

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 138/91 199
T.A. No.

DATE OF DECISION 19.3.92

Jacob P. Thomas Applicant (s)

Mr. MR Rajendran Nair Advocate for the Applicant (s)

Versus

Union of India (Min. of Personnel) & 4 others Respondent (s)

Mr. NN Sugunapalan - for R1~~4~~5

Mr. N.Nanadakumara Menon - for R3

Mr. P.santhalingam - for R4 Advocate for the Respondent (s)

CORAM : Mr. T.V.George - for R2

The Hon'ble Mr. N.V. Krishnan, Member (admeve)

The Hon'ble Mr. N.Dharmadan, Member (Judl.)

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. To be circulated to all Benches of the Tribunal ?

JUDGEMENT

N.V.Krishnan, AM

The applicant, a State Police Service Officer working as a Superintendent of Police, has filed this application, feeling aggrieved by the delay on the part of the Respondents 1 & 2, i.e. the Ministry of Personnel and the State of Kerala, respectively, in holding a timely triennial cadre review as this might result in denial of his promotion to the Indian Police Service (IPS).

2. The facts of the case are not in dispute.

2.1 The applicant, being a State Police Officer, was included for the first time, in the Select List, referred to in Regulation No.7 of the Indian Police Service (Appointment by Promotion) Regulations, 1955--Promotion Regulation, for short--as a result of the deliberations of the Selection Committee on 9.3.90. His rank in the Select List was No.7.

It is from this Select List that the State Police Officers are to be promoted to the IPS under Regulation 8.

2.2 The Select List shall be in force until it is reviewed and revised in accordance with sub-regulation (6) of Regulation 5, under ^usub-regulation (1) of which, "each Committee shall ordinarily meet at intervals not exceeding one year." The Selection Committee for the year 1990-91 has met on 11.3.91.

2.3 The applicant would normally have superannuated on 28.2.91 but for the fact that interim orders were issued in this case directing his appointment to a cadre post, he being in the Select List, till this application was disposed of. Suffice it to say that the applicant is still in service by virtue of these orders.

2.4 In regard to the appointment to the IPS of the officers included in the Select List of 1990, the 2nd respondent (State of Kerala) has stated as follows in ^upara 3 of the reply dated 25.2.91:

"From the select list, four officers have already been appointed to the service. The fifth officer, Shri G.Baburaj, respondent No.4 in the OA, has also been given temporary appointment to a cadre post under Rule 9 of the IPS(Cadre) Rules and his appointment to the service against a vacancy that arose consequent on the retirement of Shri K.J.George on 30.11.90 has been taken up with the Central Government. He has not been appointed to the IPS by the Central Government. As such there is no scope for appointing more S.P.S. officers from the existing select list as there are no substantive vacancies in the promotion quota of IPS Cadre of Kerala for which the Select List was prepared.

However, Shri Paul Leslie, the sixth officer in the Select List is being considered for appointment to IPS with retrospective effect in view of the direction of the Tribunal in OA 491/89."

2.5 The version of the 1st respondent (Ministry of Personnel is somewhat different. It is submitted in para 3 of the reply that, out of the 7 officers in the Select List, the first 4 officers have already been appointed to the IPS. ^u(Resp. 3) S1.No.6 of the Select List/has also been appointed to the IPS in compliance with the directions of this Tribunal. As there

is no further vacancy available under the promotion quota,
(Respondent-4)
Sl.No.5, i.e. Baburaj, and Sl.No.7, i.e. the applicant, could
not be appointed to the IPS so far.

3. In short, it would appear from the State Government's reply that the applicant could be appointed to the IPS if one vacancy arose in the cadre in the promotion quota before the applicant retired on 28.2.91, while, according to the Union Government, this will be possible only if there are 2 such vacancies.

4. The entire case of the applicant is rested on the argument that, as the last notification regarding fixing the cadre strength of the IPS of Kerala was issued on 12.2.88--copy kept on record-- the next triennial cadre review should have been completed and notified, latest on 12.2.91. For this, he relies on Rule 4 of the IPS (Cadre) Rules, 1954,--Cadre Rules, for short--which requires a triennial review of the cadre strength at intervals of every three years. If, on such a timely triennial review, it is found that additional senior time scale posts have to be encadred, of which one more post is made available to the promotion quota, the applicant would get a right to get appointed to the IPS and posted to that cadre post from the date when the cadre strength is increased, with all consequential benefits, as he is the next officer of the 1990 select list to be appointed to the IPS.

5. This plea is met by the first respondent as follows, as can be seen from the reply dated 17.3.91:

"The Triennial Review of IPS Cadre of Kerala was notified in 1988. Hence the next triennial review is due in 1991. However, no proposal in this regard has been received from the Government of Kerala so far. The statement that the applicant is aggrieved by the delay etc. has no bonafides and therefore they are liable to be rejected."

6. The State of Kerala (Respondent-2) has stated as follows in this regard:

"The Triennial Review of the IPS Cadre is governed by the sub-rule (2) of Rule 4 of the IPS (Cadre) Rules, according to which, the Central Government shall, at intervals of every three years, re-examine the strength and composition of each state cadre in consultation with the State Governments concerned and may make such alterations thereon as it deems fit. The last review in respect of IPS cadre of Kerala was done in 1988 and was notified on 12.2.88. As a matter of fact there has always been a time lag of more than three years between two reviews. The dates on which the strength of IPS cadre of Kerala was refixed and notified since 1975 are:-

1. 27.10.75
2. 30.7.80
3. 15.6.84
4. 12.2.88

The proposals for refixing the strength is being finalised and it will take some time before same is finalised, by the Central Government and strength refixed. Normally there may be increase in the strength of the cadre, but until the finalisation of the matter, it is not possible to anticipate the increase in the promotion quota." [Para 3/Reply dt. 25.2.91]

"Under the rules, the power to alter the strength and composition of a cadre vests with the Central Government and the changes come into force on the date of publication of the notification in the official Gazette and not earlier. The State Government has no jurisdiction to alter the schedule. For the review of the strength of the State IPS cadre, the State Government has already sent proposal to the Government of India as per the letter No. 96402/SP1-A3/90/GAD dated 28.2.91." [Para 5/Reply dt. 17.4.91]

7. In short, the contention is that there is no hard and fast rule that the triennial review should be completed and its result notified immediately on the expiry of 3 years from the date of the last notification.

