

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 125 of 2010

Tuesday, this the 18th day of October, 2011

CORAM:

Hon'ble Mr. Justice P.R. Raman, Judicial Member
Hon'ble Mr. K. George Joseph, Administrative Member

S. Radhakrishnan Nair, Aged 58 years,
 S/o. Late A.K. Sivaraman Pillai,
 Superintendent of Police (retired),
 Madhurima, Pazhaveedu P.O., Alappuzha.

Applicant

(By Advocate – Mr. P.V. Mohanan)

V e r s u s

1. Union of India, represented by Secretary, Ministry of Home Affairs, New Delhi.
2. Union Public Service Commission, represented by Secretary, Shajahan Road, New Delhi.
3. The Selection Committee for Section to Indian Police Service, represented by the Chairman, Union Public Service Commission, Shajahan Road, New Delhi.
4. State of Kerala, represented by Chief Secretary, Government Secretariat, Trivandrum.

Respondents

[By Advocates – Mr. Varghese P. Thomas, ACGSC (R1) & Mr. Thomas Mathew Nellimoottil (R2&3) Mr. P.K. Abdul Rahiman, GP (R4)]

This application having been heard on 18.10.2011, the Tribunal on the same day delivered the following:

O R D E R

By Hon'ble Mr. Justice P.R. Raman, Judicial Member -

The applicant entered the Police service as Sub Inspector.



Subsequently he got several promotions and became Deputy Superintendent of Police on 29.2.1996 and thereafter as Superintendent on 24.2.2005. While so he retired from service on 31.8.2006. He completed 54 years of age as on 1.1.2006. For selection and appointment to IPS cadre regulation 5(3) of the Indian Police Service (Appointment by Promotion) Regulation, 1955 herein after referred to as the regulations provides that the committee shall not consider the case of members of the State Police Service who shall attain the age of 54 years on the first day of January on which the select list is prepared. Accordingly, the applicant was not considered for selection and appointment to the IPS cadre against the vacancies which arose between 1.1.2005 to 31.12.2005, though the selection committee met for consideration of the eligible candidates coming within the zone of consideration only in the year 2007. Applicant contends that Regulation 5(3) in so far it affects his right to be promoted is bad in law as violative of Article 14 of the Constitution of India. In the final seniority list of Deputy Superintendent of Police as on 4.8.2003, the applicant was ranked as 141 and Annexure A-1 is the copy of the seniority list produced for the reference. According to him he was eligible for appointment by promotion to the IPS Service (Kerala cadre) under the promotion quota against vacancies as on 1.1.2005. Three substantive vacancies were determined as on 1.1.2005 against which 9 incumbents were included in the field of consideration. The seniority list was prepared and appointments made accordingly by notification dated 18.1.2007. 5 substantive vacancies were determined for promotion as on 1.1.2006. 15 persons were considered as falling within the field of choice. Juniors to the applicant namely one P.G.



Ashok Kumar at rank No. 143, M.P. Dinesan at rank No. 144 were included in the field of choice but the applicant's name was not included in the field of choice on the ground that he has completed 54 years of age as on 1.1.2006. According to the respondents there is a bar under regulation 5(3) of the regulations to consider such persons who had already completed 54 years of age as on the date on which the committee met for consideration for selecting the eligible candidates. Annexure A-2 is the proceedings dated 12.5.2006 forwarding the name of the incumbents in the field of choice. According to the applicant there was no adverse entries in the confidential records and he had 55 good service entries and commendations. He was also posted as head of the sub division of police administration between 1996 to 2005 and head of the division till his retirement. He has got exemplary service records of outstanding performance for the preceding five years to 2006. The recommendation letters and details regarding his good service entries are placed on record as Annexure A-3 series. According to him had he been considered for promotion he had the fair chance of being selected and appointed in the vacancy which arose between 1.1.2005 to 31.12.2005.

2. The applicant had earlier filed Writ Petition No. 21355 of 2006 before the Hon'ble High Court of Kerala for a direction to the State of Kerala seeking to include him in Annexure A-2 field of choice for consideration. That Writ Petition was disposed of on 15.9.2006 directing the State to consider his case for inclusion in the field of choice for promotion. Annexure A-4 is the copy of the judgement of the Hon'ble High Court. His



