and it was received back from the Home Department by the General Administration Department on 11.5.1987. After that almost a year passed when a proposal for cadre review by adding some more posts which had the approval of the Chief Minister was sent by the State Government on 13.4.1988 and intimation was received from the Central Government that the review Committee meeting was to be held in the chambers of the Cabinet Secretary to Government of India on 27.9.1988. After the meeting was held in which the State Government was represented by the then Additional Chief Secretary, the minutes were received by the Government of Orissa for the signature of its representative and minutes were signed by the Additional Chief Secretary on 29.10.88 whereafter on 5.1.1989 a notification increasing the promotion quota from 29 to 31 was made by the Central Government. After that the Secretary to the State Government, General Administration Department asked for preparation of a draft memorandum, justifying the creation of each post, to obtain concurrence of the Finance Department and consideration of the Cabinet. The draft was prepared

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and the Finance Department concurred on 29.4.1989. The chronological dates have been given as on behalf of the applicant it has been urged that at every stage there was avoidable delay and the State Government did not act promptly. There is substance in this contention of Mr. Ashok Mohanty but on perusing the papers of the two files except delay we do not find any indication of any malafide on the part of anybody connected with the processing of the matter, accordingly we hold that no malice in fact has been proved, however, malice in law may be found. Almost a similar case came up before the Gauhati Bench of this Tribunal (S.M. Rahman V. The State of Assam- ATR 1986 (2) CAT 69) and it was observed in that case that when governmental organisation fails to do its duty in time to the prejudice of its officers there is malice in law. We are in respectful agreement with those observations.

7. It has been urged by Shri K.C. Mohanty that at the time Shri S.C. Panda retired, only one promotional post fell vacant and that was filled by appointing the person who was number 1 in the Select list. He has further contended that the two additional posts for promotion had not by then been created, hence the plea of the applicant that two more posts were available for appointment by promotion cannot be accepted. His contention is that by an amendment of the cadre strength no post is created and that according to Rules of business, the approval of the cabinet was necessary and admittedly during the period of validity of the select list for 1988, cabinet approval was not given. This contention needs a serious

Manoj Kumar
19/3

consideration. Rule 2(b) of the Cadre Rules, 1954 defines a "cadre post" and that expression means any of the posts specified under item 1 of each cadre in the schedule to the Indian Police Service (Fixation of Cadre Strength) Regulations. Rule 4 (1) of I.P.S. (Cadre) Rules, 1954 says that the strength and composition of each of the cadres shall be determined by regulations made by the Central Government in consultation with the State Government, Sub-rule (2) of Rule 4 of the Cadre Rules provides for reexamination of the strength and composition of the State cadre by the Central Government in consultation with the State Government and may make such alterations as it deems fit. Thus it is clear that what posts would be there in the State cadre of the I.P.S., is to be determined by the Central Government and not by the State Government. This would be clear on reading the second proviso to Rule 4(2) and Rule 10 of the Cadre Rules. Under that proviso, the State Government is given power to add for a limited duration a post or posts carrying duties and responsibilities of a like nature to the cadre posts and Rule 10 directs that no cadre post can be kept vacant or in abeyance for more than six months without the approval of the Central Government. The meaning of all these provisions is that after effective consultation with the State Government, it is the Central Government which has the power to add to or subtract from or otherwise alter the strength and composition of the cadre post. After the Regulations the only power that vests in the State Government is to appoint a cadre

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officer to a cadre post and not to create or abolish a cadre post. Such being the position, in our opinion, the Rules of business, which are of course not produced before us, can have no application to the creation or abolition of cadre posts after the stage of consultation is over. For these reasons we are unable to accept the contention of Mr. K.C. Mohanty that in January, 1989 only one post was vacant.

8. It has next been contended on behalf of the State Government that as before the date of notification changing the cadre strength, the Committee for preparation of Select list for 1989 had met, no appointment from the list for 1988 could be made in view of Government of India decision conveyed by Department of Personnel & Administrative Reforms in their letter No. 14015/2/84-AIS(I) dated 31.5.1984. The instructions contained in that letter are in the nature of executive instructions, they cannot override the provisions of Regulation 7(4) of the I.P.S. (Appointment by Promotion) Regulation, 1955, Mr. K.C. Mohanty has submitted as such a view expressed in Arjun Behera's case is under challenge and the Supreme Court has granted stay, it may be said that the view expressed above may not be correct. May be the Hon'ble Supreme Court may not ultimately approve of the view expressed therein, but mere grant of stay of operation of the judgment in that case would not mean expression of any opinion of the Supreme Court. To sum up, our conclusions, they are that after 5.1.1989 two more posts in promotional quota were available, the select list of 1988 remained valid till 9.3.1989 and that in

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February, 1989 there having a vacancy on retirement, the total number of vacancies in promotional quota were three. Admittedly the position of the applicant being 3rd in the select list he could be appointed to one of the posts.

10. In view of our conclusions stated above we would direct that the applicant be deemed to have been promoted to the I.P.S. Cadre with effect from 1.2. 1989. No costs.

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