8. The learned counsel for the State Government has produced for ~~perusal~~ perusal the file of the State Government in which this matter was considered. It is seen that as early as on 19.9.90 a letter was sent to the Director General of Police informing him that "the next triennial review is to take place early in 1990-91" and he was asked to send his proposals. Thus, there was no delay in initiating the proceedings for the triennial review. Those proposals were,

however, received only on 9.1.91. This OA was filed on 22.1.91 and as the applicant had to retire on 28.2.91 the respondents could still have finalized the review and notified its result before 28.2.91. However, the proposals of the State Government were sent to the Government of India only on 28.2.91. A meeting of the Triennial Review Committee was held on 25.4.91 at Delhi. The proposals were considered and on that basis, Government of India issued a notification on 27.6.91 under Rule 4(2) of the Cadre Rules and amended the IPS (Fixation of Cadre Strength) Regulations, 1955 in so far as they concern the entries in respect of Kerala. Thus, while there was no delay in commencing these proceedings, there was delay at every subsequent step.

9. A copy of the notification dated 27.6.91 is kept on record and it is seen that it was published in the Gazette on 13.7.91 from which date it came into force. According to Sl.No. 3 of the notification dated 12.2.88, the senior duty posts to be filled up by promotion of State Police Service Officers was 28. After the triennial review, the notification dated 27th June 1991 shows that this number has now increased to 30. Thus, 2 additional posts in the promotion quota have become available for promotion.

10. The only question is whether the benefit of one of these posts can be given to the applicant. The learned counsel of the first respondent contends that, as the notification has come into force only from 13.7.91, the strength gets increased only from that date, before which the applicant should have retired from the State Government--but for ^{the Tribunal's} ~~the~~ interim orders--and hence not eligible for promotion.

On the contrary, the learned counsel for the applicant contends that by delaying the issue of the notification to 27th June 1991, his right cannot be defeated. The notification ought to have been issued under law on or before 12.2.91, in which case he could have been appointed to one of the two additional posts created in the cadre. It is this

disputed question of law that arises for consideration.

✓ 11. It is clear that the dispute centres round the interpretation of the provisions of Rule 4 of the Cadre Rules. The main purpose of the Cadre Rules is to fix the strength of the Indian Police Service cadre strength of a State. Rule 4 is reproduced below:

"4. Strength of Cadres.--(1) The strength and composition of each of the cadres constituted under rule 3 shall be as determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made shall be as in force immediately before the commencement of these rules.

(2) The Central Government shall, at intervals of every three years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit.

Provided that nothing in the sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any time:

Provided further that the State Government concerned may add for a period not exceeding one year and with the approval of the Central Government for a further period not exceeding two years, to a State or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts."

Sub-rule (1) deals with the initial strength and composition when the cadre is constituted. That does not concern us. It is sub-rule (2) dealing with triennial review with which we are concerned. The question is whether, considering the language of that sub-rule, it should be held that every action contemplated therein has to be completed within the interval of three years and that the provisions have to be strictly complied with by the Central Government. According to the applicant, when the notification fixing the strength of the IPS cadre of Kerala State was admittedly last issued on 12.2.88, the Central Government is bound to issue a notification on 12.2.91 fixing the revised strength of the cadre in consultation with the State Government. When questioned, the learned counsel for the State Government also appeared to

subscribe to the view that a strict compliance of Rule 4(2) would require such a notification to be issued on 12.2.91. On the contrary, the learned counsel for the Union Government argued that the Rule is flexible enough to permit the issue of a notification at any time during 1991 in which year the review has to be conducted after the expiry of 3 years of the issue of the last notification.

✓ 12. The question is whether such a flexibility is available. If it is available, would it require the Government of India to issue the notification in 1991 or is it flexible enough to permit them to issue the notification even, say, after 5 years?

✓ 13. Undoubtedly, there are no specific directions of the Government of India on this issue. Though there is no direction that the review contemplated under Rule 4(2) of the Cadre Rules should be completed sufficiently in advance so as to enable a notification to be issued on the third anniversary of the earlier notification, there are some instructions which seem to convey such an impression. Extracts from the Government of India, Department of Personnel and Administrative Reforms letter No. 4/12/70-AIS.I dated 26.5.71 are reproduced below. This has been reproduced at pages 838 to 840 of All India Services Manual, Third Edition by R.N.Mishra.

"There should be no long-term ex-cadre posts. If there are any, they ought to go into the cadre."

In other words, the need for quick and prompt encadrement is stressed.

"The adequacy of ~~recruitment~~ rate for the All India Services is vital to the proper functioning and management of Government. Two measures are needed to ensure this. The first is the prompt encadrement of new posts likely to last over an extended period and the second is to assess future needs in advance on the basis of the past experience and the future plans. A failure in either of the two requirements will affect the adequacy of cadre strength thus leading to strains and stresses which some of the States are facing today."

Apart from stressing the need for prompt encadrement, the complications that arise if this is not done have been explained:

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....contd.

"Once the cadre strength has been determined at the triennial review, which can be made more frequent if required, the rate of annual recruitment must be adequate to fill up all the posts within two or three years. In some of the (sic. States) recruitment rate has been rather low with the result that gaps continue in the cadre for years and longer Select Lists are required to meet the cadre shortages. This has two-fold disadvantages; it affects the seniority of the direct recruits and the State Service Officers develop hopes and expectations beyond those provided for in the scheme of the All India Services."

