

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No 1518/2012

New Delhi this the 23rd day of September, 2016

HON'BLE MR. JUSTICE PERMOD KOHLI, CHAIRMAN
HON'BLE MR. V.N.GAUR, MEMBER (A)

1. Shri Maqbool Ahmed Qureshi,
Aged about 59 years
Chief Engineer (Civil) Level-II
Civil Construction Wing,
All India Radio, Prasar Bharati,
6th Floor, Soochana Bhawan,
CGO Complex, Lodhi Road,
New Delhi-110003
2. Shri J.Bhagat, aged about 51 years
Superintending Engineer (Civil)
Civil Construction Wing,
All India Radio, Prasar Bharati,
6th Floor, Soochana Bhawan,
CGO Complex, Lodhi Road,
New Delhi-110003
3. Shri H.K. Padmakar, aged about 52 years
Superintending Engineer (Civil)
Civil Construction Wing,
All India Radio, Prasar Bharati,
11th Floor, Soochana Bhawan,
CGO Complex, Lodhi Road, New Delhi-110003
4. Shri R.K. Singh, aged about 52 years
Superintending Engineer (Civil)
Civil Construction Wing,
All India Radio, Prasar Bharati,
3rd Floor, Soochana Bhawan,
CGO Complex, Lodhi Road, New Delhi-110003
5. Association of Direct Recruit Officers
Prasar Bharati,
Civil Construction Wing,
7th Floor, Soochana Bhawan,

CGO Complex, Lodhi Road,
New Delhi-110003
Through its President
Shri B.S. Mudhar

... Applicants

(By Advocate: Mr. S.M. Garg)

VERSUS

1. Union of India
Through the Secretary,
Ministry of Information & Broadcasting,
6th Floor, 'A' Wing, Shastri Bhawan,
New Delhi-110001

2. Ministry of Finance
Department of Expenditure,
Government of India, South Block,
New Delhi-110001
Through its Secretary.

3. Union Public Service Commission
Through its Secretary,
Dholpur House, Sahajahan Road,
New Delhi-110069

... Respondents

(By Advocate: Mr. D.S. Mahendru)

ORDER (ORAL)

Hon'ble Mr. V.N.Gaur, Member (A):

The present OA has been filed by the Association of Direct Recruit Officers of Civil Construction Wing of Prasar Bharati along with four officers who are also Members of the Association and working as Chief Engineer (Civil) Level-II and Superintending Engineers (Civil) in the Civil Construction Wing of All India Radio. The relief sought in the OA reads as follows:-

- “(a) call for records of the case;
- (b) pass an order directing the respondents to revive and fill up the post of Chief Engineer (Level-I) in Civil Construction Wing, All India Radio as per Recruitment Rules within a fixed time frame by considering the eligible departmental candidates;
- (c) pass such further or other orders which this Hon’ble Tribunal deems fit and proper in the facts and circumstances of the case.”

2. The brief facts of the case are that there is a Civil Construction Wing (CCW) under the Ministry of Information and Broadcasting looking after the civil work of All India Radio, Doordarshan and other Media Units. According to Para 3.5.3 of the AIR Manual, the Chief Engineer (Civil) is the Head of the Department of CCW for the purpose of Delegation of Financial Powers Rules (DFPR), 1978 and Fundamental and Supplementary Rules (SR). He enjoys financial powers equivalent to D.G (Works), CPWD. There are two posts of Chief Engineer (Civil), one is designated as Chief Engineer (Level-I) and the other as Chief Engineer (Level-II) [hereinafter referred to CE (Level-I) and (Level-II) respectively]. It is the contention of the applicants that from 1992 onwards, the post of CE (Level-I) has been held by the incumbents on current charge basis as the officers in the feeder cadre never fulfilled the eligibility condition for regular promotion to that post. According to the existing instructions a post which remains unfilled for one year or more is deemed as abolished and

revival of such post requires the approval of Department of Expenditure (respondent no. 2). The post of CE (Level-I) was also deemed as abolished. When a proposal to revive the post was taken up by the Ministry of Information and Broadcasting (respondent No.1) it was not agreed to by the respondent No.2. The applicants approached this Tribunal in **OA No. 806/2010** praying for direction to respondents to fill up the post of CE (Level-I) within a fixed time period. It was argued that first applicant in that OA (who has since retired) had completed the residency period as required under the Recruitment Rules (RRs) and consequently he should have been considered for promotion as CE (Level-I). This Tribunal disposed of that OA on 24.10.2011 with the following directions.

