

OA.No.170/00458/2018/CAT/Bangalore Bench
**CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH**

ORIGINAL APPLICATION NO. 170/00458/2018

DATED THIS THE 13th DAY OF JUNE, 2018

HON'BLE DR.K.B. SURESH, MEMBER (J)
HON'BLE SHRI PRASANNA KUMAR PRADHAN, MEMBER (A)

Smt.Renuka Chidambaram, I.A.S.
D/o Sri K.Chidambaram
Aged about 59 years
Working as Principal Secretary
Department of Public Enterprise
M.S.Building, Bangalore-560 001
& residing at No.98, Defence Colony
Indiranagar, Bangalore-560 038.

.....Applicant

(By Advocate Shri M. Nagaprasanna)

Vs.

1. State of Karnataka
Represented by its Chief Secretary
Vidhana Soudha
Dr.Ambedkar Veedhi
Bangalore-560 001.
2. Dr.Sandeep Dave, IAS
Major, working as
Joint Secretary, Department
of Expenditure, Ministry of Finance
Government of India
New Delhi-110 001.
3. M.Lakshminarayana, IAS
Major, working as Principal
Secretary to Government
Public Works, Ports & Inland Water
Transport Department, Vikas
Soudha, Dr.Ambedkar Veedhi
Bengaluru-560 001.

....Respondents

(By Advocate Sri Mahanthesh for R1&3)

ORDER

(PER HON'BLE PRASANNA KUMAR PRADHAN, MEMBER (A))

The applicant aggrieved by non-consideration of her promotion to the apex scale of the IAS in the rank of Additional Chief Secretary has filed the present OA seeking the following reliefs:

- a. *Issue a writ in the nature of mandamus to the 1st respondent/State Government to promote the applicant to the apex scale of the IAS in the rank of Additional Chief Secretary carrying the pay scale of level-17 with effect from the date of her eligibility or from the date on which respondents 2 and 3 were promoted i.e., on 25.03.2017 and grant all consequential benefits.*
- b. *Issue such other appropriate writ, order or direction as this Hon'ble Tribunal deems fit to grant in the interest of justice and equity, including the award of costs of this original application.*

2. According to the applicant, she belongs to the 1985 batch of the Indian Administrative Service and is eligible for promotion to the Apex Scale. In the civil list of the IAS officers working in the State as on 2014 (Annexure-A2) the applicant is at Sl. No. 31 whereas the private respondents are at Sl. No. 44 and 47 respectively. Both the Respondent No. 2 and 3 belong to 1987 batch. While the Respondent No. 3 was promoted to officiate in the apex scale, Respondent No. 2 was given proforma promotion. They were given promotion vide order dated 25.03.2017 (Annexure-A3) when the representation of the applicant seeking promotion was pending with the Government. The applicant submitted representation on 01.12.2017 and 05.02.2018 (Annexure-A4) regarding her promotion. The applicant has also mentioned that another officer Shri P.S.Kharola who was working in the State Government in the Additional Chief Secretary grade was relieved on 10.12.2017 (Annexure-A5) pursuant to his going on central deputation

OA.No.170/00458/2018/CAT/Bangalore Bench
and a vacancy is thereby created in the State Government.

3. The applicant had referred to an earlier case wherein the applicant was permitted to take up an assignment in United Nations with effect from 23.05.2010 and the deputation was extended from time to time and the request for further extension on the State Government's recommendation was pending consideration before the Union Government. Though the applicant indicated her intention to join State Government and actually joined back the duties in the State on 05.04.2016, the Government of India by an order dated 29.03.2016 invoked sub-rule (2) of Rule 7 of the All India Service (Leave) Rules 1955 and issued a communication treating the applicant as deemed to have been resigned from service. The applicant then filed OA No. 568/2016 against the said termination and this Tribunal vide order dated 22.12.2016 set aside the order of deemed resignation issued by the Government of India (Annexure-A1). Against the said order, Government of India has preferred Writ Petition No. 25716/2017 which have been admitted by the Hon'ble High Court of Karnataka on 19.04.2018. However the Hon'ble High Court declined to grant any interim order sought by the petitioners. The applicant has been continuously working with the State Government after reporting back to duty on 05.04.2016 following an initial interim order and then the final order passed by the Tribunal quashing the deemed resignation order of Government of India.
4. For non-consideration of the case of the applicant for promotion in the apex scale and not holding DPC, the applicant again approached this Tribunal in OA No. 63/2018 and the Tribunal vide order dated 27.03.2018 directed the State Government to immediately constitute necessary DPC

and pass appropriate order within a week. According to the applicant the DPC met on 16.04.2018 and apparently had decided that the applicant though entitled and eligible cannot be considered for promotion in the light of the fact that there is no vacancy existing in the State of Karnataka to give promotion to the applicant. The plea that there is no vacancy existing is because of the fact that both the private respondents were given promotion stealing a march over the applicant and the vacancy occurred ought to have been given to the applicant who is senior to the private respondents. Though the applicant has not received a copy of the minutes of the DPC, on learning that the DPC refused to consider her case, she has approached this Tribunal in the present OA seeking the reliefs as mentioned earlier.