It is made clear that, while the review can be more frequent than triennial, it cannot be later than triennial, i.e. it has necessarily to be completed and notified in the 3 year interval mentioned in Rule 4(2). Adverse effects of delay have been clearly brought out in this instruction.

✓ 14. Having considered the instructions of Government of India, one has now to consider whether the language used in Rule 4(2) compels one to reach a conclusion that the notification as a result of the triennial review should be effective from the third anniversary of the earlier notification. The expression used in Rule 4(2) is "at intervals of every three years" which means that the interval between one fixation of cadre strength and another shall be 3 years, no more or no less. This is due to the fact that the expression "interval" is defined to mean 'intervening time or space' in Concise Oxford Dictionary. If sub-rule (2) had stated that "after the expiry of 3 years" or "at intervals not less than 3 years" the Central Government shall examine the strength etc., it would mean that the review can be made at any time after three years. Or, if the expression had been "the Central Government shall ordinarily at an interval of 3 years" or "at an interval not exceeding three years" etc., a certain amount of flexibility would have been available to complete it before three years. The expression "not exceeding three years" itself gives a flexibility within the three year limit, while the expression "ordinarily not exceeding three years" or "not less than 3 years" will permit crossing the 3 year limit on occasions. It is only necessary/

^{to point}

out that Regulation 5 of the Promotion Regulations states "each Committee shall ordinarily meet at intervals not exceeding one year" thus giving/^{the intended} flexibility while Rule 4(2) of the Cadre Rules is very precise and rigid and the language used does not give any latitude to the State or Central Government in this regard. Therefore, *prima facie*, the fresh notification after triennial review has to be issued at interval of three years, i.e. on the third anniversary of every preceding notification.

15. Such an interpretation will certainly raise the question why so much sanctity is attached to rigidly complying with the time schedule prescribed in Rule 4(2). The need for rigid compliance can be understood if we consider the nature of the All India Services of which the Indian Police Service is one Service. Article 312 of the Constitution governing the All India Services reads as follows:

"312. All India Services.--Notwithstanding anything in Chapter VI of Part VI or Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services including an all-India judicial service common to the Union and the States, and subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

(3) The all-India judicial service referred to in Cl.(1) shall not include any post inferior to that of a district judge as defined in Art. 236.

(4) The law providing for the creation of the all India judicial service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purpose of Art. 368."

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It may be added that the Indian Forest Service is the latest of the all-India Services to be created. The Hon'ble Supreme Court had occasion to consider a similar matter in relation to the Indian Forest Service in K.Prasad V.Union of India [AIR 1988 SC 535] and that judgement provides valuable clues to this issue. The Introductory Note given in that judgement is worth reproduction as it will help in understanding the nature of the Cadre Rules:

"2. A few months before India gained independence, a decision was taken that one of the primary needs of the federal constitution envisaged for India would be the setting up of All India Services common to the Centre and to the States. The members were to be recruited from the intelligent youth of the country by competitive examinations of high standard. They were to be free from political control, contented and having a sense of security. The idea was to build up a bureaucracy consisting of efficient officers of integrity and impartiality who could man important administrative posts and make possible the continued governance of the country unaffected by periodical changes in the political set-ups in the Centre and various States consequent on quinquennial elections to the various legislatures in the country. The recruitment to these services and their ultimate disciplinary control was to be with the Union Government but the officers would serve, under the immediate control of the State Governments, on various State cadres. Initially, the All India Services viz. the Indian Administrative Service and the Indian Police Service were created to replace the former Indian Civil Service and Indian Police respectively. The statutory basis for the implementation of the above policy was provided by Chapter I of Part XIV of the Constitution (Articles 308 to 314) supplemented by the All India Services Act, 1951 (hereinafter referred to as "the Act") passed by Parliament as envisaged in Article 312 of the Constitution. The Act, initially applicable to the two Services above mentioned, was extended by Amendment Act 27 of 1963 to cover the constitution of three new All India Services one of which was the Indian Forest Service. S.3 of the Act empowers the Government of India to make, after consultation with the State Governments, rules for the regulation of recruitment, and the conditions of service of persons appointed, to an All India Service. Such rules are to be laid, as soon as possible after they are made and for not less than fourteen days before Parliament."

(emphasis supplied)

✓16. The very fact that there are special constitutional provisions relating to the All India Services earmarks them

as a distinct Service with some special features. The reason why these Services are called All India Services is because members of these Services are required to serve both the State Government and the Central Government from time to time. Other Services, on the other hand, are either Central Services or State Services for exclusive service under the Central Government or the State Government, as the case may be. It is clear that the creation of All India Services, in one sense, impinges on Centre-State relations as is evident from the reference in Article 312 to Part XI of the Constitution dealing with relations between the Union and the States. In order to ensure that the cadre strength is managed properly Rule 4 provides that at intervals of every three years, the strength of the cadre shall be reviewed and refixed and the concerned Governments are expected to comply with this provision rigidly. It is to be noted that the exclusive power to amend the strength of the cadre is vested only in the Centre by Rule 4 of the Cadre Rules. If, for any reason, the Central Government refuses to review the cadre strength and re-fix it at intervals of 3 years, the concerned State Government can seek a legal remedy and obtain a direction to the Centre to comply with this statutory requirement. On the other hand, for its own reasons, a State Government may not be interested in expanding the cadre strength of its all India Services and may not send any proposals for revision of the cadre strength in due time. The Central Government may remain helpless in such a situation, even though the provisos to Rule 4(2) seems to empower the Centre to alter the strength of the Cadre at any time other than the third anniversary of the last fixation of cadre strength. For, it has been held that the Central Government cannot, unilaterally, revise the cadre strength

by taking recourse to the powers vested in it under the proviso to sub-rule (2) of Rule 4 of the Cadre Rules. In K.Prasad's case ante the initial composition of the Cadre of the Forest Service of the State was varied by the Centre on 2 or 3 occasions. It was held by the Supreme Court that the power to revise the cadre strength, no doubt, vests only in the Central Government and it can revise even the strength of the cadre notified under Rule 4(1) (i.e. initial composition) but that this can be done only in the manner prescribed by law, i.e. after consultation with the State Government. The following observations are relevant in this connection:

"If the terms of the relevant rules are scrutinised, it will be seen that the strength and composition of the cadre has to be determined by regulations and that these regulations have to be made by the Central Government in consultation with the State Government. It is a well settled principle that, if a statutory power has to be exercised in a particular manner, any exercise of that power has to comply with that procedure. It follows, therefore, that if the initial composition can be only drawn up in consultation with the State Government and by regulations, it will not be permissible for the Central Government to modify or alter the same save in the same manner. In fact also, it has been brought to our notice, there have been subsequent increases in the authorised strength of almost all State cadres and this has been effected by an appropriate amendment to the Regulations. It is not the case of the Government that before the second and third selections were made, either the State Government was consulted or the regulations were amended for increasing the strength. Nor is it even their case that there was any specific order by the Central Government changing the strength and composition of any cadre. We are, therefore, of opinion that it is not possible to accept the contention of the initial recruits that the mere appointment of an excess number of officers should be treated as an automatic expansion of the cadre strength and composition in exercise of the power available under Rule 4(1)."

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There is no / determine whether in such a case (ie. when the State Government refuses to send proposals) the Centre too has to resort to litigation or it can go through the motion of consultations as provided in the Rules and if there is no response from the State Governments it can declare that it

had consulted the State Government and then issue a notification under the proviso to Rule 4(2), refixing the cadre strength.

17. The All India Services therefore concern two Governments simultaneously who have a vital stake in the strength and composition of the cadre and its periodical revision from time to time. Whereas, in the case of a Central Service or a State Service, the concerned Government can take action at any time to create more posts in different pay scales--or abolish them--and they are free to man these posts, in whatever manner they like, subject to the provisions of the Rules framed by them, in the case of an All India Service cadre, the strength can be fixed and revised by the Centre only, but after consulting the States. It is for this reason that the Cadre Rules contain provisions as to how this strength may be fixed initially and there is also a mandatory provision for a review of the cadre strength at intervals of every three years.

18. It is in this background that it is/that a strict compliance of notifying the strength of the cadres "at intervals of every three year" (i.e. on the third anniversary of every earlier notification) is necessary, because this alone affords protection of the interests of the Centre and the States as has been shown above.

19. Lastly, there is another interested party, viz. the members of the Service or those who are eligible to become members of the Service. The question is whether the applicant has a right to claim the reliefs he has prayed for as such an interested party.

20. No doubt, in a different context, the Hon'ble Supreme Court has held in *Harjit Singh V. Union of India* [AIR 1980 SC 1275] that the Fixation of Cadre Strength Regulations made under Rule 4 of the Cadre Rules do not confer any right on any member of the service. The plea of the Union Government

in that case was that as the State Government had utilised a larger number of cadre officers to be posted on deputation than the number of posts prescribed for such deputation in the Fixation of Cadre Strength Regulations, cadre posts became vacant and they had to be filled up by officers of the State Civil Service who were in the select list. It was contended that officiation of the State Civil Service officers in the cadre posts in such circumstances cannot be treated to be approved officiation for fixation of their seniority in the cadre after their appointment to it. It is in this context the following observations were made:

"For example no cadre officer who is asked to fill a deputation post can refuse to join the post on the ground that the "Deputation Reserve" has already been exceeded. The Regulations are not intended to and do not confer any right on any member of the Service, unlike some other Rules which do confer or create rights in the members of the Services. Among other Rules for instance, Rule 9(2) of the Recruitment Rules stipulates that the total number of persons recruited by promotion shall not at any time exceed 25% of the posts shown against item Nos. 1 and 2 of the cadre in the schedule to the Fixation of Cadre Strength Regulations. Now, if at a point of time this limit is exceeded, direct recruits may have a just cause for complaint and it may perhaps be held that to the extent of the excess the appointments by promotion are invalid and confer no rights of seniority over direct recruits."

Land is distin- ✓ 21. ^{in that judgement} The reasoning ^{may not apply to the present case} Here
guishable. the applicant's name stands included in the select list and is, therefore, eligible to be appointed to the IPS if a vacancy arises. He feels aggrieved because ^{of} the delay in not completing the triennial cadre review. The need for prompt and punctual cadre review arises from the fact that the framers of law had intended that the members of ^{the} All India Services and also those who have a right to be considered for appointment to that Service, if a vacancy arose, should feel completely secure that the cadre strength will be reviewed periodically on time in accordance with law and the benefit thereof will be available to them automatically, without their being beholden to any political party or leader for this purpose. Hence from their point of view also Rule 4(2)

of the Cadre Rules contains mandatory provisions for review which have to be followed strictly. Such persons have, therefore, a vested right to claim that the review be conducted in accordance with law on the due date.

22. It is in view of these special features of the All India Services, that Rule 4(2) has been framed in the manner it has been done, which makes rigid compliance obligatory. That would require the Government of India to complete all the exercises of re-examining the strength of the State cadre, consultation with the State Government and making alterations therein within the time limit of 3 years from the last notification. In other words, in the ordinary course, the notification now issued on 27.6.91 should have been issued on 12.2.91 and also published in an Extraordinary Gazette of the same date so as to become effective immediately.

