

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DEELHHI.

OA-627/2003
MA-650/2003

New Delhi this the 5th day of July^h, 2004.

Hon'ble Shri Shanker Raju, Member (J)
Hon'ble Shri Sarweshwar Jha, Member(A)

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2. C. Chinnappa,
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4. Dr. Sharad Pant,R.O.(Ad hoc),
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R/o. D 13-56A, Harinagar, New Delhi.
5. Mohinder Singh, SIPO(EI),
DCSSI, New Delhi
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6. Rajendra Prasad Misra, Sr.Economic
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7. J.S. Nigam,Sr.Economic Investigator,
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21. Ganga Ram, Economic Officer,
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22. Vinod Kumar, Investigator Gr.I
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24. A.A. Rizvi, Sr. Investigator
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25. Ranjan Mukherjee, Economic
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M/o. Rural Development, New Delhi~
R/o 1509/II, NH IV, Faridabad.

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33. B.L. Meena, Economic Officer,
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36. Rama Kant Sharma, SIPO,
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37. J.K. Nagpal, Sr. Investigator
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38. P.N. Sharma, Sr. Investigator,
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39. Raj Pal Singh, Economic Investigator-1
M/o Rural Development, New Delhi.
R/o A-105, Kondil, HB, Delhi-96.
40. Gian Chand Saini, SIPO,
O/o, DCSSI, SISI, Karnal
R/o Vill. Bahri, PO & Distt. Kurushetra. ..Applicants

(through Sh. Gyan Prakash, Sh. Subhash Sharma and
Sh. M. R. Vig, Advocate)

versus

Union of India through,



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1. The Finance Secretary & Secretary of Economic Affairs
M/o. Finance & Co.Affairs
(Department of Economic Affairs)
North Block, New Delhi.
2. The Secretary
Union Public Service Commission,
Dholpur House, Shahjahan Road,
New Delhi.
3. The Secretary,
Department of Personnel & Training,
North Block, New Delhi.
4. The Cabinet Secretary & Chairman,
The I.E.S. Board, Cabinet Secretariat,
Rashtrapati Bhawan, New Delhi. ... Respondents
(through Sh. R.V. Sinha and Mrs. B. Rana, Advocate)

O R D E R

Hon'ble Shri Shanker Raju, Member(J)

Applicants through this O.A. have sought the following reliefs:-

(i) Since there is no officer working in Grade-IV of IES against 40% quota for promotion from feeder post holders, direction may be given to the respondents to hold DPC for promotion to Grade-IV and prepare Select List separately for each year from 1994-95 onwards on the basis of 40% of the year-wise vacancies as determined by the respondents in January, 2003 vide table at para 4.8 of OA and also for the vacancies for the years 2001-2002 and 2002-2003 in terms of law laid down on the subject. All eligible officers falling within Zone of Consideration each year should be considered for preparation of Select List of that year.

(ii) Direction may be given to the respondents that these applicants who are included in the Select List and so placed in the order of merit to be entitled to be appointed against the vacancies of any particular year be appointed against the vacancy of that year

and given all consequential benefits in terms of law laid down by Hon'ble Supreme Court. On the basis of Select List prepared by 1997 DPC, the respondents have already appointed senior colleagues of applicants from the select panel year and given all consequential benefits including promotion to Grade-III of IES vide Annexure A-16. Any other view will be discriminatory and violative of article 14 & 16 of Constitution of India.

(iii) While taking up the exercise of preparing year-wise select list, and for giving appointment and consequential benefits, the respondents may be directed to keep in view the law laid down by the Hon'ble Supreme Court with special reference to the following cases as also mentioned in the earlier paragraphs.

1. Bishan Sarup Gupta Vs. Union of India, Constitution Bench Judgment, dt.16.8.72, 1973 SCC(Lab)1.
2. Union of India Vs. N.R.Banerjee, 1997 SCC (L&S) 1194.
3. Sayed Khalid Rizvi vs. Union of India, 1993 SCC (L&S) 575.
4. Union of India vs. Vipin Chandra Hiralal Shah, 1997 SCC (L&S) 41.
5. Nirmal Chandra Bhattacharya vs. Union of India, 1991(1) SLR 761.
6. Ajit Singh & Ors. Vs. State of Punjab JT 1999(7) SC 159.

