

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR.

No.373/93

Date of order: 31-3-98

C.P.Sharma

: Applicant

Vs.

1. Union of India through the Secretary to the Govt, Ministry of Labour, New Delhi, Deptt. of Labour, Govt. of India, New Delhi.
2. Employees' State Insurance Corporation through the Director General, Kotla Road, New Delhi.

...Respondents.

Mr.S.K.Jain - Counsel for applicant

Mr.U.D.Sharma - Counsel for respondents

CORAM:

Hon'ble Mr.O.P.Sharma, Administrative Member

Hon'ble Mr.Patan Prakash, Judicial Member.

PER HON'BLE MR.O.P.SHAJMA, ADMINISTRATIVE MEMBER.

In this application under Sec.19 of the Administrative Tribunals Act, 1985, Shri C.P.Sharma has prayed for a declaration that the action of the respondents in not offering appointment to the applicant on the post of Deputy Regional Director, ESI Corporation against direct recruitment quota w.e.f the date his juniors were appointed on the said post is arbitrary, discriminatory, etc. and violative of Article 16(1) of the Constitution as well as violative of the principles of natural justice. He has sought a direction to the respondents to appoint the applicant on the post of Deputy Regional Director, ESI Corporation, w.e.f. the date his junior Shri H.B.Parmar was promoted vide the order dated 3.11.1991 with all consequential benefits.

2. The case of the applicant is that he was appointed to the post of Assistant Regional Director, ESI Corporation, on the recommendations of the Union Public Service Commission (UPSC) in 1986. He was promoted as Deputy Director (Regional), ESI Corporation vide the order dated 10.8.1989 on ad hoc basis. Thereafter, vide the order dated 5.12.1989 eight persons junior to the applicant were promoted as Deputy Regional Director. By order No.434 of 1990, the applicant was reverted to his lower post of Assistant Regional Director from the post of Deputy Regional Director, without any justification though the applicant's juniors were allowed to continue as Deputy Regional Directors. The applicant has challenged his reversion by filing a separate O.A No.594/90, which is still pending.

3. Further according to the applicant, the post of Deputy Regional Director, ESI Corporation is filled in to the extent of 50% by direct recruitment on the recommendations of the UPSC and 50% by promotion. The UPSC advertised 46 posts of Deputy Regional Director in 1989. The

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applicant applied and was selected for appointment by the UPSC to the post of Deputy Regional Director against direct recruitment quota. His name appears at Sl.No.31 in Annx.A6, which ^{is} the result of the selection by the UPSC. In the said list, the name of Shri H.E.Parmar appears at Sl.No.41. While Shri Parmar was appointed as Deputy Regional Director, ESI Corporation in pay scale Rs.2200-4000 vide the order dated 8.11.1991, the applicant was not given appointment. Other persons junior to the applicant have also been appointed appointed on the post of Deputy Regional Director, ESI Corporation and this fact ^{would} be revealed by the records of the respondents. Disciplinary proceedings were initiated against the applicant vide Memorandum dated 30.11.1990 served on the applicant on 31.12.90 and the proceedings have not been concluded so far. These proceedings had nothing to do with the applicant's selection by the UPSC as the applicant was recruited on the post of Deputy Regional Director from the open market. The initiation of disciplinary proceedings could therefore not have been made a ground for denying him appointment on the post of Deputy Regional Director. There was no condition imposed in the advertisement published by the UPSC that a candidate facing disciplinary proceedings could not be offered appointment on account of the pending proceedings. Aggrieved by the action of the respondents in superseding the applicant by appointing persons junior to him in the selection list Annx.A6, the applicant made ^a representation on 5.12.1991 to respondent No.2 (Annx.A2). This was followed by a reminder dated 26.12.1991 (Annx.A3). No action has been taken by the respondents so far on his representations. The applicant's basic grievance is that persons junior to him in the merit order in Annx.A6 have given appointment whereas the applicant has been left out thereby leading to violation of Article 16(1) of the Constitution. According to him, he should have been informed of the grounds on which the respondents appointed persons less meritorious to the applicant, ignoring his case. He has, therefore, assailed the appointments of his juniors in preference to him as illegal, arbitrary, discriminatory, etc.

4. The respondents in the reply have taken objections to the maintainability of the O.A on the grounds of limitation as well as misjoinder of parties. They have stated that since the ESI Corporation is a statutory Corporation having a distinct legal entity, the Govt of India is not at all concerned with this O.A and has therefore been impleaded unnecessarily. As regards limitation, they have stated that the applicant had made a representation on 5.12.91 (Annx.A2) against his nonpromotion, whereas the O.A has been filed in May 1993. Therefore, it is barred by limitation.

