

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR

O.A. No. 468/96
~~Ex. No.~~

199

DATE OF DECISION 7-10-1996

M.S. Pareek

Petitioner

Mr. R.N. Mathur

Advocate for the Petitioner (s)

Versus

State of Rajasthan & Anr.

Respondent

Mr. U.D. Sharma


Advocate for the Respondent (s)

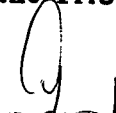
CORAM :

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

The Hon'ble Mr. Ratan Prakash, Judicial Member

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. Whether it needs to be circulated to other Benches of the Tribunal ? ✗


(Ratan Prakash)
Judicial Member


(O.P. Sharma)
Administrative Member

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR. (9)

O.A.No.468/96

Date of order: 7-10-1996

M.S.Pareek : Applicant

Vs.

1. The State of Rajasthan :
through Secretary, Deptt.
of Personnel, Govt. of
Rajasthan, Jaipur.

2. Union of India through
Secretary, Ministry of
Home, Govt. of India

South Block, New Delhi : Respondents

Mr R.N.Mathur : Counsel for applicant

Mr.U.D.Sharma : Counsel for respondent No.1

CORAM:

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

Hon'ble Mr.Ratan Prakash, Judicial Member

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

In this application under Sec.19 of the Administrative Tribunals Act, 1985, Shri M.S.Pareek, has prayed that the order dated 29.8.1996 (Annx.A1) by which, amongst others, the applicant has been transferred from the post of Director, Police Telecommunication, Jaipur to the post of Officer on Special Duty, Department of Home, Jaipur, may be quashed.

2. There is also a prayer for interim relief to the effect that the operation of the order Annx.A1 may be stayed till the final decision in the O.A. The Tribunal vide order dated 2.9.96 had directed issue of notices to the respondents and had listed the matter for hearing on the point of interim direction on 6.9.1996. The Tribunal had further directed that till then i.e. 6.9.1996, the applicant may not be relieved unless the incumbent posted vice the applicant has already been relieved from the deputation post to join his new posting. This

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direction has continued till the date of passing the present order.

3. The case of the applicant is that he is a member of the Indian Police Service (IPS), Rajasthan State cadre, belonging to 1964 batch and is in the Super-time scale. The respondent State Govt, after holding a Screening Committee meeting and on the basis of its recommendations promoted persons junior to the applicant as Additional Director General of Police although there is no post of Additional Director General in the IPS (Fixation of Cadre Strength) Regulations, 1955. The applicant's O.A against the aforesaid act of the respondents, No.513/95 is pending consideration of the Tribunal. Now, the respondent State has posted the applicant to a post known as Officer on Special Duty, Deptt. of Home, Govt. of Rajasthan, though it is not a cadre post. The applicant is governed by the All India Services Act, 1951 or by the rules and regulations framed under the said Act of 1951. Under Sec.3 of the said Act of 1951, service conditions framed by way of rules and regulations cannot be disadvantageous to the members of the service. Thus, a member of an All India Service cannot be put to a disadvantageous position by way of making ^{retrospective} amendments in the rules and regulations after the date such member entered the service. Further, according to the applicant, in the IPS (Cadre) Rules, 1954, rule 2(b) which provides definition of a cadre post states that cadre post means any of the posts specified under item No.1 of each cadre in the Schedule to the IPS (Fixation of Cadre Strength) Regulations 1955. The aforesaid Regulations of 1955 provide different posts in relation to each State. In respect of the State of Rajasthan there exists no post of Officer on Special Duty whereas there are posts of Inspector General of Police and Director General of Police. According to Rule 9 of the IPS (Pay) Rules, 1954, no member of