(iv) The respondents may be directed to produce relevant records before the Hon'ble Tribunal.

(v) Any other relief which this Hon'ble Tribunal may deem fit keeping in view the facts to circumstances of the case."

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2. Before we adjudicate the issue involved, it is relevant to briefly highlight the relevant factual matrix:-

3. Applicants, 40 in number, are holders of feeder post for promotion to Grade-IV of the Indian Economic Service (hereinafter referred as IES).

4. As per the statutory rules i.e. Indian Economic Service Rules, 1961 from the Grade-I, Grade-II, Grade-III and Grade-IV apart from super time scale post, as per the amendment effected under proviso to Article 309 of the Constitution of India. As per future maintenance of service under Rule 8 if the initial constitution in the Grade-IV - Assistant Director not more than 40% of the vacancies are to be filled as promotion quota. The applicants became eligible as per recruitment rules for promotion to Grade-IV from the years 1988-1993.

5. As per Rule 8(1)(a)(ii) 40% of the vacancies in the grade shall be filled by selection from among officers serving in offices under the Government in Economic posts. A list is to be prepared in consultation with the Commission and the requisite qualification is 4 years regular service in the feeder category. Sanctioned strength of the service under Rule 3 of the Rules ibid is provided in Schedule-I which in Grade-IV was 237 notified on 1.8.1979.

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6. In the wake of direct recruitment taking place since 1958 in the grade and the promotion quota is not being filled regularly through departmental candidates holding Grade-IV on ad hoc basis for number of years approached the Apex Court where in view of Narendra Chadha Vs. Union of India (AIR 1986 SC 638) on the basis of continuous ad hoc officiation in Grade-IV, the petitioners were ordered to be regularised. The Apex Court had directed the respondents on implementation of the directions to follow the service rules for appointment in the service in future.

7. As some of the officers had been left who were officiating in Grade-IV on ad hoc basis for long periods the benefit of Narendra Chadha's case (supra) in C.A. No. 4612 of 1990 B.S. Kapila & Ors. Vs. Cabinet Secretary decided on 11.9.1990 regularisation has been observed. Accordingly, with effect from 1.10.1990 115 officers were regularised in Grade-IV.

8. A group of officers including the applicants approached the Tribunal sought direction to promote them on regular basis as Assistant Director and Research Officer in Grade-IV of the IES by holding DPC calculating yearwise vacancies as per 40% quota for the period 1999 to 2001 separately for each year. The applicants in the above O.A. had sought the aforesaid relief on the basis that respondents have failed to take any steps to determine yearwise vacancies w.e.f. 1994-1995 and are resorted to ad hoc

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promotions from feeder cadre. Several O.As have been clubbed together and by a common order dated 1.4.2002 in OA-751/2001 & OA-2854/2001, following directions have been issued:-

"The respondents will recalculate the vacancies/posts available against DR and DP quotas for the period from 1986-87 to 2000-01 by excluding 115 posts which were filled in 1989-90 in compliance of the order passed by the Supreme Court. Thereafter, if the respondents find that regular posts have become available for being filled by promotion under the 40% quota, they will proceed to determine the yearwise vacancies/posts and hold a DPC on yearwise basis and while doing so, consider the claims of the applicants in these OAs in accordance with the relevant rules. The respondents are directed accordingly. They are also directed to carry out the aforementioned exercise expeditiously and in any event within a period of three months from the date of receipt of a copy of this order.

In the circumstances, both the OAs are disposed of in the aforesaid terms without any order as to costs.

Registry is directed to place a copy of this order in the case file of OA-2854/2001.

MA-774/2001 in OA-751/2001 and MA-2773/2001 in OA-2854/2001 stand disposed of."

9. When the respondents have failed to comply with the orders passed in CP-312/2001 filed by the applicants, CP was heard and orders have been passed on 5.9.2001 by granting four weeks time to respondents to file reply.