5. The respondents have filed a reply statement in which they have referred to the earlier order of the Government of India declaring the applicant to have deemed to have been resigned from the IAS with effect from 01.07.2013 in terms of Rule 7 (2) (c) of the All India Service (Leave) Rules, 1955, the order of this Tribunal dated 22.12.2016 in OA No. 568/2016 setting aside the said notification and Writ Petition filed by the Government of India before the Hon'ble High court of Karnataka. The respondents submits that as per the guidelines issued by the GOI, DoPT, for promotion of members of the Indian Administrative Service to various grades vide letter No. 20011/4/92-AIS-II, dated 28.03.2000, the zone of consideration for promotion to the Apex Scale of IAS carrying pay of Rs.2,25,000/- (Fixed) would consist of all the members of the service who have completed 30 years of service and appointment in this grade would be made from amongst the officers thus cleared, at any time during the

OA.No.170/00458/2018/CAT/Bangalore Bench
 relevant year and subject to the provisions of Rule 12 (7) of the IAS (Pay) Rules, 2016. It is further submitted that the DoPT, GOI vide letter dated 19.02.2018 has stated that the applicant was deemed to have resigned from service vide notification dated 29.03.2016, DoPT has filed the Writ Petition No. 25716/2017 before the Hon'ble High court of Karnataka against the order dated 23.12.2016 of the Hon'ble CAT and the matter is sub-judice, considering promotion of the officer to the Apex Scale would lead to legal complications. Further, the DoPT opined that it would not be advisable to consider her for promotion at this stage. It is submitted that the period of unauthorized absence is yet to be decided by the DoPT, Gol and the order of the Hon'ble Tribunal in OA No. 568/2016 has been challenged by the DoPT, Gol by filing Writ Petition No. 25716/2017 before the Hon'ble High Court of Karnataka. The Writ Petition has been admitted.

6. During the hearing, the learned counsel for the State Government mentioned that the applicant does not fulfill the condition of 30 years of service as the period of unauthorized absence from 01.07.2013 to 04.04.2016, i.e., during the foreign assignment, is yet to be decided. Moreover there is no vacancy, and as such, the case of the applicant could not be considered by the DPC. Since a copy of the DPC meeting held on 16.04.2018 has not been enclosed along with the reply statement, the Learned Counsel for the respondents has provided a copy of the same on being asked to. The respondents have also subsequently provided a copy of the DOPT communication dtd.19.02.2018 & 13.04.2018 and also the proceedings of the DPC meeting to consider the promotion of IAS officer of 1985 batch held on 31.01.2015 and DPC meeting held to consider the promotion of IAS officer of 1987 batch on 20.12.2016.

7. The applicant in person contended that the CAT order in OA.No.568/2016 had provided for the Union Government to take appropriate decision regarding the period of absence beyond the formal period of approval of the applicant's assignment till her resumption of duty in the State Government on 05.04.2016 as per the extant rules. However, the Union Government has not even initiated any steps to take appropriate decision in this regard over the last 17 months. Since the order relating to deemed resignation has been quashed, the period from 01.07.2013 up to 04.04.2016 continues to be an integral part of her years of service and is to be counted as such. Secondly she submitted that conducting DPC and promoting Officers to State Cadre posts is the sole jurisdiction of the State Government in its capacity as Cadre Controlling Authority and by quoting DOPT communication to deny the benefit has hardly any justification. Regarding vacancy, the applicant contended that in several similar cases in the past, the officers have been promoted to the Apex Scale and Grade even in the absence of clear vacancies. She has been repeatedly petitioning the State Government vide her letters dtd.26.12.2016, 09.01.2017, 01.12.2017, 05.02.2018, 02.04.2018 and 05.06.2018 to grant her promotion to the Apex Scale. It is learnt that an officer of 1987 batch was promoted w.e.f. 25.3.2017. If there is no clear vacancy, then how he was promoted. More over two further vacancies arisen thereafter. The first against the Central Deputation posting of Sri.Pradeep Singh Kharola of 1985 batch on 10.12.2017 and another vacancy arose due to the Central Deputation posting of Sri Subhash Chandra of 1986 batch on 07.03.2018. Therefore, it is clear that the applicant is being denied her deserved promotion in the Apex Scale in spite of promotions granted to several

OA.No.170/00458/2018/CAT/Bangalore Bench
junior officers in her own batch and several batches below her.