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the service can be appointed to a post other than a post specified in Schedule III unless the State Government concerned or the Central Government as the case may be, makes a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule. Under Rule 9, as aforesaid, a declaration of equivalence can be made only in relation to a post specified in Schedule III, in which the post of OSD does not figure. Therefore, a declaration of equivalence under Rule 9 can be made only in respect of the posts of Inspector General or Director General which are specified in Schedule III. The applicant cannot be sent on transfer to any post which is not related to the work of the Police Department. The post of OSD, Deptt. of Home, Govt. of Rajasthan, does not pertain to the work relating to Police Department. The applicant has been posted as OSD only in order to show the State Government's displeasure. No work is entrusted to a person who occupies this post. Earlier, there were two incumbents of this post and now the applicant has been posted on the said post. There is no clear policy of appointing a person from the IPS to the said post. The Hon'ble Supreme Court in the case of E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3 has held that if a State Govt. wants to appoint a member of an All India Service to a non-cadre post created by it, it cannot do so unless it makes a declaration of equivalence, as referred to above. Such declaration is not an idle formality. The government must apply its mind to the nature and responsibilities attached to the non-cadre post and then determine its equivalence. The State Govt. has not made any declaration of equivalence with regard to the post of OSD to which the applicant has been appointed. There is no public interest involved in transferring the applicant as OSD.

3. The applicant has therefore, challenged the action of

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the State Govt, in posting him as OSD Home, as illegal and unreasonable being against the scheme of the Rules. Further, this posting is in fact a deputation from the Police Department and no person can be sent on deputation without his consent. The transfer order of the applicant could have been issued by the Governor of the State for the reason that it is who exercises the powers of the Chief Executive of the State as provided under Article 166 (not Sec.166, as stated by the applicant) of the Constitution and that there is no proper authentication of the order of transfer dated 29.8.96.

4. The respondents in the reply have accepted that the post of Officer on Special Duty, Home Department, is not a cadre post. They have added that the post of OSD has been declared as equivalent in status and responsibility to the IPS cadre post of Inspector General of Police. They have denied that the applicant has been posted ~~to the post~~ as OSD in order to put him in a disadvantageous position in his service career. Further according to them, the averment regarding any rule or regulation framed which would have retrospective effect on the service career of the applicant is vague inasmuch as the applicant has not specified which law and regulation has been framed which has a retrospective effect. The correct interpretation of Rule 9 of the Pay Rules is that in case a member of the service is appointed to a post other than a post specified in Schedule III of the Pay Rules, i.e., to an ex-cadre post, a declaration of equivalence is required to be made. There is no requirement that the ex-cadre post should be specified in Schedule III of the Pay Rules. In Schedule III, the post of Inspector General of Police has been mentioned and the post of OSD Home Department to which the applicant has been appointed had been declared as equivalent to that of IGP, vide Governor's sanction order dated 21.9.94, when the post was

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created upto 28.2.95 (Annx.R1). Subsequently vide order dated 8.5.95, sanction of the Governor was accorded to the extension of the said post for a period upto 29.2.96 (Annx.R2). Still later vide order dated 4.9.96, the sanction of the Governor has been accorded to the continuance of the said post from 1.3.96 to 28.2.97 (Annx.R3). The said post was created on a temporary basis and it was required to be continued year to year by issuing sanction orders. The Department of Home mainly deals with matters connected with the police organisation and the work relating to the Police Department. The post of OSD in the Home Department has specifically been created with a view to making an effort for improvement ~~of overall development~~ in the Police Organisation in the light of the various suggestions made by several Commissions/Committees and to cull out the ideas relevant for the State of Rajasthan. A whole time officer of sufficiently senior level who had good knowledge of the working of the Police was required for the purpose. Hence, an officer of the rank of IGP was appointed to the post of OSD Home Department in the Secretariat. Reference has been made by the respondents to a note dated 6.9.94 (Annx.R4) recorded by the Principal Secretary, Home, which shows that the post of OSD has been created after due consideration and with the approval of the Home Minister, the Chief Minister and the Finance Department. Functions of the said post pertain to the work relating to the Police Department. The dictum of the Hon'ble Supreme Court in E.P.Royappa case regarding declaration of equivalence has been meticulously followed by the State Govt. The applicant's transfer to the post of OSD Home Department is in accordance with the provisions of the IPS (Cadre) Rules as well as the Pay Rules. Such posting is not in the nature of deputation from the Police Department. They have denied that the applicant's posting has been made to show the displeasure

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of the State Govt to the applicant nor has this posting been made to discourage him from pursuing his O.A No.513/95 regarding promotion to the post of Additional Director General of Police. The executive power of the Governor is exercised by the Chief Minister under the rules of business as held by the Hon'ble Supreme Court in Samsher Singh Vs. State of Punjab, AIR 1974 SC 2192. The order dated 29.8.96 posting the applicant as OSD Home Department has been issued with the approval of the Chief Minister and the order has been authenticated by the Deputy Secretary, Department of Personnel, Govt. of Rajasthan. This order, is, therefore, in conformity with the provisions of Article 166 of the Constitution.