23. A perusal of the file of the State Government shows that steps were taken sufficiently well in advance to enable the Central Government to issue the notification in time, as the letter to the Director General of Police was issued as early as in September 1990. There is no allegation that it was out of malice, that the State Government delayed taking effective action in the matter. It is a different matter that the State Government sent its proposals on 28.2.91, i.e. after the expiry of 3 years from the issue of the last notification under Rule 4(2) of the Cadre Rules.

24. In this connection, the learned counsel for the applicant contends, relying on a decision in *S.Krishnamoorthy Vs. General Manager, Railway* [AIR 1977 SC 1868] that any inadvertant administrative lapse resulting in delay in taking a particular action should not affect adversely the applicant. He claimed that the notification should be deemed to have come into force from 12.2.91 and his case for appointment to the Indian Police Service from that date should be considered.

25. In the case referred to above, there was an omission to promote the petitioner therein as a Traffic Inspector from the date he was due to be so promoted, i.e. from 1.1.1959. The Court granted relief holding that the administrative lapse should not affect the petitioner. However, he was granted promotion only from the date he approached the High Court because, promoting him from the earlier due date would have adversely affected persons who were promoted in the meanwhile. That situation does not arise here. The appointment of the applicant to the IPS from 12.2.91--if the notification dated 27.6.91 is given retrospective effect from that date--will not adversely affect anybody, because he and Shri G.Baburaj, Resp.4, are the only 2 officers of the select list of 1990 to be appointed to the IPS according to Resp.1, and as there are 2 additional posts in the promotion quota, both of them can be appointed and there will be no adverse effect on anybody.

✓ 26. As stated above, all the parties, i.e. the Central Government, the State Government, the members of the Service and persons included in the Select List have a vested right to see that the cadre strength is notified on time. If there is a delay in notification, there is no alternative except to hold that the notification shall have retrospective effect from the date the revision was due.

✓ 27. For the aforesaid reasons, I am of the view that though the notification under Rule 4 of the Cadre Rules has and became effective only from 13.7.91, been issued only on 27.6.91, it shall be given effect to from 12.2.91. It is only necessary to point out that in the past, retrospective effect had been given to the notification issued under Rule 4(1) of the Cadre Rules in Prasad's case cited above, where the notification issued on 31.10.66 was deemed to have come into force from 1st October, 1966.

28. Before passing final orders, necessary to dispose of Miscellaneous Petition No.1159/91 filed by Mr. P.G.Varghese, a State Police Service Officer, holding the post of Superintendent of Police, State Crime Records Bureau, Trivandrum. He has stated in the M.P. that his name finds place at S.No.6 of the Select List prepared on 11.3.91 by the Selection Committee. He urges that if there are 6 vacancies available for appointment to the IPS after triennial review, he would get a chance to be appointed to the last post in his turn. He contends that, as the applicant has already retired from service on 28.2.91, his name does not appear in the Select List of 1990-91. If he is, nevertheless, appointed to the IPS, it would be at the cost of the petitioner. He, therefore, sought permission to be impleaded as the additional 5 th respondent in this O.A.

29. We have heard the learned counsel appearing on behalf of this petitioner. The question that is being decided is whether the results of the triennial review should be given effect to from the date on which the notification issued on 27.6.91 became effective i.e. from 13.7.91 or it should be made effective from the date of the third anniversary of the date of issue of the last notification i.e. 12.2.91. If the notification is made effective from 12.2.91, as I have held, then, this petitioner would have no locus standi at all because the first claimants for appointment to the IPS on the basis of the triennial cadre review would be those included in the Select List of 1990 which was current till it was replaced by the subsequent selection list dated 11.3.91. In this view of the matter, the consideration of the applicant for appointment to the IPS on this basis will be his rightful due and cannot prejudice the petitioner whose name is not even included in the 1990 Select List. In the circumstances, this MP is dismissed.

✓ 30. In the circumstances, I come to the conclusion that the provisions of Rule 4(2) have to be rigidly complied with and if it is not possible to issue and publish a notification on the third anniversary of the last notification issued thereunder, whenever the notification is issued and published later, it shall be made effective from that date by giving it retrospective effect. Accordingly, I declare that the notification dated 27.6.91 shall be deemed to have come into force from 12.2.91. As a result, two additional posts have become available on 12.2.91 for appointment to the Indian Police Service under Regulation 9 of the Promotion Regulations. On that date, the select list of 1990 was in force and the applicant had not yet retired. He and Shri G.Baburaj were the only officers left in the select list for appointment to the Indian Police Service. Therefore, I direct respondents 1 and 2 to consider, in accordance with law, the applicant for appointment to the Indian Police Service from 12.2.91 against one of the 2 senior duty posts added to the Indian Police Service Cadre from that date in the promotion quota.

31. The interim order passed by the Tribunal shall continue until a final order is passed by Respondent 1 in terms of the direction in the previous para. If he is appointed to the Indian Police Service, the service rendered by him by virtue of the interim orders shall be deemed to be service rendered as a member of the Indian Police Service with all consequential benefits. These directions shall be complied with, within one month from the date of receipt of this judgement.


12/3/92

(N.V.Krishnan)
Member (Administrative)

N. DHARMADAN, JUDICIAL MEMBER

32. I have gone through the judgment written by my learned brother. I endorse his decision. But I think I should also add few words.

33. This is atypical case in which one can easily demonstrate the principle that 'delay would defeat justice.' The complaint of the applicant is against the second respondent represented by the Secretary to the Govt. of Kerala. The averments in the application lead to the inference that there is a calculated attempt on the part of the second respondent to delay the steps not only to identify the vacancies in the cadre of I.P.S. in the Kerala State and fix them correctly after a timely trienueal cadre review but also to give a provisional posting to the applicant before his retirement in the existing retirement vacancy with a view to denying the applicant the chance and benefit of getting a posting in the I.P.S. cadre on the basis of his selection to that cadre.

