

(A5)

Reserved:

CENTRAL ADMINISTRATIVE TRIBUNAL, CIRCLE BENCH LUCKNOW.

...

Registration O.A. No. 101 of 1992 (L)

M.K. Agarwal Applicant.

Versus

Union of India,
and others Respondents.

...

Hon. Mr. Justice U.C. Srivastava, V.C.
Hon'ble Mr. V.K. Seth, Member (A)

(by Hon. Mr. Justice U.C. Srivastava, V.C.)

The applicant was appointed to the U.P.Civil Service (Executive Branch) (hereinafter referred to as P.C.S.) and was placed on probation with effect from 17.5.1961 after he was declared suitable for appointment in the said service by the U.P. Public Service Commission on the result of the competitive examination and interview conducted by them. For the purposes of seniority in P.C.S. he was allotted 1960 as the year of his allotment by the State Government. He was confirmed in the P.C.S. with effect from 17.5.1963 after successful completion of his two years probation. The work and conduct of the applicant in the senior scale of the P.C.S. was also found up to the mark on the basis of which he was confirmed in the senior scale of the P.C.S. w.e.f. 27.2.1978. By virtue of his seniority in the P.C.S., the applicant became eligible for being considered for promotion to the senior scale of P.C.S. in the year 1983 because on the basis of his

(A-6)

- 2 -

excellent service records, he was selected and promoted to the special scale of the P.C.S. from 1.5.1971 in the scale of Rs. 14000-1800 which was later revised to Rs. 4500-5700 for which the criterion for selection was purely merit. The selection committee constituted in 1983-84 under Regulation -3 of the I.A.S.(Appointment by Promotion) Regulation 1955 for making selection of eligible P.C.S. Officers for promotion and appointment to the I.A.S. adjusted the applicant suitably for inclusion in the select list of I.A.S. on the criterion of merit on the basis of his good service records and he was accordingly, included in the said select list. He was appointed to officiate in the senior scale of I.A.S. vide letter dated 26.9.1984, issued by the state Government. The applicant took over charge of the senior scale of the I.A.S. w.e.f. 29.9.1984 and his appointment to the I.A.S. was later notified in the Government of U.P. notice dated 31.10.1984. The Government of India Ministry of Personnel Public Grievances and Pensions, vide their notification dated 17.10.1986 appointed the applicant along with others to the I.A.S. on probation and allocated them to the U.P. cadre of I.A.S. The applicant's lien in the P.C.S. cadre was continuing during the period he was not confirmed in the I.A.S. and as such, he was entitled to notional promotions in the higher scale of the P.C.S. in the pay scale of Rs. 2300-2700 which was revised to Rs. 3100-5700 as well as in the super time scale of the P.C.S. in the pay scale of Rs. 2700-3000 which

was revised to Rs. 5900-6700 from the dates his juniors in the P.C.S. were notionally given promotion in the said higher scale and Super Time scale of the P.C.S. According to the applicant, he has entitled to notional promotion to the higher scale as well as the super time scale of the P.C.S. from the date of notional promotion of his juniors in those scales during the continuance of his lien in the P.C.S. cadre. The applicant submitted his representation dated 5.6.1987 to the respondent no. 2 for considering his case for notional promotion to the higher scale of the P.C.S. and to the supertime scale of the P.C.S. and also praying that so long as a decision is not taken thereon, he should not be confirmed in the I.A.S. It was also prayed that in case he is promoted to the super-time scale of the P.C.S., he is prepared to resign from the I.A.S. When the said requests of the applicant were not accepted, he filed a claim petition No. 5000(F) -III-90 in December, 1990 before the U.P. Public Services Tribunal, Lucknow for directing the respondents to give him notional promotions in the higher scale and supertime scale of the P.C.S. from the date his juniors in the P.C.S. have been given the benefits of these scales, and after filing of this petition, the applicant has given notional promotion in the higher scale of the P.C.S. in the pay scale of Rs. 5100-5700 w.e.f. 12.8.1987 but he has not been