5. The applicant has also filed a rejoinder to the reply which is also on record.

6. During the arguments, the learned counsel for the applicant drew our attention to the provisions of Rule 4 of the IPS(Cadre) Rules, 1954. According to sub-rule (1) thereof the strength and composition of the IPS cadre for each State as provided under Rule 3 of these rules shall be determined by regulations made by the Central Government in consultation with the State Government concerned. The subsequent provision in sub-rule (1) is not relevant for our purpose. Sub-rule (2) provides that the Central Govt shall at intervals of every 3 years re-examine the strength and composition of the Cadre for each State in consultation with the State Govt concerned and may make such alterations therein as deemed fit. The proviso to this sub-rule provides that nothing in the sub-rule shall be deemed to affect the power of the Central Govt to alter the strength and composition of any cadre at any other time. The second proviso on which particular stress was laid by the learned counsel for the applicant provides that the State Govt concerned may add for a period not exceeding one year and with the approval of the Central Govt, for a further period not

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exceeding two years to a State Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts. He stated that the post of OSD Home had been created initially by order dated 21.9.94 and it had been continued by subsequent orders passed from time to time by the respondent State upto 28.2.97. Thus the post has been continued for more than two years. According to the learned counsel for the applicant, the State Govt, was empowered to create this post only for a period of one year, as per the second proviso referred to by him and since the approval of the Central Govt had not obtained for continuing the post of a period beyond one year, the continuance of the said post beyond the initial period of one year and therefore, the posting of the applicant on the said post by order dated 29.8.96 was illegal. The learned counsel for the applicant then referred to Rule 9 of the IPS(Pay) Rules 1954 of which sub-rule (1) provides that no member of the service shall be appointed to a post other than a post specified in Schedule III of the said Pay Rules, unless the State Govt concerned in respect of posts under its control, or the Central Govt in respect of posts under its control, as the case may be, makes a declaration that the said post is equivalent in status and responsibility to a post specified in Schedule III. He added that no declaration had been made under the said rule declaring the post of OSD Home as equivalent in status and responsibility to that of the Super Time Scale Post held by the applicant. He relied on the judgment of the Hon'ble Supreme Court in E.P.Royappa case according to which such a declaration is a condition precedent before a member of the service can be appointed to a non-cadre post. Although this judgment is with regard to officers of Indian Administrative Service yet in view of the fact that the relevant provisions of the IPS(Pay) Rules are the same as the corresponding provision

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of the Indian Administrative Service, this pronouncement of the Hon'ble Supreme Court would be equally applicable to IPS officers as well. He further stated that in any case, a declaration of equivalence under Rule 9 of the IPS (Pay) Rules cannot be made with retrospective effect. For this argument, he relied upon the judgment of the Lucknow Bench of the Tribunal in Satya Narayan Shukla Vs. State of U.P & Ors, 1996(1) SLJ (CAT) 1. The facts of that case show that the applicant belonging to Indian Administrative Service was transferred to a post carrying a lower scale of pay and the government issued a retrospective order to upgrade the post. The Tribunal held that relevant rule mandates that the declaration of equivalence must be made in advance. In this case while the applicant was posted as OSD Home by order dated 29.8.96, the declaration of equivalence is contained in the order dated 1.9.94 by which the post was also continued for the period from 1.3.96 to 28.2.97. Therefore, according to him, the posting order was invalid. He also relied upon the judgment of the Hon'ble Supreme Court in Govind Prasad Vs. P.G.Prasad & Ors (1994) 1 SCC 437 to urge that an executive order of the Govt cannot be made operative with retrospective effect. He then referred to the judgment of the Principal Bench of the Tribunal in B.D.Nandpal & Anr. Vs. Union of India & Ors, 1995(2)SLJ (CAT) 106 in which one of the questions to be decided was whether transfer on deputation was an appointment within the meaning of Rule 9(1) of the Indian Forest Service (Pay) Rules. This rule 9 is the same as Rule 9 of the IPS(Pay) Rules. The Tribunal held that the expression "appointment" referred to in Rule 9(1) of the Pay Rules cannot be given a restricted meaning and one of the methods of appointment is on deputation basis. According to the learned counsel for the applicant since the applicant has been sent on deputation from his original post in the IPS to a post in the Department of Home, not related to the duties of the applicant