10. Applicants had continued to work as Grade-IV IES on ad hoc basis from 1998 to 2000 against the vacancies under 40% quota. They had been reverted



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later on. The ad hoc promotion was taken of from the applicants by O.M. dated 15.6.2001 retrospectively from 7.5.2001.

11. In CP-368/2002 respondents have filed their compliance affidavit on 2.12.2002 where the vacancy position has been reflected and a stand has been taken that 94 vacancies were required to be filled by DPQs between 1986-87 and 2001-2001 against which 91 DPQs had been appointed in the IES. On the basis of IES Examination 2000, 10 more posts on matching quota for DPQs were released which made the total number of vacancies of 13 have become available in the year 2001-2002 which was notified to the UPSC for holding of DPC etc. By an order dated 14.1.2003 CP-368/2002 was disposed of with liberty to the applicants to agitate their grievance on original side in the event grievance subsists and if it is felt that the respondents while implementing the order of the respondents have not given them correct and proper relief.

12. The aforesaid liberty has given rise to the present O.A.

13. Learned counsel of the applicants have also filed written submissions as well as the counsel for the respondents.

14. Before adjudicating upon the merits of the case, the preliminary objections raised by the respondents are to be set at rest.

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15. Respondents' counsel contends that the decision of the Tribunal dated 1.4.2002 was upheld in CWP-6558/2002 by the High Court of Delhi on 11.11.2002 and also SLP preferred was also rejected. It is stated that the only direction given in OA-751/2001 was to recalculate the vacancies excluding 115 of Kapila's case (supra). Accordingly, directions have been complied with in true letter and spirit. Learned counsel states that the present application is without any cause of action and is not maintainable. In the above conspectus it is stated that as liberty was accorded to the applicants in CP-368/2002, the grievance has already been adjudicated upon between the parties with the same contentions raised and relief common to both the O.As on the doctrine of constructive resjudicata taking resort to Order 2 Rule 2(3) of the C.P.C., it is contended that as per the decision of the Apex Court in Government (NCT of Delhi) & Ors. Vs. Nitika Garg (JT 2000(10)SC 189) that direction in C.P. does not give a fresh cause of action.

16. Respondents' counsel further raised the plea of resjudicata and has relied upon the following decisions to substantiate his plea:-

- (i) Rajindra Kumar Vs. Kalyan (deceased) by L.R., 2000(8)SCC 99
- (ii) Employees State Insurance Corporation Vs. Rup Chand & Co.(DHC) DB 1981 RLR 50.
- (iii) P.V. Vijayan Vs. Kamalakshi Arimul (AIR 1994 SC 2145).



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- (iv) Sachhindra Nath Jana Vs. United Bank (2002(2)SLT 36).
- (v) State Bank of India Vs. Ram Chandra Dubey (2001(1) SCC 73).

17. Learned counsel further states that if the decision has been taken by the Tribunal and the grounds and reliefs prayed for in the earlier OA-751/2001 have not been considered despite being raised, are deemed to have been rejected.

18. Learned counsel further took a preliminary objection as to maintainability of O.A. on the ground that in a judicial review a well considered policy decision of the Government cannot be interfered. The following cases have been cited in support:-

- (i) S.R. Bomai Vs. Union of India (AIR 1994 SC 1918).
- (ii) State of Punjab Vs. Ram Lubhaya Bagga (1998(4) SCC 117).
- (iii) Balco Employees Union Vs. Union of India (AIR 2002 SC 350).
- (iv) Union of India Vs. Rajinder Singh Kadyan (2000(6) SCC 698).
- (v) P.U. Joshi Vs. A.G., Ahmedabad (2003(2) SCC 632).