promoted to the super time scale of the P.C.S. in the pay scale of 5900-6700 though he was entitled to the notional promotion to the said higher scale of the P.C.S. from 15.11.1984. In the meantime, orders ~~are~~ issued by the respondent no.1 dated 22.4.1991 confirming the applicant retrospectively 17.10.1987 in the I.A.S. According to the applicant, ~~as~~ the order dated 22.4.1991 issued by the respondent no.1 will deprive the applicant of his right of notional promotion to the super time scale of the P.C.S. if he is not promoted to the said supertime scale by the respondent no.2 before 17.10.1987 and the said retrospective confirmation issued by the respondent no.1 is illegal on the basis of the law laid down by the Central Administrative Tribunal, Chandigarh bench in the case of Sri Pritam Singh vs. Union of India and others, reported in 1990 (4), ~~as~~ page 296, and is liable to be declared invalid so far it relates to the confirmation of the applicant in the I.A.S. from 17.10.1987 instead of from April, 1991, the date of issue of the order. The applicant's prayer in this application is for quashing of the impugned order dated 22.4.1991 so far it relates to his confirmation in the I.A.S. with retrospective effect as the same ~~is~~ null and void.

2. The respondents have opposed the claim of the applicant and have stated that the applicant has challenged the orders issued by the Central Government in their notification dated April, 27, 1991 wherein

(A) 9

- 3 -

three officers including the applicant have been confirmed in the I.A.S. with retrospective effect from 17.10.1987. The basis for challenging the said order is that the confirmation of the applicant in I.A.S. with retrospective effect is detrimental to his interest in the sense that he will stand deprive of the fixation of his pay in the super-time scale of the P.C.S. (Rs. 5800-6700) and consequential heavy reduction in his emoluments and retirement benefits in case of his continuance in the I.A.S.

After being appointed in the I.A.S., the applicant as per allegation

/ was under the impression that on the basis of the recommendations of the Central Pay Commission, the pay scale of the Senior scale of the I.A.S. shall be revised much above the super-time scale of P.C.S. i.e. Rs. 5900-6700 which was introduced from January 1, 1986 but the orders were issued by the Central Government in their notification dated 13.3.1987 announcing the new pay scale of I.A.S. The pay scale of Senior scale of the I.A.S. in the said notification was revised from 1200-2000 to 3200-4700 w.e.f. 1.1.1986. The State Government has also opposed the application and has stated that the applicant is entitled to all benefits that would have accrued to in the State Civil Service till 17.10.1987 when he was confirmed in the I.A.S. and he was given national promotion in the higher scale of P.C.S. Rs. 51200-5700 from 12.3.1987. They have further stated that since the applicant was

promoted to the scale of Rs. 5100-5700 from 12.6.1987, he would become eligible for promotion to the super-time scale of the P.C.S. Rs. 5900-6700 one year after 12.6.1987 as provided in Rule 18(4) of the U.P. Civil Service (Executive Branch) Rules but since he has been confirmed in the I.A.S. from 17.10.1987, he is not eligible for promotion to the scale of Rs. 5900-6700. Contrary to this stand, the State Government allowed the applicant notional promotion to the said scale from 12.8.1987 after changing the date of notional promotion in the scale of Rs. 5100-5700 from 12.8.1987 to 11.8.1986 vide orders dated 29.8.1992. The respondents have further contended that the period of probation of the State Civil Service officers appointed to the I.A.S. by promotion is one year under Rule 3(2) of the I.A.S. probation rules, 1954 and in the case of officiation in a cadre post as a select list officer, any period of such approved officiation is counted towards the period of probation of upto one year, as such, the applicant was eligible for confirmation with effect from the date of his appointment to the I.A.S. @ i.e. 17.10.1986. As per the I.A.S.(pay) Rule, 1954 the member of the service is not entitled for revision of pay in the I.A.S. on the basis of his enhanced pay in the SCs on confirmation in I.A.S., thus, the promotion to the higher scale of pay in the SCs of the applicant by the State Government is not in conformity with the I.A.S. (pay) Rules, 1954.

(All)

- 7 -

The respondents have further concended that the confirmation of the applicant with retrospective effect in the I.A.S does not give him any cause of action and it is perfectly legal and is supported by the Hon'ble Supreme Court's decision in CIVIL APPEAL NO. 1273 of 1979, State of Gujarat Vs. Akhilesh C. Shargava and others, AIR 1987 SC page 2135, in which it has been stated that the confirmation of the applicant with retrospective effect is perfectly legal.