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as a Police Officer, the judgment of the Hon'ble Supreme Court in E.P.Royappa case ^{would} ~~is~~ squarely apply to this case. In accordance with the judgment of the Hon'ble Supreme Court in E.P.Royappa case, the declaration of equivalence has to be on the basis of application of mind to the nature of responsibilities and the functions and duties attached to the non-cadre post to which a cadre officer is appointed. In this case, there has been no application of mind in this behalf and a mechanical order has been passed declaring the post of OSD Home as equivalent to the Super Time Scale post held by the applicant in the IPS Cadre. Further since it has been averred by the respondent State that the appointment of the applicant as OSD Home has been made in the public interest, such public interest must be disclosed if the order of appointment is challenged on the ground that there is no public interest involved in the transfer. In this connection, he relied upon the judgment of the Hon'ble Supreme Court in Ramadhar Pandey Vs. State of UP & Ors (1993) 25 ATC 77, in which in connection with an order of transfer the Hon'ble Supreme Court observed that there was no recital of public interest in the order of transfer and it was not possible to infer from other records what public interest was involved. Therefore the order of transfer was held by the Hon'ble Supreme Court as not supportable. The same, logic according to the learned counsel for the applicant, would apply in the present case too. The learned counsel for the applicant further argued that an order can be supported by the reasons given in it and fresh reasons given subsequently in the shape of affidavit or otherwise cannot be allowed to supplement the reasons, if any, already given while passing the order. In this connection, he relied upon the judgment of the Hon'ble Supreme Court in Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New

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Delhi & Ors, AIR 1978 SC 851. He then argued that the order of transfer has been passed in undue haste. He relied upon the judgment of the Hon'ble Supreme Court in Dr.S.P.Kapoor Vs. State of Himachal Pradesh, SCSE Vol.II 777, to support his argument on this point. (Unfortunately, however, he has not supplied us with a copy of the judgment and the relevant book in which this judgment is said to have been reported is not available with us). For all these reasons and those contained in the O.A of the applicant, the order of transfer/appointment of the applicant to the post of OSD Home should be quashed, he argued.

7. During his arguments, the learned counsel for the respondent State Govt stated that the understanding of the learned counsel for the applicant with regard to the creation of the post of OSD Home was not correct. The said post had not been created under Rule 4 of the IPS (Cadre) Rules, because this post is not by way of addition to the cadre posts specified in the relevant Schedule to the IPS(Fixation of Cadres Strength) Regulations, 1955. Therefore, there is no question of taking the approval of the Central Govt for continuing the post beyond a period of one year. This is in fact an ex-cadre post and that is why the government is required to make a declaration under Rule 9 of the IPS (Pay) Rules. Such declaration of equivalence is required to be made in respect of posts which are not specified in Schedule III to the Pay Rules. This post of OSD Home is not mentioned in Schedule III to the said Pay Rules and hence a declaration of equivalence is required. He added that Annex.E1 dated 21.9.94 by which the post was created for the first time upto 28.2.95, in the rank of IGP, contains a declaration of equivalence under Rule 9 of the IPS(Pay) Rules. Another ex-cadre post of IG,RSBI was kept in abeyance, on creation of this post of OSD Home, in

