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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

JAIPUR BENCH

JAIPUR

Date of Decision: 23.12.1994.

OA No.333/94

D.D.SOOD

...

Applicant

V e r s u s

UNION OF INDIA AND ORS. ...

Respondents

Mr.R.N.Mathur, Counsel for the applicant.

Mr.Manish Bhandari) Counsel for the respondents.
Mr.U.D.Sharma)

...

CORAM :

HON'BLE MR.JUSTICE D.L.MEHTA, VICE CHAIRMAN

HON'BLE MS.USHA SEN, ADMINISTRATIVE MEMBER

...

PER HON'BLE MR.JUSTICE D.L.MEHTA :

Shri D.D.Sood submitted the petition and prayed that (1) the respondent State may be directed to consider the name of the applicant for appointment and appoint the applicant as a member of the Board of Revenue (2) the respondents may be directed to assign the year 1979 as the year of allotment to the applicant in the Indian Administrative Service (IAS). As a preliminary issue the question of jurisdiction relating to relief no. 1 was considered. This Bench came to the conclusion that we have no

jurisdiction as far as prayer no. 1 regarding consideration of appointment of the applicant as a member of the Board of Revenue is concerned. Now, there remains only one prayer i.e. the respondents may be directed to assign the year 1979 as the year of allotment to the applicant in the IAS.

2. The brief facts of the case are that the Select List of 1988 contains the name of the applicant and some other persons. Applicant was appointed on the cadre post of Registrar vide order at Annexure A-4 dated 8.12.1988. The Notification under Regulation 9 of the IAS (Appointment by Promotion) Regulation 1955 was issued in relation to the first twelve persons on 29.12.1988 or earlier but the Notification in respect of the applicant was issued on 11.5.1989. However, admittedly, applicant continued to hold the cadre post of IAS throughout from 8.12.1988 onwards. The grievance of the applicant is that he should be treated as a person holding the IAS cadre post from the year 1988 and he should be allotted the year 1979 under the seniority rules.

3. The case of the applicant is that under the Indian Administrative Cadre Rules, 1954 (hereinafter to be referred as 'the Rules of 1954') under Rule 9 there is a mandate that a cadre post shall not be filled by a person who is not a cadre

officer except in the following cases :

- (a) if no suitable cadre officer is available for filling the vacancy ;
- (b) if vacancy is not likely to last for more than three months.

Further a cadre post shall not be filled by a person who is not a cadre officer except in accordance with the following principles :-

- (a) if there is a select list in force appointments shall be made in the order of the names of officers in the Select List ;
- (b) if it is proposed to depart from the order of names appearing in the Select List, 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 Government shall forthwith make a proposal to that effect to the Central Government together with reason therefor and the appointment shall be made only with the prior approval of the Central Government.

The contention of the applicant that his name finds place in the select list is an admitted position and for this very reason only after four months his name has been notified under Rule 9 and he has been placed in the IAS cadre. The submission of the learned counsel for the applicant is that for all purposes it should be presumed that the post was vacant and for this very reason the applicant has been posted after appointment under Rule 9 on a IAS cadre post of Registrar, Revenue Board.

4. The respondents have come with a case that at the relevant time there was no vacancy and the vacancy accrued in April 1989. As such, the applicant's name was notified on 14.5.1989. They admit this position that applicant was posted under Rule 9 on a cadre post of Registrar on 8.12.1988. However, they could not explain why the applicant was posted on a cadre post when there was no vacancy in the cadre. Shri Kherwal who was present with the record submitted that the posting is taken very lightly and cadre officers are placed on ex-cadre post and ^anon-cadre officer is some times posted on cadre posts. This submission of Shri Kherwal is not available on the record submitted or even in the reply filed. However, if this practice is there, it is against the rules and on the cadre posts only the cadre officers should be posted and the services of non-cadre officers can be taken on ex-cadre posts. Mr. Mathur wants to draw the inference that the applicant was rightly appointed and posted and the Government has failed to rebut the presumption which is available in his file that there was a vacancy and the applicant has rightly been placed on the cadre post. Mr. U.D. Sharma appearing on behalf of the respondents Union of India submitted that he is not in a position to make any statement about the State Government's action but he submits that the Central Government has not accorded the sanction after three

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months and the applicant continued to hold the post even after three months so the continuance of holding the post under Rule 9 is irregular or illegal and the applicant cannot derive benefits on account of the mistakes committed by the State Government.