It was further stated that a writ against the Pritam Singh's case has already been filed before the Hon'ble Supreme Court and has been admitted by the Hon. Supreme Court. The respondents have further pointed out that the Union of India has not committed any irregularity by confirming the applicant under the provisions of Rule 3-A of the I.A.S. (Probation) Rules, 1954 with retrospective effect.

According to Rule 3(2) of I.A.S. (probation) Rules 1954 every person recruited to the service in accordance with the I.A.S. (Appointment by promotion) Regulations 1955 is appointed to the service on probation for a period of one year. Rule 3(2) of the said Rules reads as under;

3. PERIOD OF PROBATION

3(1)

(ii)

3(2) every person recruited in the service in accordance with

(i) the Indian Administrative Service (Appointment by promotion) Regulations, 1955 or

(ii) the Indian Administrative Service (Appointment by selection) Regulations, 1956.

(iii) omitted

(A-12)

- 8 -

Shall be appointed to the service on probation for a period of one year.

Provided that in the case of any person recruited to the service in accordance with the Indian Administrative Service (Appointment by promotion) Regulations, 1953 any period for which he has been appointed to a cadre post, may having regard to his performance in such post, be counted towards the period of probation.

Provided further that the Central Government may in exceptional circumstances of any case after consulting the Commission, reduce the period of probation."

The applicant was appointed to the I.A.S. cadre on 17.10.1986 and was placed on probation for one year, which expired only on 17.10.1987. The Central Government did not consult the commission for reducing the period of probation and immediately after expiry of the period of probation did not confirm him, and even before the period of expiry of one year, the notional promotion in the grade of Rs. 5100-5700 w.e.f. 12.8.1987 was given to the applicant in the State Civil Service. According to Rule 18(4) of the U.P. Civil Service (Ex-Branch) Rules for promotion to the highest grade of Rs. 5900-6700 the officer should have completed one year service in the scale of Rs. 5100-5700. Rule 18(4) of the said rules reads as Under;

"18 SPECIAL SCALE, HIGHER AND HIGHEST SCALE.

- (1)
- (2)

(AB)

- 9 -

(3)

(4) Selection to the highest scale shall be made on the recommendation of a selection committee on the basis of seniority subject to the rejection of unfit from amongst such substantively appointed officers of the higher scale, who have completed one year service on the date of selection, the selection committee shall be constituted as under sub-rule(2)."

and by that time no order was issued confirming the applicant in that grade and according to the applicant his junior was earlier considered in that grade and because he was officiating in IAS cadre and that is why, his case was not considered.

3. The pivotal question in this case is not-withstanding the confirmation order, the applicant could be deemed to have been confirmed after expiry of the period of 1 year in IAS cadre as has been done by the respondents who have passed the confirmation order with retrospective effect, ^{also} although the applicant has intimated his option under certain circumstances for not accepting the same, and would like to go back to the PCS cadre in case he has been given notional promotion which matter still remain to be decided.

4. Fundamental Rule-9 (13) defines 'lien' as meaning the title of a Government servant to hold substantively, either immediately or on termination of a period of periods of absence, a permanent post, including a tenure post, to which he has

been appointed substantively.

Fundamental Rule 14(a) provides, that the president shall suspend the lien of a Government servant on a permanent post which he holds substantively, if he is appointed in a substantive capacity;

- (1) to a tenure post or
- (2) omitted.

(3) Provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under this rule."

Rule-14 (a) "Except as provided in clauses (c) and (d) of this rule and Rule 97, a Government servant's lien on a post may in no circumstances be terminated, even with his consent if the result will be to leave him without a lien or a suspended lien upon a permanent post".

These rules also make it clear that the lien will continue so long as he has not been appointed in substantive capacity to other post. In the case of Karibans Nishra Vs. Railway Board, AIR 1989 SC, page 696, in this case it has been observed that a person may have lien on a post and not alien on the place. A person appointed to the post on adhoc basis cannot have any lien on the post. It is only when a person is appointed, on the permanent basis, then he can claim lien to the post to which, be he was appointed. In this case, the applicant was holding the lien in the State Service which had not come to an end. Though it is always open for the Government also to confirm a person with retrospective effect but this right cannot be exercised inviolately.