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order to keep the total number of such posts within the specified limit. By order Annx.F2 dated 8.5.95, which was passed in continuation of the order dated 21.9.94, the post was extended upto 29.2.96. By yet another order Annx.F3 dated 4.9.96, which was in continuation of order dated 8.5.95, the post was continued from 1.3.96 to 28.2.97. In this order Annx. F3 also a declaration of equivalence is incorporated in which it is stated that the post is equivalent in status and responsibility to the IPS (Cadre) Post of IGP. The learned counsel for the respondent State added that the process of extension of the post was started from 23.4.96 as seen from notings in the relevant file which was shown to us during the arguments. The file for procuring sanction of the Finance Department was moved on 31.8.96 and order Annx.F3 was issued on 4.9.96. The applicant's appointment/transfer to this post was made on 29.8.96 by Annx.A1. Thus, in fact the process of extension of the post was started long before the applicant was posted to the said post and it was not that the applicant was first posted and thereafter the file was moved for seeking extension of the post. Thus, it would be seen that it was not after a decision had been taken to appoint/transfer the applicant to this post that it was decided to seek extension for this post or it was decided to create the post. Accordingly it was not even a case of seeking retrospective sanction for continuance of the post after the applicant had been transferred/appointed to the said post. Moreover, according to him, as admitted by the applicant himself there were two persons who had held this post prior to the posting of the applicant to this post. Thus, it cannot be said that the post was created specifically for shunting out the applicant to an insignificant post to put him in a disadvantageous position in his service career or to punish him. Further, according to him,

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Annx.R4, the note recorded by the Principal Secretary Home on 6.4.94 for creation of the post contains adequate justification for the post and this post had been created after full application of mind by the appropriate authorities in the State Govt. With regard to the interpretation of Rule 9 of the IPS(Pay) Rules, the learned counsel for the respondent State drew our attention to the judgment of the Hon'ble Supreme Court in M.Sankaranarayanan, IAS Vs. State of Karnataka & Ors, 1993 SCC (L&S) 122. In this case, the appellant had been transferred by order dated 4.1.91 as Secretary, High Power Committee for development of Hyderabad Karnataka area, Bangalore. One of the grounds on which this order was challenged was noncompliance with the procedural formalities for a valid transfer of the appellant to the said post of Secretary, High Power Committee, inasmuch as there was no declaration under Rule 9(1) of the IAS (Pay) Rules, 1954 to the effect that the said post was equivalent to the post of Chief Secretary and in the absence of such a declaration the transfer of the appellant from the post of Chief Secretary to that of Secretary, High Power Committee, was illegal and void. The Hon'ble Supreme Court held in para 13 of the judgment that there had already been a declaration of equivalence under Rule 9(1) of the IAS(Pay) Rules when the redesignated post of Secretary, High Power Committee was established. The declaration was to the effect that the post was equivalent to the post of Additional Chief Secretary which post was initially an ex-cadre post but was subsequently encadred. The Hon'ble Supreme Court observed that prior to the impugned orders, a decision to declare the post of Secretary, High Power Committee, as equivalent to the post of Chief Secretary of the State had been taken. The Hon'ble Supreme Court held in their judgment that making a formal declaration of equivalence on 5.1.91 did not invalidate the impugned order

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of transfer of the appellant dated 4.1.91. The decision to declare the post of Secretary, High Power Committee as equivalent to that of the Additional Chief Secretary had already been taken on 4.1.91. The formal order in this regard was however, published on 5.1.91. Infraction, if any, in making the publication formally on 5.1.91 was only a technical violation for which no interference was called for. The learned counsel for the respondent State added that in the instant case, the file for extension of the post had been moved in April 96 and the delay if any in making the declaration of equivalence as contained in order Annx.F3 dated 4.9.96 would not invalidate the transfer/appointment of the applicant to the said post a few days earlier, i.e. on 29.8.96. He added that in the bureaucratic system of working delay of a few days of this nature would occur but the bonafides of the State Govt were established from the notings on the file. No serious injury was caused to the applicant by the order of transfer and it could not be said to be an order prejudicial to the applicant.

8. By way of rejoinder to the reply of the learned counsel for the respondent State, the learned counsel for the applicant stated that the construction of various provisions of the statute, rules and regulations should be harmonious. A proper interpretation of second proviso to sub-rule (2) of Rule 4 of the IPS(Cadre) Rules would lead to the conclusion that what the State Govt intended to do was to create the post of OSD Home by way of addition to the cadre of IPS officers of the State of Rajasthan as the post had been continued for nearly 3 years. Hence the approval of the Central Govt was required for continuing the post beyond the period of one year. The nature of the post created is that it is a permanent post and therefore it should have been created under sub-rule (2) of Rule 4 of the aforesaid Cadre Rules. He added that

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M.Sankaranarayanan judgment has no applicability in this case because the facts of that case emerging from the judgment of the Hon'ble Supreme Court are different from those of the present case.