34. The applicant, a seniormost Supdt. of Police in the State Police Service, who got selection in the list for appointment to I.P.S. cadre in the meeting held on 9.3.90 and inclusion in the panel, approached this Tribunal on the verge of his retirement from State Service for justice with the following prayers:

"i) To direct the respondents to complete the process of Trienueal review of 1990 and issue final notification as expeditiously as possible at any rate sufficiently before the date of retirement of applicant so that the applicant is granted appointment by promotion in a vacancy en-cadereed by the final notification;

ii) Direct the respondent to grant promotion to the applicant to IPS cadre in the vacancy caused on account of the leave preparatory to retirement availed of by Mr. M.J. Jacob subject to regularisation w.e.f. the date of occurrence of regular vacancy in the cadre..."

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35. This application was filed on 22.1.91. The applicant was due to retire on superannuation from the State Service on 28.2.91. He submitted that he is No. 7 in the I.P.S. Select List of 1990. Officers upto Sl. No. 5 were already appointed. The sixth person is getting an appointment on the basis of orders of this Tribunal. Two regular vacancies would arise in the one ^b I.P.S. Cadre-/on the retirement of one Mr. M. J. Jacob who is due to retire on 31.3.91 and was on leave for three months and the other due to superannuation of Raghavan Nair. ^b preparatory to retirement/ Therefore, the applicant can be easily posted in the vacancy provisionally. But the State Government is not taking any steps to post the applicant in the vacancy.

36. He has a further case that the last triennial review for the year 1987 was completed on 11.2.1988. If the triennial review for the year 1990 is completed within the time stipulated under the rules, at least few more vacancies in I.P.S. cadre would arise and he is entitled to be posted against the first vacancy which is to be reckoned on the basis of the triennial review. But the second respondent is delaying the issue of final notification in view of the fact that the applicant is due to retire from State Service on 28.2.91. This causes serious prejudice and injustice to him. Under these circumstances, he filed Annexure+I representation on 15.1.91 for getting a posting under Rule 9 of the I.P.S. Cadre Rules.

37. The case of the applicant is simple and based on factual allegations which can be easily met by the second respondent, if the allegations are unfounded and baseless and nonsuit him

so that his attempt to continue in service merely because of the inclusion of his name in the panel prepared by the Committee can be effectively prevented. The respondents did not choose to adopt this course.

38. This case was filed on 22.1.91 with an interim prayer for a direction to grant him officiating promotion to I.P.S. Cadre pending disposal of the case. Before filing the application, the learned counsel appearing on behalf of the respondents received copy of the application, but none appeared when the case came up for admission, only proxy counsel was present for respondents.

39. The case came up for admission before the Bench on 23.1.91. The Tribunal admitted the application and issued urgent notice to the respondents and posted the case on 28.1.91 for passing orders on interim prayer. Since there was no appearance for the second respondent, fresh notice was issued to Home Secretary by messenger returnable on 1.2.91. There was no appearance on behalf of the second respondent on 1.2.91. The case was again posted to 4.2.91 after observing that "the SOGSC is good enough to undertake to inform the State Govt. that in view of the urgency of the case, the Tribunal is likely to pass orders on the interim relief prayed for in the O.A. on the next date of hearing which is fixed on 4.2.91. We regret to note that no appearance has been effected on behalf of the State Govt. despite notices which have been served on them more than once."

40. On 4.2.1991 Shri P. V. Mohanan, learned State Govt. Pleader appeared on behalf of the State Government. He was directed to

clarify whether there is any difficulty in considering the applicant for officiating promotion in a xxxxxxx cadre post against which xxxxx Shri M.J. Jacob xxx is on leave preparatory to retirement till the applicant gets a substantive vacancy." The case was posted on 11.2.91. There was no appearance on behalf of the State Govt. on that day. The Tribunal passed the following order regarding the conduct of the State Govt. on 14.2.91:

" We have been hearing the learned counsel for the applicant and the Union of India a number of times and on one occasion Shri P. V. Mohanan appeared before us on 4.2.91 on behalf of the State Govt. A number of adjournments were given to ascertain whether the State Govt. has any difficulty in considering the applicant for promotion under Rule 9 of the Cadre Rules of IPS before 28.2.91. On 4.2.91, Shri P.V. Mohanan was directed to clarify whether there is any difficulty in granting the interim relief prayed for and an adjournment was given to 11.2.91 for the purpose. On that day none appeared on behalf of the State Govt. We gave a further adjournment on 11.2.91 for today but even today none has appeared on behalf of the State Govt.....

X X X X

In the conspectus of facts and circumstances, we direct the Government of Kerala to consider the applicant for officiating promotion under Rule 9 of the Cadre Rules due to the leave vacancy arising out of Shri Jacob's going on leave preparatory to retirement. We make it clear that this will be without any prejudice whatsoever to the continuance of Shri Baburaj in a cadre post either provisionally or ~~regularly~~ regularly or to his promotion to the IPS cadre according to his turn in the select list. The State Govt. is also directed to pass necessary orders regarding the applicant's officiating promotion to a cadre post within a period of one week from today.

We also make it clear that if a vacancy is later found as a result of the trienueal review of 1990 in the IPS cadre of Kerala, the applicant would also be considered for that post irrespective of whether he is in service or not. The case is listed for completion of pleadings on 20.2.91. All the respondents are directed to file counter affidavit before 27.2.91 with a copy to the applicant who may file rejoinder, if any, before that date. List for further direction on 27.2.91."