5. Mr. Mathur has also referred the Indian Administrative Service (Regulation of Seniority) Rules, 1987 and referred Rule 3 Clause (4) which reads as under :-

"Notwithstanding anything contained in clause (ii) of sub-rule (3), if a promotee officer officiated continuously in a senior post in accordance with the provisions of Rule 9 of the Cadre Rules, he may be assigned the year of allotment of the junior most direct recruit officer who was appointed to officiate in a senior post from a date earlier to the date of commencement of such officiation of the promotee officer, subject to the following conditions....."

Mr. Mathur submits that under this rule the officer gets the benefit of assignment of year of allotment from the date of commencement of such officiation of the promotee officer on the cadre post. He submits that admittedly the applicant has been posted on 8.12.1988 on a cadre post and he performed his duties throughout on the cadre post till the notification under rule 9 was issued by the Central Government placing him in the IAS cadre w.e.f. 11.5.1989.

6. Mr.Sharma, learned counsel for the respondents Union of India invited our attention to the fact that the book published as All India Services Manual by Shri A.K.Kulshrestha in 1992 does not give the correct picture of the law as clause 4 has been deleted on 3.2.1989 and sub-rule 3 has been substituted. He submits that the provisions giving the benefit of officiation in a senior post of the IAS cadre cannot be considered now for the purpose of assignment of year of allotment.

7. Mr.Mathur in reply to the submissions made by the counsel for the Union of India submitted that under the provisions of All India Services Act 1951 Sec.3 (1-A) the power to make rules conferred by that section shall include the power to give retrospective effect from a date not earlier than the date of commencement of this Act, but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable. He submits that deletion of the rule on 3.2.1989 prejudicially affects the interest of the applicant as the applicant had acquired the right of getting a year of allotment under the rules as ^{they} ~~it~~ existed on 8.12.1988, the date on which he was posted on the cadre post of IAS.

8. Preliminary Objections have also been raised by Mr.U.D.Sharma, the counsel for the Union

of India that the petition is not maintainable on the following grounds :-

(i) That the applicant has claimed two reliefs and they are independent of each other. As such, the petition is not maintainable.

(ii) The second submission of the respondents is that the application is time barred as the applicant was assigned the year of allotment in 1989 and the petition has been filed in 1994 i.e. after more than four years and nine months.

As far as the first preliminary objection is concerned, we are of the view that it is devoid of any force as the applicant cannot claim the relief no. 1 prayed for in the petition on account of the decision of this Tribunal that 'the Tribunal has no jurisdiction as far as prayer no. 1 is concerned'. Thus, after the order of the Tribunal, we can only entertain the petition in relation to prayer no. 2 and we cannot go through prayer no. 1. Now, there remains only one prayer i.e. prayer no. 2. Thus, this is not a case of multiple reliefs. We will take the objection regarding the limitation now. Mr. Sharma appearing on behalf of the respondents submitted that the cause of action accrued to the applicant in 1989 i.e. from the date of notification of the year of allotment

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and the petition has been filed after a delay of four years and nine months. In the case of S. Shanmugasundaram V. Union of India and Others reported in 1991(4)SLR 187, the Madras Bench of the Tribunal held as under :-

"Appointment to Indian Forest Service by promotion-Assignment of year of allotment-Officiation in a senior post before inclusion of name in the Select list - Officiation in a senior post after the inclusion of name in the Select List alone will count for the purpose of assignment of the year of allotment. Application filed before Administrative Tribunal after 12 years from the date of cause of action-No relief can be granted due to delay and laches."

In the said case by an order dated 27.4.1977 the Union of India passed an order assigning the year of allotment to the applicant as 1968 which was challenged before the Tribunal in a petition which was filed in 1989 and which was registered as OA No. 901 of 1989. This case has a bearing on the points raised by Mr. Sharma though, the case may not be of an identical nature, firstly, because of the cause of action which is said to have accrued in the case of the Madras Bench in 1977 when the Tribunal was not in existence, and secondly, the distinction is that the petition was filed in 1989 i.e. after a period of about 12 years.