9. We have heard the learned counsel for the parties and have perused the records and the judgments cited before us. The following issues are required to be decided in this case:

- (i) Whether there has been any retrospective amendment of any rule or regulation which may have affected the vested rights of the applicant;
- (ii) Whether the post of OSD Home Department has been created by way of addition to the cadre posts of IPS Officers, as specified in sub-rule (2) of Rule 4 of the IPS(Cadre) Rules, and therefore whether the approval of the Central Govt was necessary for continuing it beyond a period of one year or whether it is in fact an ex-cadre post;
- (iii) If it is an ex-cadre post whether a declaration of equivalence as required under Rule 9 of the IPS (Pay) Rules has been made;
- (iv) Whether the declaration of equivalence, if made, has been made after application of mind;
- (v) Whether the reasons given for creating the post of OSD Home Department are tenable, whether the post relates to the work of the Police Department, whether it is a deputation post and whether any public interest is served by creating the post and posting the applicant to it;
- (vi) Whether the order of transfer of the applicant to the said post can be issued only by the Governor of the State.

10. As regards issue No.(i), the applicant has not specified in the application which rule or regulation has been amended

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which affects the vested rights of the applicant retrospectively. Therefore, this issue need not detain us any further.

11. As regards issue No.(ii), we have carefully gone through the provisions of Rule 4 of the IPS (Cadre) Rules and other related provisions in the Cadre Rules, the Pay Rules and the Fixation of Cadre Strength Rules. There is nothing to show that the post has been created by way of addition to the cadre strength as mentioned in sub-rule (2) of Rule 4 of the Cadre Rules. Maybe the post has been continued for a period about 3 years, but that by itself would not mean that the post has been created by way of addition to the cadre of IPS Officers for the State of Rajasthan. On the other hand, all the actions of the respondent State, including the various orders passed by them in connection with this post suggest that it was intended to be an ex-cadre post. The State Govt could have created the post by way of addition to the cadre and in that case the provisions of sub-rule (2) of Rule 4 of the Cadre Rules including the requirement of obtaining the approval of the Central Govt if the post was to be continued for a period of more than one year would have been required to be fulfilled. If the State Govt intended to create an ex-cadre post, it has to equate it with an existing cadre post and issue necessary declaration of equivalence to protect the interests of the incumbent posted in the said post. The State Govt chose to create an ex-cadre post. When both the options are available to the State Govt, it is not for the Tribunal to lay down how the post should have been created.

12. As regards issue No.(iii), it is seen that the post was created for the first time by order dated 21.9.94 (Annx.R1). At that time, the sanction of the Governor was obtained for creating the post upto 28.2.95 and a declaration of equivalence under Rule 9 of the Pay Rules was also incorporated in the said

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order. The post was continued upto 29.2.96 by order dated 8.5.95 (Annx.R2) but in this order there is no declaration of equivalence incorporated. However, it has been stated in the order Annx.R2 that this order has been passed in continuation of order Annx.R1 and that sanction of the Governor has been obtained for extension of the post upto 29.2.96. Order Annx.R3 dated 4.9.96 states that it is in continuation of the previous order dated 8.5.95. This order also states that the sanction of the Governor has been obtained for extension of the post from 1.3.96 to 28.2.97. A declaration of equivalence under Rule 9 of the Pay Rules has also been incorporated in this order. Obviously a declaration of equivalence has been made by which the post of OSD Home has been equated with the post of IGP, which is a cadre post for IPS Officers in the State of Rajasthan. The applicant was appointed to the post of OSD Home by order dated 29.8.96. Order Annx.R3 by which the post has been continued from 1.3.96 to 28.2.97 in which a declaration of equivalence has been incorporated, was passed on 4.9.96 vide Annx.R3. Question is whether the applicant's posting to the said post was made first and the declaration of equivalence was made subsequently. What we find is that the declaration of equivalence was also incorporated in order Annx.R1 dated 21.9.94 when the post was created for the first time. The second order Annx.R2 dated 8.5.95 extending the term of the post does not incorporate this declaration but then it states that this order is in continuation of the earlier order dated 21.9.94. As already stated above, of course, in the order Annx.R3 dated 4.9.96, the declaration has been incorporated. When a declaration of equivalence was made when the post was created for the first time and the second order passed by the State Govt extending the term of the post states that it is in continuation of the previous order, we are of the view that the declaration of equivalence already incorporated in Annx.R1, the