“9. It is trite that once a post is created; recruitment rules to fill up the post is notified; and eligible candidates are available for consideration to fill up the post by promotion, the legitimate expectations of the eligible candidates needs to be recognized and considered for the same. In the present case, the only obstacle is the deemed abolition of the post due to non availability of eligible persons to be promoted to the said post. We are aware of our limits in the matters of creation/abolition/revival of posts which come within the exclusive domain of the executive. But we notice that the first respondent has not shown to us the action taken on the above note of the Department of Expenditure. The intention of the above note seems to examine the 1st respondent's proposal with reference to Para 2.6.2 of the OM dated 22.07.2006. Such examination does not seem to have reached the logical conclusion. Hence, we have to issue appropriate directions in the matter.

10. Taking into consideration the totality of facts and circumstances of the case, we direct the first respondent to consult the Department of Expenditure on the issue of revival of the Chief Engineer (Level-I) post in CCW of AIR and come to a definite decision as expeditiously as possible but preferably within a period of nine weeks from the date of receipt of a certified copy of this order. In case the said post gets revived, during the next three months, the 1st and second respondents would consider the eligible applicants along with others as per the Recruitment Rules

to convene DPC for the said post and decide the promotion issue. In case the post does not get revived, the applicants are entitled to receive a speaking and reasoned order within the said period which, they have the liberty to challenge in appropriate proceedings as may be advice.”

3. The respondent No.1 thereafter took up the matter with respondent no. 2 but the latter did not agree to the revival of the post. The impugned order dated 31.01.2012 was passed by respondent no.1 in compliance of the direction of the Tribunal dated 24.10.2011.

4. The learned counsel for the applicants in his submission stated that the Tribunal had directed the respondent no.1 to consult the respondent No.2 on the issue of revival of the Chief Engineer (Level-I) post and come to a definite decision as expeditiously as possible. However, the respondent No.2 in its note dated 11.01.2012 rejected the proposal without examining it afresh as directed by the Tribunal. In the impugned order the fact that the post was vacant for a very long time since 1992 has been indicated as the reason for rejecting the request for its revival. This reason was given by respondent No.2 in their note dated 17.05.2007. With the additional affidavit filed by the respondent no.1 on 18.01.2016, a copy of the note dated 19-22/06/2012 of the respondent no. 2 which gives a new reason i.e. functional necessity of CE (Works), AIR, as the reason for rejecting the

proposal. This note cannot be taken on record at this stage as it is a settled law that a fresh reason cannot be inserted in the impugned order by way of counter affidavit or additional affidavit by the respondents. According to learned counsel, the decision taken by the respondents is flawed on several grounds. First, the post of CE (Level-I) is a Head of Department post and cannot be considered as non-functional and abolished. Two, the post could not be treated as vacant because it was held by officers on current charge basis. It was wrongly categorized as deemed abolished. Three, it is the prerogative of respondent no.1 to decide the functional necessity of a post in the department. The respondent no.2 cannot impose its views on respondent no.1 on this issue. The communication of the respondent No.2, not agreeing with the proposal of respondent no.1 was, therefore, exceeded its powers.

5. The learned counsel for the respondents, on the other hand, justifying the action of the respondents, stated that according to the AIR Manual, para 3.5.3, it is the Chief Engineer (Civil) who is the Head of the Department. It does not mention the level of the post. Even CE (Level-II) can be the Head of Department as has been the case since 1992 because no officer was fulfilling the residency period in the feeder grade. In terms of the orders of respondent no.2, any post

vacant for more than one year would be deemed as abolished. The post of CE (Level-I) also fell in that category. When the matter was taken up with the respondent no. 2 in the year 2007, the proposal was rejected for the aforesaid reason. The matter was again taken up after the order of this Tribunal in OA No 816/2010 dated 24.10.2011 but the respondent no. 2 did not agree. The reasons for rejection have been explained in para 4 (iii & iv) of the counter and a note received from respondent no.2 has also been placed on record through an additional affidavit dated 18.01.2016. In these documents it was stated that had the post of CE (Level-I) been a functional necessity and there was no eligible candidate in the feeder cadre for promotion, the respondent-1 could have filled up the post by alternative method of recruitment, i.e. transfer on deputation. The fact is that the post of CE (Level-I) was never filled up after 1992 on regular basis and incumbents were holding routine charge only to mark the papers etc. and not 'dual charge' under FR-49 to discharge the functions of the post of Head of Office.