19. On the other hand respondents' counsel in so far as resjudicata is concerned contends that in a proceeding before the Administrative Tribunal as per Section 20(1) of the Administrative Tribunals Act, 1985 and in view of the fact that a liberty has been given to them to file a fresh original proceedings, as

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the decision of the Tribunal in OA-751/2001 has not been complied with in accordance with law resjudicata is not applicable. It is also stated that in the earlier O.A. what has been directed to the respondents is recalculation of vacancies in DP quota from the period 1986 to 2001 excluding 115 posts of yearwise vacancies by holding a DPC accordingly. This according to the applicants has not been done in the manner directed by the Tribunal. Learned counsel of the respondents has relied upon the following decisions to substantiate his plea:-

- (i) Council of Scientific & Industrial Research Vs. KGS Bhatt (AIR 1989 SC 1972)
- (ii) Madras Port Trust Vs. Hymanshu International (AIR 1979 SC 1144)
- (iii) State of Punjab Vs. Shamlal Murari (AIR 1976 SC 1177)
- (iv) Ram Manohar Lal Vs. N.B.M. Supply (1969(1) SCC 869)
- (v) Gawsh Trading Co. Vs. Moji Ram (1978 2 SCC 91)
- (vi) Raj Narain Vs. Smt. Indira Gandhi (1972(3)SCC 850)
- (vii) J.S. Parihar Vs. Ganpat Duggar & Ors. (JT 1996(9) SC 608)
- (viii) Dr. Chandra Prakash Vs. UOI (2003(3) SC SLJ 293)

20. Accordingly it is stated that resjudicata applies only when an issue in earlier proceeding has been conclusively decided between the parties but in an event there is a liberty in the contempt petition and if there is a wrong committed in

preparation of the select panel yearwise aggrieved party has a right in judicial review through a fresh proceeding to approach the Tribunal.

21. In K.G.S. Bhatt's case (supra) the Apex Court has observed that disputes as to the service matters should not be tied down to strict rules of evidence. It is also equally settled in Madras Port Trust case (supra) that the public authorities cannot adopt the practice of raising technical pleas for defeating pleas of the concerned.

22. In J.S. Parihar's case (supra) the following observations have been made:-

"Para 6.....The question is: whether seniority list is open to review in the contempt proceedings to find out, whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to see redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review."

23. If one has regard to the above though we cannot brush aside the principle of resjudicata and rule out its application in service matters as well. This principle is not restricted to only proceedings of civil nature but resjudicata shall apply in a



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situation where in an earlier proceedings between the same parties the issue has rested finally and a conclusive decision has been arrived at by the Court.

24. In OA-751/2001 the background of direction was that the applicants therein who had served on ad hoc basis had been reverted to the lower post for non-filling of promotion quota for number of years. As per recruitment rules 40% of the quota falling yearwise in so far as vacancies are concerned is to be filled in the ratio 60 & 40 in so far as DRQs and DPQs are concerned. What has been observed that the DPQs has been over filled which felt need of freezing the vacancies. But, however, 115 vacancies which formed basis of Kapila's case for wrong taken into consideration for calculating the grant of regular promotion. Accordingly, a direction to exclude 115 vacancies was issued and as a consequence available regular posts for 40% promotion quota have been observed to be recalculated yearwise vacancies holding a D.P.C. yearwise. In the reply to the contempt petition, the compliance affidavit shows segregation of vacancies yearwise and we find from 1994-1995 onwards when there was no vacancy in DR quota DPQ quota was also not filled. This was also repeated in 1995-1996 and continued till 2000-2001. It is on the strength that the cadre strength has been reduced twice to make it 100 and as per the quota 94 vacancies were required to be filled by DPQ from 1986-1987 and 2000-2001 and also 91 DPQs had already been appointed in the IES resulting in a deficit of 3 DPQs. Apart from 10 DPQs as a matching quota 13

vacancies had been made available in DPQ in the year 2001-2002. In the order passed in contempt petition, the applicants have demonstrated before the Tribunal that by not making any promotion in DPQ for the relevant yearwise the recruitment rules requires filling up of DPQ quota not on the cadre strength but on yearwise available vacancy. A contentious issue was raised, accordingly the order in contempt petition clearly shows that respondent No.3 was in the impression that in a particular year when no direct recruitment had taken place ordering promotion of DP quota would leave into excess. However, having regard to J.S. Parihar's case what has been held is that there is no wilful disobedience but if the respondents have erred in law by not recalculating the vacancies in accordance with the rules and established law, the same cannot be gone into in a contempt petition. Accordingly, the record was on original side for which liberty was given.