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first order dated 21.9.94, would be applicable as if it had also been issued while passing the subsequent order Annx.P2 dated 8.5.95. The declaration of equivalence has to be made with regard to the post. Once this post has been declared as equivalent in status and responsibility to that of IGP, which is a cadre post and the terms and conditions of the duties & responsibilities attached to the post have not been changed while posting the applicant who was a third incumbent on the post, we hold that the declaration issued initially while passing order Annx.P1 dated 21.9.94 would continue to be applicable as long as the post exists either on the basis of the original order or on the basis of orders of extension of the post passed subsequently. The declaration of equivalence incorporated in order Annx.P3 dated 4.9.96, shortly after posting the applicant to the said post by order dated 29.8.96, appears to have been made by way of abundant caution. The learned counsel for the respondent State showed us the record which indicates that the file had been moved as far back as April 96 for extending the post. We hold, in the circumstances of the case, that it is in fact not a case in which the posting order was made first and the declaration of equivalence was issued afterwards. A situation similar to the one referred to in the judgment of the Hon'ble Supreme Court in M.Shankaranarayan case has arisen in this case also. Accordingly we hold that declaration of equivalence was not in fact issued retrospectively after the appointment/posting order of the applicant had been issued.

13. As regards issue No.(iv), the Hon'ble Supreme Court held in E.P.Royappa case that determination of equivalence is a condition precedent before a Member of the IAS can be appointed to a non-cadre post. It further held that the declaration of equivalence though imperative is not conclusive in the sense

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that it cannot be questioned. It is open to the member of the service to contend, notwithstanding the declaration of equivalence, that the non-cadre post to which he is appointed is in fact inferior in status and responsibility to that occupied by him. The burden of establishing this would undoubtedly be very heavy and the court would be slow to interfere with the declaration of equivalence made by the government. The government is ordinarily the best judge to evaluate and compare the nature and responsibilities of the functions and duties attached to different posts with a view to determining whether or not they are equivalent in duties and responsibility. However, the Hon'ble Supreme Court further held that where it appears that the declaration of equivalence is made without application of mind to the nature and responsibilities of the functions and duties attached to the non-cadre post or extraneous or irrelevant factors have been taken into consideration in determining the equivalence or the nature and responsibilities of the functions and duties of the two posts are so dissimilar that no reasonable person can possibly say that they are equivalent in status and responsibility or the declaration of equivalence is malafide or in colourable exercise of power, etc, ~~the~~ the Court can set at naught the declaration of equivalence. (These observations are contained in para 32 in Royappa case and are on behalf of 3 of the 5 Judges).

14. Now in the instant case, the post of OSD Home was created on the basis a note dated 6.9.94 recorded by the Principal Secretary Home, Govt. of Rajasthan (Annx.P4). The note reads as under:

"The performance of police all over the country has come under criticism on various counts. The need of adequate training and change in the attitude of police personnel

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has been stressed time and again. The conduct of the police particularly with regard to Human Rights aspect and crime in custody has drawn adverse comments not only in this country but by various Human Rights Organisations all over the world. It is, therefore, necessary that an effort for improvement of over all performance of the police should be made. In this regard several Commissions/Committees have been set up earlier both at the national level and by States. Numerous suggestions have been made by these Commissions/Committees. It is necessary to examine all these suggestions given before and cull out ideas which are relevant for our State. This is a time consuming job and would require a whole time officer of sufficiently senior level who has good knowledge of the working of the police as well. It is, therefore, proposed that a post of OSD in the rank of IGP may be created in the Home Department in the Secretariat.

This matter has already been discussed with the Chief Secretary, Home Minister and Chief Minister and they gave approved (Sic) this proposal. Finance Secretary may kindly agree. Supporting staff like: One Stenographer, One LDC and one Class IV may also be agreed for this post."