9. Mr.Mathur appearing on behalf of the applicant cited before us the case of Shri Ram Nath Chadha V. Union of India reported in 1988(2)(CAT)SLJ 273. The Principal Bench of the Tribunal considered the provisions of the limitation. In that case the applicant was discharged in 1959 and he was reappointed in 1962 and the period of break was ordered to be treated as break in 1979. The Tribunal was satisfied that the break should be condoned and considered that the order of 1959 merged into the order of 1979, so could not be barred by limitation. It was further held that in a case of discrimination under Articles 14 and 16 no limitation was attracted.

10. Mr.Mathur also cited before us the case of this Bench reported in 1988(1)(CAT) 337. This Bench has only suggested that the provisions relating to limitation should not be allowed to be invoked when the Tribunal is satisfied about the genuineness of the case, but is constrained by sec.21. Mr.Mathur again cited the case of State of Madhya Pradesh Vs. Bani Singh and Anr. reported in 1990(1)LLN 780. The Hon'ble Supreme Court has taken the view as under :-

"(8)..... The Tribunal considered this question in detail and held that since the representation for the year 1980, was pending till 1986 and there is an allegation that the respondent had been making representation to the Government in this regard and in fact one such representation was accepted and it is on that basis in

spite of the fact that the facts and situations remained the same in 1982 the respondent was selected for selection grade with effect from 4th March 1982. In those circumstances the Tribunal said that they were not willing to dismiss the application on ground of the laches and it has to be decided on merits. In these circumstances we are also unable to interfere with the order of the Tribunal."

Mr. Mathur has cited before us the case of New Bombay Bench, CAT reported in 1988(3)SLJ 501 which is not at all applicable to the facts and circumstances of the present case.

11. To appreciate the submissions made by the parties now, it is necessary for us to consider the question on facts. Applicant in para 4 has submitted that the applicant earlier submitted a representation for change in his year of allotment but the same was rejected in the month of June 1993. He again submitted representation explaining the entire legal position but to no avail. In para no. 8 again the applicant has mentioned that he is continuously working in IAS from the date he was given promotion on the aforesaid post i.e. from 8.12.1988. He further submitted that in the light of the judgment of the Hon'ble Supreme Court his case for allotment of year should be revived and he should be allotted the year 1979. The applicant has taken the same ground in ground (D) of para 5. In reply to the submissions made by the

applicant respondent : State of Rajasthan submitted that the applicant has rightly been given the weightage of nine years and correctly assigned 1980 as the year of allotment. In this very paragraph it was also submitted that the representation and the application of the applicant were forwarded by the department of Personnel to the Revenue Department for necessary action. However, it was submitted that the applicant never submitted any representation against his year of allotment. It will not be out of place to mention here that the respondents Union of India has also come out with a case that no representation was received by them. The counsel for the applicant submitted that applicant is not having the copy of the representation. He submitted the representation to the Secretary, Department of Personnel, Rajasthan, Mr. Sriyastava, and a copy thereof was also handed-over to Shri Hari Singh, Desk Officer in the Department of Personnel, Government of India. The fact that the copy was handed-over to Shri Hari Singh, Desk Officer has been mentioned in the rejoinder but this fact has not been mentioned in the OA. Ofcourse, Shri Hari Singh has not filed any counter and it needs examination whether any representation was filed earlier within time and it remained pending with the Government. This fact which he has brought-out is not borne-out from the OA. As such, the respondents could not file the reply. We are of the view that the cause of action

accrued in 1989 when the year of allotment was assigned. In 1980 some persons might have been appointed as we find from the civil list and they are not parties before us.

12. The only consideration is that the applicant is retiring in December, 1994 and if for the purpose of salary only any benefit is given to him it is not likely to adversely affect any of the persons whose names find place in the civil list ^{above} ~~prior to~~ him.