representation made thereon is Annexure A-5. The DGP by his letter dated 30.9.2006 referred the matter to the Government stating that he is not the competent authority to decide the issue. The government by proceedings dated 18.10.2006 proposed to include the name of the applicant for consideration for selection to the year 2006 and requested the Director General of Police to furnish necessary details. Copy of the proceedings is produced as Annexure A-6. Subsequently, the government by proceedings dated 7.2.2007 rejected the claim of the applicant. A copy of the proceedings is produced as Annexure A-7. It is held that the Department has considered the applicant's case for inclusion of his name in the zone of consideration for appointment by promotion to the IPS cadre and in terms of the IPS (Appointment by promotion) Regulation, 1955. As per regulation 5(3) of the IPS (Appointment by promotion) Regulations, 1955 the selection committee shall not consider the case of the members of the State Police Service who have attained the age of 54 years on the first day of January of the year for which the selection list is prepared. The selection under consideration is for the preparation of the select list for the year 2006. The date of birth of the applicant is 15.8.1951 and that of the Mr. S. Martin K. Mathew is 11.10.1951. The applicant has crossed 54 years on the 1st day of January, 2006 and since he has also retired from service is not eligible for consideration as per the existing rules. According to the applicant the selection committee met on 17th May, 2007 but did not consider the claim of the applicant. However by notification dated 7.11.2007 S/Shri K.J. Devassia, rank No. 70, E. Divakaran, rank No. 78, N. Gopala Krishnan, rank No. 134, P.G. Ashok Kumar, rank No. 143 and M.P. Dinesan, rank No.



144 were considered. Annexure A-8 is the copy of the notification produced in the case. It is his case that S/Shri Ashok Kumar and M.P. Dinesan, are juniors to the applicant and they are less meritorious compared to the applicant. According to the applicant the reason given in Annexure A-7 is contrary to the provisions contained in regulation 5(3) read along with the provisos. He impugns Annexure A-7 merely on two grounds, i) inter alia contending that if the interpretation as placed in Annexure A-7 is correct, the very provision in regulation 5(3) is unconstitutional. ii) it is his alternate contention brought out by an amendment in the OA that on a true interpretation of regulation 5(3) with the provisos contained therein, there cannot be any doubt that a person who is otherwise qualified against a particular year in which the vacancy arises, he will not be disqualified merely because the selection committee did not meet in the year in which vacancy arose but only in the subsequent years. In other words according to him as against the vacancy which arose in the year 1.1.2005 to 31.12.2005, the applicant is fully entitled to be considered falling within the zone of consideration and while the committee considering the vacancies during the period in question, ought to have considered the case of the applicant as well. The fact that he has crossed 54 years as on 1.1.2006 in which year the select list is prepared is of no consequence. According to him the select list relates back to the year of 2005 in which the vacancy has arisen. Though he might not be entitled to be considered and will not fall within the zone of consideration as against the vacancy which has subsequently fallen in the year 2006 and 2007 as the case may be but not for the vacancy which arose in the year 2005.

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3. In the reply statement filed by the respondents 2 & 3 i.e. UPSC the contention of the respondents is that the decision of the Punjab & Haryana High Court which supports the contention of the applicant has got only prospective effect. Hence, the applicant cannot rely on the said decision to advance his case. It is also contended that the vires of regulation 5(3) has been upheld by the Karnataka High Court in a batch of cases i.e. WPs Nos. 1803-1806 of 2010 and connected cases rendered in CDJ 2011 Karnataka High Court 321.

4. A separate reply statement is filed by the first respondent DOP&T wherein it is contended that the decision of the Punjab & Harayana High Court as confirmed by the Apex Court (Annexure A-10 is the copy of the judgment) have got only prospective effect.

5. We have heard the learned counsel for the parties.

6. We may at once consider the contention of the respondents regarding the effect of the judgment of the Punjab & Harayana High Court as confirmed by the Apex Court. In the Punjab & Harayana High Court the question was as to whether regulation 5(3) read with its proviso to the regulation in any way stand in the way of the person's right to be considered as against the year in which vacancy arose when there was no disqualification if subsequently at the time when the committee met for consideration he has crossed the age of 54 years. On a true interpretation of the provisions contained in the regulation it was held in paragraph 21 as follows:-



"21. We find substantive support to the aforesaid submission in unnumbered proviso to Regulation 5(1). According to the aforesaid proviso if no meeting of the Committee could be held during a year then whenever the Committee meets again, the select list has to be prepared separately for each year during which the Committee could not meet as on December 31st of each year. The aforesaid proviso is consistent with the definition of expression 'year' in Regulation 2(1)(l). Therefore, the vacancies for the year 2006 i.e. from 01.01.2006 to 31.12.2006 have to be determined as on December 31st of that year. The select list, which has been erroneously styled as 'Select List of 2007', in fact, is the select list for the year 2006. Therefore, the age of the petitioner has to be determined as on 01.01.2006. Accordingly, he would be eligible."