The proposal was concurred in by the Finance Secretary and thereafter the post was created vide order Annx.R1 dated 21.9.94. This note contains adequate justification for creating the post and a genuine need for creating the post has been indicated in the said note. We, therefore, hold that there was proper application of mind by the State Govt while creating the post. It is the same post which has been continued and on which the applicant has been posted by order dated 29.8.96. An

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important fact to be noted is that this post was not created with a view to justifying the posting of the applicant alone to this post. This post had been created about two years before the applicant was posted to this post and as stated by the applicant himself, there were two previous incumbents of this post. It cannot, therefore, be said that this post was created only with a view to putting the applicant in a disadvantageous position in his service career. The requirements laid down in E.P.Royappa case, as referred to in para 82 of that judgment, seem to have been amply fulfilled.

15. As regards issue No.(v) the note dated 6.9.94, reproduced above, clearly shows that the work attached to this post is in connection with the Police Department. It is not clear how the applicant has chosen to describe his posting/appointment to the said post as being sent on deputation. On the question whether any public interest is served by creating the post and posting the applicant in the said post, the note dated 6.9.94 once again provides a full answer to it. Apparently, the duties and responsibilities attached to this post are important in nature and these are intended to bring about improvement in the functioning of the Police Department of the State. Therefore, the applicant's grievance on this score is not justified.

16. The last issue No.(vi) to be determined is whether the Governor's personal approval was necessary before transferring the applicant and posting him as OSD Home. According to the applicant, the order could have been issued only by the Governor of the State while exercising the powers of the Chief Executive of the State as laid down under Article 166 of the Constitution. However, no rule or provision has been shown to us to suggest that transfer of an officer from one post to other within the State Govt can be made only by or in the name

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of the Governor. As far as the creation of the post is concerned, it has been clearly stated in the order Annx.F1, by which it was initially created and the subsequent orders Annxs.F2 and F3 by which the post was continued that the sanction of the Governor had been obtained for creating the ex-cadre post of OSD Home in the rank of IGP. The declaration of equivalence is also specifically incorporated in orders Annxs.F1 and F3. As laid down in clause (1) of Article 166 of the Constitution, all executive actions of the government of a State shall be expressed to be taken in the name of the Governor. This requirement has been fulfilled in this case when it has been stated in the orders Annxs.F1, F2 and F3 that the sanction of the Governor has been accorded to the creation of the aforesaid post. Clause (2) of Article 166 of the Constitution further provides that orders and other instruments made and executed in the name of the Governor shall be authenticated in such a manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Orders Annxs.F1, F2 and F3 state that these have been issued 'by order' and are signed by Deputy Secretary/Assistant Secretary to the government. Thus, these orders cannot be questioned as not having been made by the Governor in view of the provisions of clause (2) of Article 166 of the Constitution. Moreover, the judgment of the Hon'ble Supreme Court in Samsher Singh Vs. State of Punjab, AIR 1974 SC 2192, is conclusive on the subject. When it is a question of discharging executive functions, the personal satisfaction of the Governor is not required before passing such an order in the name of the Governor. This principle has been further reaffirmed by the Hon'ble Supreme Court in a recent judgment in

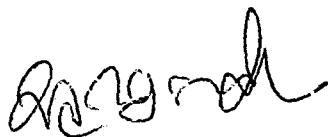
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State of Madhya Pradesh & Ors Vs. Dr. Yashwant Trimbak (1996) 33 ATC 208. Undoubtedly, the creation of the post of OSD Home in the rank of IGP is an executive function of the government and the personal satisfaction of the Governor was not required before passing the orders in question.

16. We have carefully considered all other judgments cited before us by the learned counsel for the applicant and we are of the view that for the reasons given by us above, these judgments do not afford any ground for grant of any relief to the applicant. No doubt, the public interest involved in creating the post of OSD Home has not been indicated in the orders creating the post, yet adequate material exists on record to show that there was justification for creating the post. The justification for the post has not merely been given in the counter affidavit filed by the respondents but it was given at the time of creating the post in September 1994 as seen from the note dated 6.9.94 (Annx.R4). The Hon'ble Supreme Court's judgment in Mohinder Singh Gill case, therefore, does not help the applicant. There is no material on record to ~~show~~ justify the inference that the applicant's posting was made with a view to putting him in a disadvantageous position in his service career or it was passed in undue haste. For all the reasons, the O.A is dismissed.

17. The O.A has been disposed of at the stage of admission with the consent of both the parties. No order as to costs.



(Ratan Prakash)

Member (Judl).



(O.P. Sharma)

Member (Adm).