in / every case . In the case of Pritam Singh (supra) it was observed that, " No doubt under the IAS(probation) Rules, 1954 as amended with effect from 3.9.1976 the normal period of probation in the case of a promoted officer is one year which may not ordinarily exceed two years. however, in view of the admitted position, there is no such thing as automatic confirmation in the absence of specific order to that effect on the expiry of normal period of probation. It was open to the respondents to confirm the applicants on the expiry of their probation period, but that not having been done, they were not competent to order confirmation of A.C. Sharma, applicant or for that matter other similarly situated IAS officer with retrospective effect because that would certainly affect their valuable accrued rights apart from defeating the various object of the provisions contained in clauses (4) & (5) of section- 1, Schedule-I (supra). The words underlined by us therein clearly show that in such a situation a probationer is entitled to have his pay in the senior time scale of the IAS recalculated in accordance with the principles laid down in the said section on the basis of the enhanced pay in the State Civil Service as if he had been promoted to the IAS with effect from the date of such enhancement. In this view of the matter, therefore, the applicant shall be entitled to claim protection even in respect of stagnation increments earned by

(A6)

- 12 -

them during the course of their probation as "personal pay." In the Akhilesh C. Bhargava's case (supra) the administrative instructions were issued by the Ministry of Home Affairs, Government of India on 16.3.1973 indicating the guidelines to be followed in the matter. The Supreme Court in the case of Dharam Singh Vs. State of Punjab, 1968, 3C. page 1210 for probation, the maximum period of three years have been prescribed. The case of Akhilesh C. Bhargava is altogether distinguishable and has got no applicability to the fact of this case and in the case of an Indian Administrative Officer, no such instructions have been issued as in I.P.S. unless an order of confirmation is not passed, he will not be deemed to have been confirmed and so long as he has not been confirmed, his liaison from the State service or the service from which he has come will not come to an end.

5. Now the question which remains for our consideration is as to whether a retrospective confirmation would have been passed. A retrospective confirmation could be passed when the same is claimed or when a person is passed over, for confirmation or the rules prescribed the same and the same cannot be validly challenged. It cannot be denied that till before confirmation the applicant had a right to go back to the State service though not unilaterally. The applicant had already intimated to the Central Government regarding his intention to go back to the State Service, if no national promotion is given to him for which he laid a claim, and for which the matter was subjudicte.

A-17

- 13 -

His prayer for non-confirmation was standing, and in these circumstances he could not have been confirmed with retrospective effect, as the Government while confirming ~~as~~ an officer giving him extra benefit cannot take away the rights which have accrued to him or deprived him of a right which otherwise were accune to him. in Pritam Singh's case (supra) it was observed that the confirmation of a probationer from retrospective effect would be totally unjust and illegal inasmuch as it would adversely affect the rights already accrued to him by way of stagnation of increments etc. Reliance in this contest has been placed on the Case of Nand Kishore Vs. Lt.

Governor of Delhi and others, 1973(2) SLR, 666
(Delhi High Court) which it has been held that his confirmation had been made with retrospective effect on the post of Post Graduate Teacher with the result that he was deprived of his confirmation in the selection grade of the lower post for which he had become due while he was on probation. It was under these circumstances the retrospective confirmation made despite ^{so} protests of the applicant ~~which is liable to suffer~~ from the vice of legal ~~malafide~~ and is liable to be quashed. In the instant case, the retrospective confirmation would result in a confirmation against the wishes of a person who did not like to accept the same, and who was prepared to back to the state cadre so that he may not suffer monetary loss at present and also post retirement benefits. The retrospective confirmation also

would result to putting an end to the litigation or to end his claim which is still subjudice. Thus, without final adjudication of the applicant's case claim which is pending before a competent Tribunal, the order results in refusal of the relief so claimed and dismissal of the claim ultimately. The retrospective confirmation which may be legally valid in some cases but not in this case and as the same suffers from the vice of legal malice, if not actual and cannot be legally recognised and allowed to stand and is illegal and invalid.

6. In these circumstances the retrospective confirmation of the applicant dated 22.4.1991 deserves to be quashed and it is accordingly quashed, and the consequences will follow, we need not specify the same in this case at this stage. The applicant will be allowed to go back to P.C.S./^{cadre} unless he ~~does not~~ opt for confirmation in I.A.S. cadre. There will be no order as to costs.

L N S

ADMN. MEMBER

L

VICE CHAIRMAN.

Dated: 26 April, 1993.

(n.u.)