7. After considering relevant provisions it was held in paragraphs 24 and 27 as follows:-

"24. The intention of the framers of the Regulations further become discernible from the reading of un-amended Regulations, which have linked the age of 54 years to the 1st of April of the year of meeting. The framers of the Regulations must have found that the year of meeting has no relationship for determination of the age of eligibility as it was wholly fortuitous. Therefore, to keep the eligibility intact in respect of the year for which the select list is prepared, amendment has been incorporated in the year 2000 and an effort has been made to link the age of eligibility to the occurrence of vacancies and to de-link the same from the year of meeting. If we construe the Regulation 5(3) to mean that age has to be determined by reference to the year of meeting then the mischief which is sought to remedied would perpetuate and amendment would loose its object. The aspirations of a brilliant and meritorious officer working in the State cannot be defeated by any arbitrary method of fixing the age of eligibility, which has got nothing to do with the basic principles of service jurisprudence, namely, occurrence of vacancy. Therefore, we find that the Tribunal has committed a grave error by presuming that the age of eligibility has to be determined in respect of the year when the Committee is supposed to meet, which is wholly unsustainable.

27. For the reasons aforementioned, this petition succeeds. The order of the Tribunal, dated 4.9.2009 (P-13) is hereby quashed. As a consequence, the combined eligibility list of the State Civil Service officers, dated 7.8.2008 (P-4) and the notification dated 13.8.2009 (P-14) in respect of so called select list for the year 2007 is also quashed. However, it is made clear that respondent Nos. 5 to 10 would continue to work on their present postings till the fresh decision is taken by the Committee to make selection as per Regulation 3.



Accordingly, respondent Nos. 1 to 3 are directed to re-consider the names of all the eligible candidates by determining the age of 54 years as on 01.01.2006 qua the vacancies occurring from 01.01.2006 to 31.12.2006 by including the name of the petitioner. The needful shall be done within a period of one month from today and the petitioner shall not be debarred from entering Indian Administrative Service merely because he would retire in February 2010, because all the proceedings of the Select Committee up to the issuance of impugned notification, has always remained subject to the result of the OA, which was filed by the petitioner well in time.”

8. Ultimately based on the above reasoning the petition was allowed.

The order of the Tribunal against which the Writ Petition was filed was quashed and as a consequence, the combined eligibility list of the State Civil Service Officers, dated 7.8.2008 and the notification dated 13.8.2009 in respect of the so called select list for the year 2007 was also quashed and directions were issued to reconsider the names of eligible individuals by determining the age of 54 years as on 1.1.2006 qua the vacancies occurring from 1.1.2006 from 31.12.2006 by including the name of the petitioner therein. It is well settled law that a judgment interprets the provisions and merely declares the law as it ought to be and is always retroactive. Such declaratory judgment is always a right in rem. The judgment cannot be said to be prospective especially when the judgment declares the law. In the light of the above legal position the fact that any circular or direction was issued by the DOP&T stating that the said decision will have prospective effect cannot stand in the eye of law.

9. As we have already noticed in the light of the decision of the Punjab & Harayana High Court true interpretation to be placed on the regulation contained in regulation 5(3) along with the proviso is that if the person has



not crossed the age of 54 years as on the date on which the vacancy arose then he will not become disqualified for being considered against those vacancies merely for the reason that he has crossed the age of 54 years as on the date of the meeting of the committee for conducting the selection. Therefore, the only reason for rejection of the applicant's claim for consideration is that he has crossed the age of 54 years at the time when select list of 2006 is prepared. But this on our own reasoning and on the reasons made by the Punjab & Harayana High Court, is totally wrong and contrary to the provisions contained in regulation 5(3). Thus the applicant is entitled to be considered for the vacancy which arose on 1.1.2005 till 31.12.2005. However, before we part with the case we have to consider as to whether the application is well within the time and if not whether there is any reason shown by the applicant to condone the delay, if any before we grant the relief.

10. Annexure A-7 is dated 7.2.2007 and the present OA is filed in February, 2010. Technically there is a delay of normally two years but according to the applicant there was no laches or negligence on his part in non-prosecuting the matter. He has earlier filed a Writ Petition before the Hon'ble High Court of Kerala when his name was not considered as not falling within the zone of consideration and Annexure A-4 judgment was rendered. It was thereafter that he was considered and replied by Annexure A-7. According to him the Punjab & Harayana High Court judgment was rendered only subsequently on 1.2.2009 which was confirmed by the Hon'ble Supreme Court by dismissing the SLP on 31.5.2010. Until then the



law was not clear and according to him he has approached this Tribunal well within time and has explained the circumstances that this OA can be filed only in 2010 February. We have anxiously considered the plea raised by the applicant. Even though technically this petition is time barred, considering the fact that the applicant has fought out his case before the Hon'ble High Court in the earlier litigation and soon after Annexure A-7 was passed he has approached this Tribunal to challenge the vires of the regulation 5(3) it cannot be said that there was any negligence or laches on his part in the matter of prosecuting his case. Further if the rule is ultra vires the provisions of the Constitution, there is no bar in considering his contentions on merit. In the circumstances, we condone the delay in filing the OA.