5. As to the merits of the case, they have stated that the

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applicant's promotion to the post of Deputy Regional Director on ad hoc basis and his subsequent reversion on the ground of pendency of disciplinary proceedings against him have nothing to do with the present O.A. The applicant has already filed separate O.A against the said reversion which is pending adjudication by the Tribunal.

6. As to the averments in the present O.A, the respondents have stated that the applicant while applying for the post of Deputy Regional Director to the UPSC did not inform the competent authority within the department and rather concealed this fact from the department, thereby preventing the department from informing the UPSC about the pendency of the disciplinary proceedings against him. All departmental candidates applying to the UPSC for the various post can submit their applications directly but they have^{to} inform the department immediately after sending such applications. The applicant also managed to obtain a no objection certificate dated 14.5.1991, one day before the interview of the applicant was scheduled with the UPSC, from an officer who was neither competent nor authorized to issue such a certificate and when no application for issue of such no objection certificate have been made by the applicant. This was intended to ensure that the fact of issue of the charge sheet to the applicant may not be brought to the notice of the UPSC. If the fact of the pendency of the disciplinary proceedings against the applicant had been brought to the notice of the UPSC, he would not have been called for the selection by the UPSC. The disciplinary proceedings had been initiated against the applicant vide memorandum dated 30.11.1990 which were pending when the recommendations of the UPSC for appointment of the applicant to the post of Deputy Regional Director were received. The appointing authority had withheld the appointment of the applicant pending completion of disciplinary proceedings. Other persons though junior, but not under any cloud had been given appointment. The appointing authority was competent to withhold the appointment of the applicant because merely on account of the recommendations of the UPSC the applicant had not acquired an absolute right to appointment. It is not a case of discrimination because the applicant cannot compare himself with others against whom no disciplinary proceedings were pending. The applicant's representation had been duly considered but it had been decided to defer the applicant's appointment pending conclusion of the disciplinary proceedings. In case the applicant is exonerated he will be given appointment to the post of Deputy Regional Director. Therefore, the applicant cannot have any grievance in the matter.

7. In so far as impleading the Union of India is concerned, the Tribunal had already passed an order on 23.12.93 to the effect that

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the name of Union of India may be deleted from the array of respondents as ESI Corporation is a statutory body.

8. As regards limitation, the applicant has stated in the rejoinder to the reply filed by the respondents, that since the applicant has not impugned any particular order but has only sought appointment from the date persons junior to him have been appointed vide the order dated 8.11.91 (Annx.A1), there is no question of limitation being reckoned with reference to the date of order Annx.A1 or the date of his making the representation to the respondents against his non-appointment to the post of Deputy Regional Director.

9. With regard to the question of limitation, we may state that the O.A was admitted as far back as on 14.7.93 and it has been pending adjudication since then. In these circumstances and in the interest of justice, we are inclined to the view that the O.A should be disposed of on merits. We accordingly proceed to consider the O.A on merits.

9. During his oral arguments, the learned counsel for the applicant drew our attention to Regulation 9 of the ESI Corporation (Recruitment) Regulations 1965, which relates to recruitment on posts corresponding to Class I & II posts under the Central Govt. This Regulation reads as under:

"9. The Director General shall make the appointment as recommended by the Commission, unless he is of the opinion that the recommendation of the Commission should not be accepted, in which case he shall bring the matter to the notice of the Standing Committee, and if the Standing Committee also agrees with the Director General, the matter shall be submitted to the Central Govt for a final decision."

According to him, the Director General is bound to make appointment on the basis of recommendations of the UPSC, but ^{if} he is of the opinion that the recommendation of the UPSC shall not be accepted, in that case he shall have to bring the matter to the notice of the Standing Committee and if the Standing Committee agrees with the Director General the matter shall be referred to the Central Govt for a final decision. According to him, the matter of denial of promotion to the applicant on the basis of the recommendations of the UPSC was placed before the Standing Committee some time in 1996 as seen from the Agenda papers placed before the Tribunal by the respondents for its perusal but the Standing Committee did not approve of the recommendations of the Director General for not offering appointment to the applicant on the post of Deputy Regional Director against the direct recruitment quota. The learned counsel for the applicant also cited before us the following judgments in support of his case which according to him suggest that appointment cannot be denied to a person

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on the ground on which it has been denied to the applicant:

- i) Dr.M.V.Hair Vs. Union of India & Ors, 1993(1) SLE 708, in which the Hon'ble Supreme Court held that for the purpose of appointment to a post, suitability and eligibility is to be seen with reference to the last date of receiving the applications. In the applicant's case no disciplinary cases were pending against him on the date on which the UPSC conducted the selection and therefore the pendency of the disciplinary proceedings could not be held as a ground to deny the appointment to the applicant on the basis of selection by the UPSC.
- ii) Dr.Hari Dev Goyal Vs. Union of India & Anr, (1987) 4 ATC 678 in which the Principal Bench of the Tribunal held that the question of any vigilance clearance could arise only in a case of a departmental promotion and not when a person is selected through the open competition by way of direct recruitment. In the instant case according to the learned counsel for the applicant, the appointment to the post of Deputy Regional Director was to be by way of direct recruitment through the open competition and therefore any pendency of disciplinary proceedings against him could not stand in the way of his appointment on the basis of direct recruitment.
- iii) Girish Bhardwaj Vs. Union of India & Ors, (1990) 13 ATC 178, in which the Principal Bench of the Tribunal held that mere involvement of a person in a criminal case cannot be a ground for denial of appointment to him. In this case, the denial of appointment was to a candidate who had been selected for appointment as Sub Inspector in the CBI. The learned counsel for the applicant argued that when pendency of a criminal case could not lead to denial of appointment on recruitment, mere pendency of departmental proceedings could not be a ground for denying appointment to him on his being selected for appointment by the UPSC.

The learned counsel for the respondents argued that the disciplinary proceedings had been initiated against the applicant by issuing a charge sheet dated 30.11.90 whereas the recommendations of the UPSC for appointment of the applicant and others were received subsequently as a result of which order Annx.A1 dated 8.11.91 was issued appointing certain others to the post of Deputy Regional Director. The Corporation could certainly take note of action/development subsequent to the selection of the applicant by the UPSC, for deciding whether the applicant should be granted appointment to the post of Deputy Regional Director since by the time of the recommendations of

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the UPSC were received the applicant had already given a charge sheet. He could not be granted appointment on the post of Deputy Regional Director as long as the charge sheet against him were pending. In this connection he cited the judgment of the Hon'ble Supreme Court in Dr.H. Mukherjee Vs. Union of India & Ors, 1994 SCC (L&S) 454, wherein even after the appellant's case was recommended by the UPSC for appointment the ACC did not approve his appointment after recording reasons. The Hon'ble Supreme Court held in this case that events subsequent to the UPSC selection could be taken into consideration before appointment. Therefore, in view of the ratio of this judgment, he argued, the respondents were justified in not granting appointment to the applicant on the post of Deputy Regional Director on the ground that he was facing disciplinary proceedings.

10. We have heard the learned counsel for the parties and have perused the material on record, including the judgments cited before us.

11. The applicant has not denied that he had directly applied to the UPSC for recruitment to the post of Deputy Regional Director, without informing the department. That has been considered by the respondents as a lapse or irregularity on the part of the applicant. Had the applicant informed the respondents about his applying for direct recruitment on the post of Deputy Regional Director by the UPSC, they could have informed the UPSC about the pendency of the disciplinary proceedings against him. We need not go into the controversy whether the applicant should have informed the respondents after applying to the UPSC for recruitment to the post of Deputy Regional Director. Earlier by an order dated 7.11.97 we had called for certain information from the respondents having a bearing on the question whether the applicant was supposed to inform the respondents about his having applied for the recruitment through the UPSC. On a further consideration of the matter, we are of the view that this issue is not quite relevant for deciding the O.A. In any case, a copy of a letter dated 29.5.91 issued by the ESI Corporation, New Delhi, shows that a certificate regarding experience of the applicant had been furnished by the ESI Corporation to the UPSC. In this letter, it has been stated that a disciplinary case is pending against the applicant. Thus, in any case, the respondents had informed the UPSC about pendency of the disciplinary case against the applicant presumably well before the UPSC made its recommendation regarding appointment of the applicant on the post of Deputy Regional Director.

12. The limited question now is whether in view of the pendency of the disciplinary proceedings against the applicant, the respondents could have denied appointment to the applicant on the post of Deputy Regional

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Director, when they have proceeded to appoint persons junior to the applicant in the merit list at Annx.A4. The learned counsel for the applicant has placed heavy reliance on Regulation 9 of the Recruitment Regulations of 1965, reproduced above. According to him, if there was no approval by the Standing Committee of the decision or the recommendation of the Director General not to appoint the applicant, appointment to the applicant could not be denied. We are of the view that the Director General did place the matter before the Standing Committee as seen from the Agenda for the 134th meeting of the Standing Committee held on or which was to be held on 6.3.96. Both the parties agreed that the recommendations of the Standing Committee are not available. The learned counsel for the respondents stated that this particular item, denying appointment to the applicant, could not be reached. In any case, there is no document available to show that the recommendation of the Director General was rejected by the Standing Committee, either. Atmost it can be said that the matter may probably still be pending before the Standing Committee but all the facts relating to this matter has not been placed before us by either party. We cannot also say that the Director General's recommendations have been disapproved of by the Standing Committee.