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41. On 25.2.91 the second respondent filed a reply statement without complying with any of the earlier directions. In that reply the applicant's contentions were virtually admitted. The retirement vacancy of Shri Jacob as indicated by the applicant and his leave preparatory to retirement is admitted. So also regarding trienueal review respondents admitted that "the last review in respect of I.P.S. cadre of Kerala was done in 1988 and was notified on 12.2.88." But the respondents submitted that it will take some time to finalise the strength of the cadre by the Central Government. Nothing was said about State's attitude towards it. But the State Govt. initiated steps for convening another meeting of the Selection Committee for preparing a fresh panel presumably with a view to superseding the existing panel in which the applicant's name was included. Hence, the applicant filed M.P. 238/91 on 25.2.91 for interim direction to continue the applicant in the post. This was heard on 27.2.91. But Shri P. V. Mohanan who received the copy of the M.P. did not appear on that day. In view of the urgency, the case was posted on 28.2.91. On that day after hearing the parties, the Tribunal ⁴ was compelled to pass a detailed order. It reads as follows:

"At long last and after a number of adjournments only today we have been able to arrange a hearing with the learned counsel for the Central and State Govts. before us. The State Govt. has by their order dated 21.2.91 annexed to their counter affidavit has indicated their inability to appoint the applicant to the leave vacancy of Shri Jacob under Rule 9 of the IPS Cadre Rules. Paras 6 and 7 of their order dated 21.2.91 which gave the reasons are quoted below:

"6. The select list for promotion to IPS is made based on the number of substantive vacancies for one year in the promotion quota of the cadre. Actual appointment of the Select List officers to the service is made against substantive vacancies in the promotion, normally according to the order in which the names are arranged in the list. Leave vacancy or Shri M.J. Jacob is not a substantive vacancy. Normally, temporary appointment under Rule 9 of the Cadre rules is resorted to a prelude to formal appointment to the service.

7. Further, Rule 9 of the IPS cadre Rules empowers the State Govt. to give temporary appointment to non-cadre officers to cadre posts where they are satisfied that no suitable cadre officer is available for filling thevacancy and that the vacancy is not likely to last for more than three months. Against 60 senior duty posts and 15 deputation reserve under the State Govt. (excluding Central deputation quota) in the State Cadre of IPS, there are at present 79 officers in position. As such, there is no dearth of cadre officers to man the cadre post and the question of appointment of any non-cadre officer to a cadre post does not arise. The inclusion of the officer's name in the Select List does not entitle him for appointment to the service against vacancies which are to be filled up from the subsequent select list."

We are not at all convinced by the reasons given by the respondents for rejecting the applicant's claim for even a Rule 9 appointment to a cadre post. It is admitted that the applicant is the seniormost person in the select list of 1990 waiting to be promoted to a cadre post or to the IPS. Shri Baburaj has already been accommodated in a cadre post under Rule 9 as a prelude to his regular promotion to the IPS. The contention of the respondents that the applicant cannot be appointed in the leave vacancy of Shri Jacob because it is not a substantive vacancy is to be dismissed summarily because nobody is claiming promotion to the IPS against leave vacancy. The applicant has sought a temporary promotion under Rule 9 of the Cadre Rules. This Rule reads as follows:

"9. Temporary appointment of non-cadre officer to cadre post (1) A Cadre post in State shall not be filled by a person who is not a cadre officer except in the following cases; namely:-

(a) if there is no suitable cadre officer available for filling the vacancy: Provided that when a suitable cadre officer becomes available, the person who is not a cadre officer, shall be replaced by the cadre officer ; Provided further that if it is proposed to continue the person who is not a cadre officer beyond a period of 3 months, the State Govt. shall obtain the prior approval of the Central Govt. for such continuance;

(b) if the vacancy is not likely to last for more than three months:

Provided that if the vacancy is likely to exceed a period of 3 months, the State Govt. shall obtain the prior approval of the Central Govt. for continuing the person who is not a cadre officer, beyond the period of three months."

(2) A cadre post shall not be filled by a person who is not a cadre officer except in accordance with the following principles namely:

(a) if there is a Select List in force, the appointment or appointments shall be made in the order of the names of the officers in the Select List;

(b) if it is proposed to depart from the order of names appearing in the Select, the State Govt. shall forthwith make a proposal to that effect to the Central Government together with reasons therefor and the appointment shall be made only with the prior approval of the Central Government.

(c) if a Select list is not in force and it is proposed to appoint a non Select List Officer, the State Govt. shall forthwith make a proposal to that effect to the Central Govt., together with reasons therefore and the appointment shall be made only with the prior approval of the Central Govt.

(3) 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 Govt. shall report the full facts to the UPSC 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 UPSC give suitable directions to the State Govt. concerned."

A bare reading of the Rule would convince anyone that this provision is meant to fill up cadre posts which are vacant for temporary periods of even less than three months. Nowhere has it been mentioned that this provision will be applicable only against substantive vacancies. The condition for appointment of a non-cadre officer is not immediately available and the vacancy is not likely to last for more than three months. The other condition is that the non-cadre officer to be appointed under that Rule should be in the select list for such appointment has ripened. The applicant indicated earlier ^{as} eminently fulfils the conditions