25. In the earlier OA-751/2001 basically the grievance was non-filling up of vacancies in DPQ yearwise as per recruitment rules. Accordingly, a direction was given to that effect.

26. As held by the Apex Court in Rajendra Kumar Vs. Kalyan (2000(8) SCC 99) that the principle of constructive resjudicata predominantly is a principle of equity, good conscience and justice. This precludes an issue raised earlier not to be permitted to be raised later on in a different proceeding. Basically the idea behind this that a

litigation which has attained finality should not be allowed to perpetuate. However, this doctrine has to be viewed in its strict sense but not without isolation with the facts and circumstances of each case. If the earlier Court has not been dealt with the issue and there is no conclusive finding it does not shut remedies to a litigant to assail his legitimate grievance. There cannot be a waiver or acquiescence to a substantive right. In the conspectus of the present case the directions were for recalculation of vacancies yearwise whether expressly or not, the recalculation has to be deemed in accordance with rules and law. If on recalculation the respondents have erred and taken a decision dehors the rules and law, the same can be interfered otherwise this wrong if allowed to perpetuate would be against rule of law and principle of equity and good conscience. On affirmation of the decision of the Tribunal by the Apex Court the same attains finality in all respects which, inter alia, includes recalculation in accordance with rules and law.

27. Resjudicata would be relevant in issue if the present issue raised by the applicant as to not filling up DPQ quota in a year when no direct recruitment had taken place has been dealt with by the Tribunal and a finding has been recorded to this effect in the earlier proceedings. To attract the doctrine of resjudicata it has to be established as a sine qua non that the same issue has been conclusively



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determined and adjudicated. From the perusal of the order of the Tribunal in OA-751/2001, we do not see any such consideration.

28. It may so that the pleas had been taken by the applicants in these OAs which form subject matter of a composite order in OA-751/2001 but the non-consideration and adjudication of the issues would not indicate deemed consideration and rejection. Though despite an opportunity the applicants had not raised this plea but as it is not adjudicated earlier applicants' claim cannot be outrightly rejected on the doctrine of resjudicata.

29. Another objection put forth by the learned counsel of respondents is that on recalculation 13 vacancies had been reported to the UPSC for holding DPC which is a well considered and conscience decision is not prone to challenge in a judicial review being a policy decision.

30. It is settled law that abolition of posts is the conclusive discretion of the State and is not to be interfered in a judicial review. However, the aforesaid discretion of the government is subject to limitation and should be in consonance with the principles of equality enshrined under Articles 14 & 16 of the Constitution. Apex Court in three Judges Bench in Union of India & Ors. Vs. Lt. Gen. Rajendra Singh Kadyan & Anr. (2000(6) SCC 698) while

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dealing with the case of promotion in so far as judicial review and its permissibility is concerned held as follows:-

"The contention put forth before us is that there are factual inaccuracies in the statement recorded by the Cabinet Secretary in his note and, therefore, it must be deemed to be vitiated so as to reach a conclusion that the decision of the Government in this regard is not based on proper material. The learned Attorney General, therefore, took great pains to bring the entire records relating to the relevant period which were considered by the Cabinet Secretary and sought to point out that there were notings available on those files which justify these remarks. Prima facie, we cannot say, having gone through those records, that these notings are baseless. Critical analysis or appraisal of the file by the Court may neither be conducive to the interests of the officers concerned or for the morale of the entire force. May be one may emphasize one aspect rather than the other but in the appraisal of the total profile, the entire service profile has been taken care of by the authorities concerned and we cannot substitute our view to that of the authorities. It is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such. In that view of the matter, we think there is no justification for the High Court to have interfered with the order made by the Government."

31. Three Judges Bench in State of Punjab & Ors. Vs. Ram Lubhaya Bagga & Ors. (1998(4) SCC 117) held as follows:-

"Now we revert to the last submission, whether the new State Policy is justified in not reimbursing an employee, his full medical expenses incurred on such treatment, if incurred in any hospital in India not being a government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Governments form its policy, it is based on a number of circumstances on facts, law including constraints based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints."