8. We have gone through the proceedings of the Departmental Promotion Committee meeting held on 16.04.2018 to consider the case of promotion of the applicant to the Apex Scale of IAS. The committee has referred to the DoPT notification dated 29.03.2016 declaring that the officer deemed to have been resigned from service with effect from 01.07.2013 in terms of Rule 7 (2) (c) of All India Service (Leave) Rules, 1955, the order of the Tribunal in OA No. 568/2016 setting aside the said order and the Writ Petition No. 25716/2017 filed by the DoPT before the Hon'ble High Court of Karnataka. It mentions that the period of unauthorized absence from 01.07.2013 to 04.04.2016 when the applicant was in the foreign assignment is yet to be decided by the DoPT. The committee have also indicated that the DoPT had informed vide letter dated 13.04.2018 that before consideration of promotion of the applicant to the Apex Scale, the State Government may ensure that it fulfills the pre-condition for seeking concurrence of vacancy against permissible posts from Government of India. They have also indicated that there were 8 sanctioned posts at Apex level in addition to 8 ex-cadre posts which can be operated. Therefore there has been total 16 posts at the Apex level of IAS and at present all the 16 posts of the Apex scale are filled. Therefore the committee had stated that in view of all these facts based on DoPT letter of 13.04.2018 and as per Rule 12(7) and 3 (2) (ii) of IAS (Pay) Rules, the committee does not find it appropriate at this stage to recommend the case of the applicant for promotion to the Apex Scale of IAS.
9. The DPC has referred to the DOPT communication dtd.13.04.2018. The

DOPT has sent two communications in this regard first one on 19.02.2018 in which they have referred to the CAT's order quashing the deemed resignation notification and WP filed by them in Hon'ble High Court of Karnataka and saying that since the matter is sub-judice, considering promotion of the officer to the Apex Scale would lead to legal complications. In a subsequent letter of 13.04.2018, they mentioned that the State Government should ensure that it fulfills the pre-condition for seeking concurrence of vacancy against the permissible posts, from the Government of India. We have also gone through minutes of two earlier DPCs which was provided by the State Government. In the DPC held on 31.01.2015 to consider the promotion of IAS officers of 1985 batch, it was decided to consider promotion of the present applicant to Apex Scale of IAS as and when the officer returns to the cadre. In the proceedings of the DPC held on 20.12.2016 to consider the promotion of IAS officer of 1987 batch to the Apex Scale of IAS, the following was noted regarding vacancy:

"The Committee noted that State Government have addressed to Government of India, DoPT vide letter No.DPAR 527 SAS 2016, dated: 22.11.2016, seeking concurrence for availability of vacancies in various grades as per Rule 3(2)(ii) of the IAS (Pay) Rules, 2016. The concurrence of DoPT is still awaited from Government of India, DoPT. The Committee also noted that as per rule 3(2)(iii) of IAS (Pay) Rules, 2007, if the Government of India does not accord concurrence within a period of 30 days, the concurrence on availability of vacancies shall be deemed to have been accorded."

The said DPC had recommended several officers of 1987 batch as fit for promotion to the Apex Scale of IAS.

10. In the DPC meeting held on 16.04.2018 two issues were raised. The first one is regarding pending litigation before the Hon'ble High Court of Karnataka and the fact that the absence period from 01.07.2013 to

04.04.2016 is yet to be decided by the DOPT. The second issue relates to availability of vacancies. On the first issue regarding required qualifying service for promotion to the Apex Scale which is 30 years, the order on deemed resignation issued by the DOPT was quashed by this Tribunal vide order dtd.22.12.2016 in OA.No.568/2016. No doubt the Government of India had approached the Hon'ble High Court of Karnataka in WP.No.25716/2017. However, the fact remains that the applicant is continuing in her service since her joining back in the State Government on 04.04.2016. The earlier period on foreign deputation unless decided by the Govt. of India cannot be ignored. Therefore, the applicant cannot be deprived the service rendered by her unless High Court decided to the contrary in the WP.No.25716/2017. Hence, the State Government could have considered the said period towards qualifying service. Therefore, it would have been logical on the part of the DPC to take into consideration the matter subject to further order of the Hon'ble High Court of Karnataka in WP filed by Govt. of India.