of Rule 9. The respondents themselves have stated that the leave vacancy of Shri Jacob is from 1.1.91 to 30.3.91 i.e. less than three months. The fact that the State Govt. has not so far been able to appoint any Cadre Officer is available to fill the post. In this background we are surprised that the State Govt. has not found it possible to appoint the applicant to Shri Jacob's post under Rule 9 of the Cadre Rule. They have not raised the question of any administrative or suitability problems in regard to the applicant. We also cannot help noticing that whereas in case of Shri Baburaj, another select list officer immediately above the applicant, the State Govt. has appointed him to a Cadre post under Rule 9 of the Cadre Rule in identical circumstances. they are finding it difficult to accommodate the applicant despite the fact that he is retiring on 28.2.1991 and despite the fact that the vacancy has been available to the State Govt. w.e.f. 1.1.1991 and has not yet been filled up. The circumstances evidence a crass case of discrimination and lack of fairness to the applicant in so far as his appointment under Rule 9 of the Cadre Rules is concerned. We are conscious of the fact that the applicant is a State Police Officer and that posting is an administrative matter resting with the State Govt. but since in accordance with para 6 of the State Govt.'s own order dated 21.2.91 "temporary appointment under Rule 9 of the Cadre Rules is resorted to as a prelude to formal appointment to the service." The case falls squarely within our jurisdiction being intimately related to the process and 'prelude' to an All India Service. Considering that a *prima facie* case of discrimination and less than fair treatment is involved in the instant case and considering also that the applicant is retiring on 28.2.91, we are constrained to allow the M.P. in the interest of justice and equity with the direction to the State Govt. of Kerala as respondent No. 2, to appoint the applicant who is already working as a Supdt. of Police to the leave vacancy of Shri Jacob forthwith and before he retires on 28.2.1991.

Copy of this order be delivered to the learned counsel for the parties by hand. Learned counsel for the State Govt. is directed to communicate the substance and operative portion of this order post haste to the concerned authorities of the State Govt. so that the implementation of this order is not delayed beyond the date of applicant's retirement. The learned counsel for the respondents is directed to file counter affidavit within four weeks with a copy to the other side who may file rejoinder within two days. List for further directions on 20.3.91.

Tribunal ✓

42. The /..... passed the order on compelling circumstances after hearing the parties and considering all the aspects only because the delaying tactics adopted by the State Govt. to cause prejudice to the applicant resulting in miscarriage of justice. ~~xx~~ Though it was passed as an interim measure due to non-cooperation of the second respondent to furnish full details and papers connected with the steps taken by the Tribunal State Govt. pertaining to the Trienueal Review, the /expressed the views on the discriminatory treatment and unfairness shown by the State Govt. to the applicant, presumably with some oblique motive.

43. Though this order reached the Home Secretary in time, he was reluctant to implement the direction. This is clear from the facts stated in a further M.P. 338/91 filed for stay of the proceedings that with a view to removing the name of the applicant from the Select List, and to send him out under the guise of an enquiry, a chargesheet in respect of some default alleged to have committed by him on an earlier occasion was served on him on 28.2.91, the last date of his retirement from State Tribunal's service. However, the order was implemented and the applicant at present is continuing in the vacancy on a provisional basis.

44. The State Govt. did not furnish the full details of the proposal of trienial review, further details of the

follow up action taken by them in this behalf, the minutes of the meeting etc. for our perusal in spite of about a dozen postings and in spite of repeated directions after the interim order referred to above. Ultimately, on 21.1.92 in the course of the arguments, the files and necessary details were produced for our perusal.

45. From a perusal of the records of this case, it is clear that the State Govt. initiated steps for trienueal review well within time but the proposal for the same was delayed upto the last date of the retirement of the applicant viz. 28.2.91 presumably with ulterior motive as alleged by the applicant. However, the fact remains that there is no satisfactory or acceptable explanation from the second respondent for this cuplable negligence and inordinate delay in sending the proposal. This delay when examined under the circumstances narrated above, the applicant's apprehension that the second respondent is purposefully delaying the steps for holding the trienueal review with a view to denying the chance of the applicant to get a posting in the IPS cadre, is well founded.

46. The proceedings and the various orders passed by this Tribunal in this case would establish beyond doubt that there is absolute non-cooperation and inexcusable delay on the part of the State Govt. represented by the Home Secretary in taking timely steps for filling up the vacancies and identifying them in accordance with law, as

indicated above. This negligence and delay would defeat justice. If the applicant was allowed to retire on 28.2.91, there would have been miscarriage of justice. The Tribunal's attempt is only to prevent miscarriage of justice in this case. Thus, this is a clear case to illustrate the principle "delay defeats justice."

47. Accordingly, having regard to the facts and circumstances, I am of the view that interest of justice demands to allow this application granting relief to the applicant by issuing appropriate directions.


(N. DHARMADAN)
JUDICIAL MEMBER

19.3.91

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ORDER OF THE BENCH

For the reasons mentioned in our judgements, we dispose of this application with the following declaration/directions:-

(a) We declare that the notification No.11052/3/91-AIS(II) dated 27th June 1991 issued by the Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training) amending the Indian Police Service (Fixation of Cadre Strength) Regulations, 1955 by substituting the entries under "Kerala" shall be deemed to have come into force with effect from 12th February, 1991.



..contd.

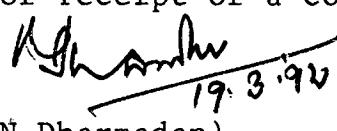
(b) We direct--

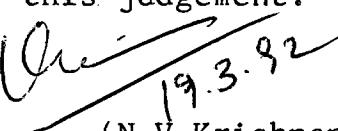
(i) that the first and the second respondents shall consider, in accordance with law, the applicant for appointment to the Indian Police Service from 12.2.91 against one of the two additional senior duty posts in the Indian Police Service Cadre of the State of Kerala which have become available from that date in the promotion quota as a result of the aforesaid notification dated 27.6.91;

(ii) that if the applicant is appointed to the Indian Police Service, the service rendered by him in a senior duty Indian Police Service Cadre post by virtue of our interim orders shall be deemed to have been rendered by him as a member of the Indian Police Service with effect from the date of his appointment to that Service, and

(iii) that the interim orders we have passed shall continue until a final order is passed by the respondents in pursuance of the aforesaid declaration/ directions and communicated to the applicant. /

These directions should be complied with by the respondents 1 and 2 within a period of one month from the date of receipt of a copy of this judgement.


19.3.92
(N.Dharmadan)
Member (Judicial)


19.3.92
(N.V.Krishnan)
Member (Administrative)