32. Apex Court in Balco Employees' Union
(Regd.) Vs. U.O.I. & Ors. (AIR 2002 SC 350) held as follows:-

"It is evident from the above that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical."

33. In Kailash Chand Sharma Vs. State of Rajasthan (AIR 2002 SC 2877), the following observations have been made:-

"Para 12.... If the policy decision, which in the present case has the undoubted effect of deviating from the normal and salutary rule of selection based on merit is subversive of the doctrine of equality, it cannot sustain. It should be free from the vice of arbitrariness and conform to the well settled norms both positive and negative underlying Arts. 14 and 16, which together with Art. 15 form part of the constitutional Code of equality."

34. The following observations have been in State of Haryana Vs. Piara Singh (1992 SCC(L&S) 825):-

"Para 21 ... Ordinarily speaking, the creation and abolition of a post is the prerogative of the executive.....The main concern of the court in such matters is to ensure the rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness....."

35. A Constitution Bench in Shankarsan Dash Vs. U.O.I. (1991(3) SCC 47) made the following observations:-

"Para 7Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner....."

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36. A logical conclusion is deducible from the reading of the plethora of decision that although a policy decision of the government in the form of an executive act cannot be kept beyond the purview of the judicial review if it does not conform to the well settled norms and is arbitrary and violative of Articles 14 and 16 of the Constitution of India. The stand taken by the respondents that they had taken a conscience decision as a policy, resulted in calculation of 13 posts Grade-IV of IES against 40% DP quota is open for scrutiny to ensure whether this calculation is an outcome of the laid down norms, rules and law on the subject.

37. Accordingly, we have no hesitation to hold that the decision of the respondents after recalculation of vacancies can be a subject matter of judicial review if it does not conform to the laid down norms and if it is arbitrary.

38. Before we discuss the contentions raised by the applicants, the respondents stand is relevant to be highlighted first so that the same may be examined elaborately in the light of the contentions raised by the applicants.

39. Respondent No.2 (UPSC) in its reply stated that the proposal received for DPC to Grade-IV of IES of vacancies for subsequent years 1994-95 to 2000-2001 was received from Department of Economic Affairs in May 2000 but that proposal was withdrawn in

January 2002. In this view of the matter it is stated that 13 vacancies have been reported and as recalculation and the process adopted by the respondents is within the domain of Department of Economic Affairs, the same may be ascertained from the concerned.

40. Shri R.N. Singh, learned counsel of respondents No. 1, 3 and 4 in its reply banked upon an additional affidavit filed in CP-368/2002.

41. The aforesaid affidavit has explained the vacancy position and the process arrived at in recalculation in pursuance of directions of OA751/2001.

42. According to the respondents 13 DPQs post of IES examination of 1985 were recommended by UPSC. They joined in December 1986 but appointed for the vacancies 1985-1986. Accordingly, they were not shown against vacancies of 1986-1987. 15 DPQs were recommended in IES examination 1986.

43. 170 officers in pursuance of decision of Narender Chadha's case (supra) in 1986 were inducted to IES on ad hoc basis. No IES examination was held from 1987 to 1991. However, in 1990 115 feeder posts holders were inducted in Grade-IV.

44. A cadre review of IES reduced the strength of Grade-IV of 139 in 1991-1992. 25 DPQs vacancies were intimated to the UPSC in 1992-1993

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again a proposal for 25 vacancies was sent. In 1993-1994 7 vacancies were intimated to UPSC. No examination was held for the year 1994-1995. 25 candidates were recommended by UPSC and also 25 candidates for the year 1995-1996.

45. In 1996-1997 and 1997-1998 as no IES examination was held, as it was decided but temporarily subject to recruitment pending restructuring of IES cadre. However, in 1997-1998 91 feeder posts holders were intimated to fill up DPQ.