6. We have heard learned counsel for parties and perused the record. This Tribunal in OA no. 816/2010 had noted that the post of CE (Level-I) was lying vacant for a very long time for want of eligible candidates in the feeder grade. Some candidates were eligible in the year 2005-06 when the

respondent no.1 took up the proposal to revive the post of CE (Level-I) but the respondent no.2 vide their note dated 13.09.2006 advised the respondent no.1 to examine the proposal with reference to Para 2.6.2 of the Department OM dated 22.07.2006 and conduct a review of all vacant posts. The Tribunal, therefore, had directed the respondent no.1 to carry out the exercise advised by respondent no. 2 and approach them once again with the proposal. It is seen that when the proposal was taken up again, the respondent no. 2 vide communication dated 11.01.2012 sent it back with a rejection simplicitor stating "not agreed to".

7. In our view, in the face of the Tribunal's aforementioned direction it was incumbent on respondent No.2 to consider the matter afresh and give reasons for its decision. The order of the respondent no.1 dated 01.12.2012, which reproduces the reason stated by respondent no.2 in 2007, can not be considered as compliance of the Tribunal's order. Further, we are in agreement with the learned counsel for the applicant that the respondents can not supplement the reasons indicated in the impugned order in the counter reply or additional affidavit.

8. The issues at the core of the present controversy are: (i) whether the post of CE (Level-I) was rightly considered as

deemed abolished, and (ii) if it was considered as deemed abolished, whether respondent no. 2 could have rejected its revival on the ground of its functional necessity.

9. From the records, it is seen that respondent no. 1 has invariably assigned the charge of CE (Level-I) to officers of the cadre on current charge basis since 1992. The counter filed by the respondents does not dispute this fact except saying that the charge given was only 'routine charge' to mark the papers etc. and not 'dual charge' under FR-49 to discharge functions of the post of Head of Office of CCW which is now vested in CE (Level-II). This submission of the respondents is contradicted by the orders issued in the past while giving charge of the post of CE (Civil) (level-I), copies of which have been placed on record as Annexure 5 (colly), which have not been denied by the respondents. These orders, some which are reproduced below, show that the officers were holding that post in addition to their own duties and were authorised to exercise administrative and financial powers vested in CE (level-I) and was even declared "Head of Department under Rule 10(2) and 10(3) of DPFRs, 1978 and SR 2(10)". In one order the incumbent has been made "entitled to extra monetary benefits/remuneration as per rules applicable".

1.

“No. 308/11/91-B(D)

Government of India
Ministry of Information and Broadcasting

New Delhi, Dated 1st Oct., 92

Order No. 43/92-B (D)

Shri H.M.Joshi, Chief Engineer, Directorate General, All India Radio will hold the charge of the post of Chief Engineer (Civil) Level I in the Civil Construction Wing of All India Radio, until it is filled on regular basis, with immediate effect in addition to his own duties vice Shri K.P. Ramaswamy.

2. Shri Joshi is hereby authorized to exercise administrative and financial powers vested with the Chief Engineer (Civil) Level 1, Civil Construction Wing, All India Radio.”

2.

“No. 308/11/91-B (D)

Government of India
Ministry of Information & Broadcasting

New Delhi, Dated 23.6.1993

Order No. 31/93-B (D)

Shri Mahesh Chandra, Chief Engineer, All India Radio, will hold the charge of the post of Chief Engineer (Civil) Level I in the Civil Construction Wing of All India Radio, until the aforesaid post is filled on regular basis with immediate effect, in addition to his own duties vice Shri H.M.Joshi.

2. Shri Mahesh Chandra is hereby authorized to Exercise administrative & financial powers vested with the Chief Engineer (Civil) Level 1, Civil Construction Wing, All India Radio.”

3.

“No. 310/43/96-B (D)

Government of India
Ministry of Information & Broadcasting
NEW DELHI

Dated : 2nd September, 199?