11. But even though the applicant would contend that regulation 5(3) is ultra vires to the provisions of the Constitution of India, the question is no longer res-integra as the Karnataka High Court in batch of Writ Petitions in WPs Nos. 1803-1806 of 2010 and connected cases rendered in CDJ 2011 Karnataka High Court 321, set aside the order of the Bangalore Bench of this Tribunal produced as Annexure A-9 in the present OA. It was held in paragraph 41 and 42 as under:-

"41. It is well settled that when the respondents attack regulation 5(3) insofar as it relates to fixation of age of 54 years as a bar for employees under the state civil services to be considered for promotion to IAS cadre, it is for them to aver and prove as to how the same would affect their fundamental right or constitutional principle of unreasonable. Apart from stating that fixation of age of 54 years is arbitrary and fixation of age would not enable selection of the best available persons in the state civil services to the IAS cadre, they have not proved that the said regulation violates article 14 of the



constitution. It may be noted here itself that when the burden is upon the applicants to prove that the said regulations violates articles 14 & 16 of the Constitution of India, the Tribunal has proceeded on the basis that the government did not justify with valid reasons for fixing the age of 54 years. The tribunal has referred to the nothings made by the joint secretary and also the Desk Officer regarding fixation of the age of 54 years and merely because it was argued that there is the pertaining to the notes regarding fixation of age of 54 years as cut off year, the same has not been produced and therefore, adverse inference has to be drawn and has jumped to the conclusion that the said regulation is arbitrary, unreasonable and liable to be quashed. It is well settled that the scope of judicial review in respect of policy decisions taken by the government regarding conditions of services of employees of the state or union government is limited as the state is presumed to be the employer who knows best about the conditions of service to be fixed upon its employees and this court or Tribunal cannot sit in judgment over the decision taken by the government. The scope of interference by this court has been explained by the supreme court in Triloki Nath Khosa's case cited supra and in Dilip Kumar Garg & another [2009 (4) SCC 753].

42. In Triloki Nath Khos's case the supreme court has laid down that rule cannot be struck down as discriminatory on any a priori reasoning that where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend article 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration. Further in para 20 it has been observed as follows:-

“20. Respondents have assailed the classification in the clearest terms but their challenge is purely doctrinaire. “academic or technical qualification can be germane only at the time of initial recruitment for purposes of promotion, efficiency and experience alone must count' this is the content of their challenge. The challenge, at best, reflects the respondent's opinion on promotional opportunities in public services and one may assume that if the roles were reversed, respondents would be interested in implementing their point of view. But we cannot sit in appeal over the legislative judgment with a view to finding out whether on a comparative evaluation of rival theories touching the question of promotion, the theory advocated by the respondents in not to be preferred. Classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and condition of service; and if looked at from the classification is found to rest on a reasonable basis, it has to be upheld.

32. Judicial scrutiny can therefore, extend only to the consideration whether the classification rests on a reasonable



basis nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permissible it would be open to the courts to substitute their own judgment for that of the legislature or the rule making authority on the need to classify or the desirability of achieving a particular object.

43. In Dilip Kumar Garg's case, the Supreme Court has laid down as follows:

15. In our opinion article 14 should not be stretched too far, otherwise it will make the functioning of the administration impossible. The administrative authorities are in the best position to decide the requisite qualifications for promotion from junior engineer to Asst. Engineer and it is not for this court to sit over their decision like a court of appeal. The administrative authorities have experience in administration, and the court must respect this, and should not interfere readily with administrative decisions (see Union of India vs. Pushpa Rani and Official Liquidator vs. Dayanada)"

12. Even though this Tribunal in OA No. 14 of 2010 in an another case has upheld the contention of the applicant and held that the provisions is ultra vires in view of the subsequent pronouncement of the Karnataka High Court as is referred to above which are binding on, we hold that the provisions contained in regulation 5(3) is constitutionally valid and there is no merit in the contention of the applicant that the same is ultra vires the provisions of the Constitution.

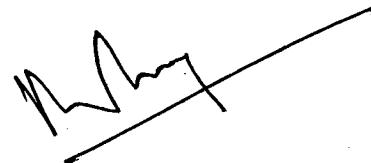
13. In the result we allow this OA directing the respondents Nos. 2 & 3 i.e. UPSC to conduct a review DPC and consider the case of the applicant as against the vacancy/vacancies arose during the period 1.1.2005 to 31.12.2005 and if he is found fit to be promoted he will be entitled only for notional promotion and will not be entitled for any monetary benefits



therefrom. The applicant will be entitled for such notional promotion only for limited purpose of fixation of his pay and for the last drawn pay to be calculated for the retirement benefits. We grant the relief as above by allowing the OA as aforesaid. No costs.



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER

“SA”