13. The Hon'ble Supreme Court decision in Dr.M.V.Nair's case is on altogether different facts. The conditions regarding suitability and eligibility referred to therein are of entirely different character. These relate to educational qualifications, experience, etc. It is in the context of these qualifications that the Hon'ble Supreme Court held these should have been possessed by the candidates as on the last date of receiving the applications. Pendency of disciplinary proceedings is a different matter altogether and does not fall in the same category as conditions relating to suitability and eligibility such as educational qualifications, experience, etc. Therefore, this judgment will have no applicability to the present case.

14. We have carefully considered the two judgments of the Tribunal cited before us. Question is however to what extent these would be applicable in view of the judgment of the Hon'ble Supreme Court in the case of Dr.H.Mukherjee relied upon by the learned counsel for the respondents. This judgment of the Hon'ble Supreme Court is by three Judges Bench and was delivered on 28.9.93. In this judgment the facts were that one Shri S.N.Bhargava was selected by the UPSC for appointment as Chief Controller of Explosives on 10.6.87 and recommendation for his appointment was made on 8.6.87. When the matter of his appointment was pending before the Appointment Committee of the Cabinet ACC, a CBI enquiry was commenced against him in September 1987, in regard to some matter of 1985. The enquiry ended in

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his exoneration in Dec.87. The AOC again took up the matter on the basis of the recommendations of the UPSC. There were adverse remarks in the ACR of Shri Bhargava for the year 1987. These adverse remarks were communicated in May 1988 and Shri Bhargava represented against these in June 1988. The adverse remarks were partly expunged by order dated 4.10.88. The AOC decided on 7th Dec.1988 not to appoint him. The Tribunal directed that events subsequent to selection by the UPSC should not be taken into consideration by the AOC while adjudging his suitability. The Hon'ble Supreme Court held that subsequent events could be taken into account before approving appointment and the AOC could disapprove of the recommendation of the UPSC for valid reason to be recorded in the file. The Hon'ble Supreme Court further held that such decision can be assailed on the limited ground of it is being thoroughly arbitrary, malafide or capricious. This is what the Hon'ble Supreme Court observed in para 8 of its order, while referring to Article 323 of the Constitution.

"... There is nothing in that Article or in the rules to suggest that the government cannot take into consideration the developments subsequent to the selection made by the UPSC. Such a view would not be in public interest and may lead to serious complications if the government is enjoined to make the appointment notwithstanding certain serious matters having come to its notice, subsequent to the recommendations made by the Commission..."

15. In the instant case disciplinary proceedings had been initiated against the applicant before appointments on the basis of the recommendations of the UPSC were made in respect of persons junior to the applicant. The Director General had taken the view that appointment could not be given to the applicant since disciplinary proceedings were pending against him. We see no force in the arguments that when appointment of a departmental candidate is to be made to a higher post on the basis of direct recruitment through UPSC, the pendency of departmental proceedings cannot be taken into account for denying him the appointment. As far as the UPSC is concerned, it had to make selection on the basis of qualifications and the suitability of the person as judged in the written examination and the interview. The appointment of the candidate selected by the UPSC is however a different matter. The employer is entitled to judge whether in view of the pendency of the disciplinary proceedings the person concerned, though selected for appointment should actually be given appointment as long as disciplinary proceedings are pending against him. We cannot fail to take note of the observations of the Hon'ble Supreme Court in Dr.H.Mukherjee case that ignoring subsequent developments after

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selection by UPSC, may lead to serious complication if the government is enjoined to make the appointment notwithstanding certain serious matters having come to its notice. Needless to add, mere selection for appointment does not confer any right on the candidate to be appointed to the post on which he has been selected. Nonappointment of the applicant cannot be said to be arbitrary, mala fide, or capricious, because others who have been given appointments were not facing disciplinary proceedings as the applicant was. Pendency of disciplinary matters, in our view, is a matter serious enough to justify denial of appointment to a person selected for appointment by the recruiting agency (UPSC) in this case), in view of the ratio of the judgment in Dr.H.Mukherjee's case.

16. In these circumstances, we find no merits in this O.A. It is dismissed. No order as to costs.



(Ratan Prakash)
Judicial Member.



(O.P.Sharma)
Administrative Member.