11. On the other issue regarding availability of vacancy, it is seen from the proceedings of 22.11.2016 when the State Government had addressed to Government of India regarding seeking concurrence for availability of vacancies in various grades as per Rule 3(2)(ii) of the IAS (Pay) Rules, 2016, the Govt. of India did not accord the concurrence within a period of 30 days and hence it was taken as deemed concurrence. Thus raising of this issue by DOPT does not seem very relevant. Further the issue here is not availability of vacancy at this moment but the availability of vacancy when the applicant was already due for promotion to the Apex Scale. It has been submitted by the applicant that she has been representing to the

State Government from 20.06.2016 onwards for considering her promotion and a 1987 batch officer Shri M.Lakshminarayana was promoted on 25.03.2017. It was presumed that on 25.03.2017, a clear vacancy was definitely available and hence the State Government could have considered the applicant for promotion at that point of time. Since she was senior to Shri M.Lakshminarayana, it may also be noted that till that time, the Government of India have not yet decided to file Writ Petition against the order of CAT quashing the deemed resignation order. It has also been mentioned by the applicant and which has not been denied by the respondents that two further vacancies have arisen following central deputation of Shri Pradeep Singh Kharola and Shri Subhash Chandra. Therefore, it is clear in addition to a clear vacancy being available on 25.03.2017 when Sri M.Lakshminarayana was promoted and two more vacancies have been arisen on account of two officers in Apex Scale going on central deputation. It has been pointed out that in several cases officers have been sent on leave to create vacancies and giving promotion to officers in the so called available vacancies. However, without going into that aspect in detail, it is clear that vacancies are available when DPC considered the case of applicant on 16.04.2018.

12. Therefore in view of the position outlined in the preceding paras, it is clear that on both accounts about the applicant's qualifying length of service as well as availability of vacancies, the stand taken by the DPC in not recommending the case of the applicant for promotion to the Apex Scale of IAS does not appear to us as justified. We also note that the DPC has not recorded anything adverse against the applicant in the said minutes. Hence it can be presumed no other issue is involved regarding eligibility of

OA.No.170/00458/2018/CAT/Bangalore Bench
the applicant to the Apex Scale except for the issues raised by the DPC regarding qualifying service and availability of vacancy for not recommending the case of the applicant for promotion to the Apex Scale of IAS.

13. Therefore, on detailed consideration of the facts and circumstances of the case, we hold that the applicant is eligible for promotion to the Apex Scale of IAS and the stand taken by the Departmental Promotion Committee in its meeting held on 16.04.2018 not to recommend the applicant for promotion to apex scale is erroneous and unjustified. Therefore, we allow the OA and direct the respondent No.1 i.e. State Government to promote the applicant to the Apex Scale of IAS in the rank of Addl.Chief Secretary carrying the pay scale of level-17 w.e.f. 25.03.2017 i.e. the date from which the respondents No.2 & 3 were promoted. This shall be done within a period of ten(10) days from the date of receipt of copy of this order. However, this shall be subject to the outcome of WP.No.25716/2017 pending before the Hon'ble High Court of Karnataka. No order as to costs.

(P.K. PRADHAN)
MEMBER(A)

(DR. K.B. SURESH)
MEMBER (J)

/ksk/ /ps/

Annexures referred to by the applicant in OA.No.170/00458/2018:

Annexure-A1: Order dtd.22.12.2016 passed by this Hon'ble Tribunal in
OA.No.568/2016

Annexure-A2: Civil list of IAS officers 2014

Annexure-A3: Notification dtd.25.3.2017 issued by the 1st respondent

Annexure-A4: Representation dtd.01.12.2017 & 5.2.2018

Annexure-A5: Notification dtd.10.12.2017

Annexure-A6: Notification dtd.07.03.2018

Annexure-A7: Order dtd.27.03.2018 passed by this Hon'ble Tribunal in OA.No.63/18

Annexure-A8: Representation dtd.02.04.2018 of the applicant

Annexures with reply statement:

-NIL-

Annexures with reply statement filed by the applicant:

Annexure-A: Notification dtd.25.03.2017

Annexure-B: Representations dtd.09.01.2017, 5.6.2018, 2.4.2018, 5.2.2018

Annexure-C: Notification-I dtd.10.12.2017

Annexure-D: Notification-I dtd.07.03.2018

Documents submitted by the respondents:

Document-1: Copy of DPC proceedings dtd.16.04.2018

Document-2: Copy of DOPT letter dtd.13.04.2018

Document-3: Copy of DOPT letter dtd.19.02.2018

Document-4: Copy of DPC proceedings dtd.20.12.2016

Document-5: Copy of DPC proceedings dtd.30.01.2015