13. As far as the merit of the case is concerned the admitted position is that the applicant is performing regularly the duties of the cadre post of IAS since December 1988 and he was placed in IAS cadre on 11.5.1989. The counsel for the applicant cited before us the Regulation of Seniority Rules, 1987 and invited our attention to Rule 3. On the date of appointment on the IAS cadre post under Rule 9 the un-amended rules were in force and sub rule 4 of rule 3 provided that notwithstanding anything contained in clause (ii) of sub rule (3), if a promotee officer officiated continuously in a senior post in accordance with the provisions of Rule 9 of the Cadre Rules, he may be assigned the year of allotment of the junior most direct recruit officer who was appointed to

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officiate in a senior post from a date earlier to the date of commencement of such officiation of the promotee officer. This sub-rule 4 has been deleted on 3.2.1989 and under the new rules w.e.f. 3.2.1989 the period of officiation cannot be counted. The question is about the applicability of the rules particularly in the light of sec.3(1-A) of the All India Services Act 1951 according to which a rule cannot be amended retrospectively so as to be prejudicial to the employee to whom the rules in existence prior to the amendment were applicable. In the instant case the amendment has come on 3.2.1989 and the applicant was holding the post since 1988 so he may claim the benefits of the provisions of sub rule 1-A of sec. 3 of the Act of 1951. Mr.Sharma appearing on behalf of the respondents cited before us the case of V.Jagannathan V. Union of India and Ors. reported in 1990(7)SLR 469 and he has invited our attention to para 15 and submitted that allotment of the year is the administrative function and the Tribunal should ordinarily not interfere. Even in the case cited by Mr.Sharma directions were given that the matter may be remitted to the 1st respondent for fresh disposal keeping in view the rulings and facts of the case.

14. Mr.Sharma has cited before us the case of Indian Administrative Service (SCS) Association, UP

and Others V. Union of India and Others reported in 1993 (1)SLR 69 in which it has been laid down that no statute shall be construed so as to have retrospective operation unless its language is such as plainly to require such a construction. The Hon'ble Supreme Court was dealing with the allotment rules and the Hon'ble Supreme Court further held that it is a settled law that where the intention of the statutory amendment is clear and expressive, words cannot be interpolated. This very amendment was under consideration and the Hon'ble Supreme Court held that "legislature intended that the First Amendment Rules would operate prospectively from February 3, 1989, the date of their publication in the Gazette of India. Its policy is explicit and unambiguous. Rule 3(3)(ii) intended to remedy the imbalances while at the same time the proviso intended to operate prospectively to avert injustice to the officers recruited/promoted earlier than the officer promoted later to that date."

15. In the case of Nityanand Sinha Vs. The State of Bihar and Others reported in 1981 (3)SLR 135 the Patna High Court considered the question of over utilisation of State Deputation Reserve by the State Government. It is true that the State is violating the law. This needs a check. It does not suit the respondent State of Rajasthan to say that there was

no vacancy in the cadre post when they are appointing a person on the cadre post under Rule 9. The applicant continued to hold the cadre post and it was their duty to prove that the appointment was given by mistake and they wanted to rectify it. They have also not come-out with a case that what was the mistake, how the appointment to the cadre post was made under Rule 9 and the applicant was posted on the cadre post. All these facts go against the State. Ordinarily, the persons who are in the IAS cadre can only be appointed on the cadre posts. There may be a good case on merits, of the applicant and the judgments cited by the counsel for the applicant may be applicable in the instant case. Further, the judgment given by the Hon'ble Supreme Court in the case of M.V. Krishna Rao and Ors. Vs. Union of India and Ors. reported in 1994 (1) JT 492 may also be applicable in the instant case. However, taking into consideration all the facts we will not like to interfere with the question of limitation and the question of adverse effect if any on other persons may arise. The applicant is retiring in December, 1994 so we can only issue a direction that on humanitarian grounds the case of the applicant may be considered according to law and on account of retirement if the future prospects of any other person are ~~is~~ not likely to be affected then the case of the applicant may be considered liberally. With this direction the OA is disposed of with no order as to costs.

Usha Sen
(USHA SEN)
Administrative Member

D.L. Mehta
(D.L. MEHTA)
Vice Chairman