Order No. 33/96-B (D)

Lt. Col. D.S.Manchanda, Chief Engineer Level-II is hereby transferred and posted in his own grade pay against the post of Chief Engineer Level-1 with immediate effect.

2. He will continue to hold the charge of Chief Engineer Level-II also until further orders.”

4.

“No. 310/43/96-B (D)

Government of India
Ministry of Information and Broadcasting
NEW DELHI-110 001

Dated : 10th April, 1997

Order No. 26/97-B (D)

In continuation of this Ministry's Order No. 33/96-B (D) dated 2nd September, 1996, Shri D.S.Manchanda, presently posted against the post of Chief Engineer (Level-1) in CCW, AIR, New Delhi, will be overall incharge of CCW and is hereby declared as Head of Department under Rule 10 (2) and 10 (3) of DFPRs, 1978 and SR 2 (10) for purpose of Delegation of Financial Power Rules and the Fundamental and Supplementary Rules.

2. Shri R.Krishnaswamy, who holds the current duty charge of Chief Engineer (Level-II), will report to Shri D.S. Manchanda, Chief Engineer (Level-1) in all matters concerning the office of Chief Engineer (Level-II).

3. Dr. K.M.Paul, Chief Engineer (R&D) will continue to handle the work relating to vigilance matters in the CCW of AIR as per existing instructions.”

5.

Prasar Bharati
Broadcasting Corporation of India
(Directorate General: All India Radio)

No. PA/Dir(P&EA)/1/2005/4769

New Delhi: 25.08.2005

OFFICE ORDER -2/2005 {Dir(P&EA)}

Shri S.K.Mohindra, Suptdg. Engineer (Civil) has been promoted to the post of Chief Engineer (Level-II), Civil Construction

Wing, Soochna Bhawan vide Ministry of Information & Broadcasting's Order No.503/3/2005-BA(E) dated 4.8.2005.

2. Shri Mohindra, Chief Engineer (Level – II) is entrusted additional charge of the post of CE (Civil) (Level-1) until further orders. He will be entitled to extra monetary benefits/remuneration as per rules applicable.

3. He shall be reporting direct to Director General, All India Radio.

4. This issues with the approval of competent authority.”

10. The contents of above orders lead to inescapable conclusion that the post had never remained ‘unfilled’ from the functional point of view. The respondents have not placed on record the instructions regarding deemed abolition of posts. However, the afore-narrated facts establish the contention of the applicants that the post of CE (Level-I) has all along been occupied and functional, and, therefore, the question of the post getting deemed abolished did not arise. We are of the view that the respondents were not justified in treating the post as deemed abolished.

11. The facts that the respondent no.1 felt the need to keep the post manned by giving additional charge to the officers in the grade of CE (Civil) (Level-II); even gave them administrative and financial powers; and, declared the incumbent to be ‘Head of Department’ within the meaning of the DFPRs and Supplementary Rules, itself speak about the functional necessity of the post. The orders of posting reproduced in this order do not show that the charge given was routine charge “to

mark papers etc” as the respondents would have us believe. There was functional necessity of the post and the respondent no.1 managed to run the affairs of the Civil Wing by giving additional charge of the post to the CE (Level-II) though the right course would have been to resort to the alternative method of filling the post, i.e. transfer on deputation. However, that alone can not annul the functional necessity of the post and justify its abolition. We are also of the view that it is ultimately for the concerned department to assess the need, or otherwise, of a post and seek financial concurrence. The respondent no.2, that has to be consulted for financial concurrence, has to examine the proposal from financial angle and not from the administrative angle. The decision of the respondent no.2 rejecting the proposal of respondent no.1 on the ground of there being no “functional necessity”, cannot be sustained.

12. In the background of the preceding discussion, we quash and set aside the order of respondent no.1 dated 31.01.2012. The respondent no.1 is directed to fill up the post of Chief Engineer (Level-I) on regular basis, in accordance with the RRs as if the post was never abolished. In the event of any consultation required with the respondent no.2 in terms of the Allocation of Business Rules, or any other rules or guidelines in force, on such reference the respondent no.2 shall consider

the proposal keeping in mind the views expressed by us in the preceding paras. The entire exercise must be completed within a period of 4 months from the date of receiving a copy of this order. The OA is disposed of accordingly. No costs.

(V.N.Gaur)
Member (A)

(Permod Kohli)
Chairman

23rd September, 2016

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