46. On a review by IES, it was decided to resume the direct recruitment at a rate of 5 officers per year or 10 every alternative year. It was decided on 25.6.1999 in IES Board meeting to recruit 5 to 6 officers every year or 10 to 12 years every two years. Accordingly, IES examination was resumed in 1998-1999 where 12 DPQs were recruited in 1999-2000, 15 vacancies were intimated to UPSC but no recruitment due to cancellation was made. However, in 2000-2001 15 vacancies were intimated to UPSC.

47. On restructuring of cadre of IES in August 2000, posts in Grade-IV further reduced to 100. No examination was held in 2001-2002. 10 vacancies were intimated to UPSC. Accordingly, yearwise total vacancies from 1986 to 2001 excluding 115 posts. There is a deficit of 6 DPQs in the year 2000-2001. 6 as per the availability of DRs quota was 10. An

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examination was conducted in 2002-2003 to select 10 DRs but the names still to be recommended by UPSC. This had made 13 vacancies in DPQ quota.

48. In the aforesaid backdrop of recalculation it is stated by learned counsel that there is presently no IES officer against 40% quota. The Tribunal after consideration of freezing of vacancies to be filled through DPQ recorded a clear finding in OA-751/2001. This cannot be reopened for adjudication.

49. Learned counsel further in view of U.O.I. Vs. M. Jungamayya (1977 SLJ SC 1990) contends that no employee has a right to have a vacancy filled in higher post which can be left unfilled by the government in its discretion.

50. On the other hand applicants' counsel vehemently opposed the aforesaid justification.

51. The pleas taken by the applicants in support of their claim are as under:-

(i) Statutory rules of 1961 reckoned total vacancies occurred during each year and not the cadre strength.

(ii) Calculation of vacancy has been wrongly arrived at. No yearwise panel has been prepared and yearwise vacancies have not been considered in DPQ quota.

(iii) Mistakes have been committed in calculation of vacancies when there is no DPQ in any year no DPQ was filled up. Excess and deficit DPQ has been arrived at by inducting of DPQ from the notional 40%. Vacancies have been clubbed together for 15 years.

(iv) Direct recruitment was suspended during 1997-1998 which was resumed from 1999. The down sizing policy of the government does not envisage as a notional consequence decision to suspend promotion to Grade-IV except a decision to freeze in 2001.

(v) Legitimate claim for preparation of select panel of restructuring of vacancies in 2000.

52. Plethora of decisions have been cited by the applicants' counsel which shall be discussed later on in the body of the judgement.

53. At the outset on careful consideration of the rival contentions of the parties and perusal of the relevant record Rule 8(1)(a)(i) and (ii) of IES Rules, 1961 we find that it provides methodology for filling up the vacancies as per the rules. 40% of DPQ vacancies are reckoned on the basis vacancies occurred during each year shall be filled up by holding DPC

etc. Apex Court in a Constitution Bench in Bishan Sarup Gupta Vs. UOI (1973 SCC (lab.1)) held as follows:-

"Para 14.....the contention on behalf of direct recruits....the rule was to secure that at any given moment the service consist of direct recruits and promotees in the proportion of 2:1 i.e., If for example, in any year 50 direct recruits were appointed, then not more than 25 promotees could be appointed in that year. If also no direct recruits was appointed in a year there could be no appointment of promotees..... What was however, over-looked is that the rule, dated October 18, 1951, was not concerned with the constitution of the cadre but was concerned as to how permanent vacancies were to be filled....The vacancies for any particular year being ascertained, not more than one-third of the same were to go to the promotees and the rest to the direct recruits. The ratio was not made dependent on whether any direct recruits was appointed in any particular year or not. In our opinion, the promotees were entitled to one-third of the vacancies in any particular year whether or not there was direct recruitment by competitive examination in that year...."

54. The calculation of vacancies for DR and DPQ has also been laid down in Sri Kant Tripathy Vs. State of U.P. (2002 SCC(L&S) 968) as under:-

"Para 22.....for the purpose of recruitment in the year 1988, the High Court was duty-bound to examine and find out the number of vacancies occurred in 1988 as well as the anticipated vacancies likely to occur in 1989 and 1990 and thereupon, calculate the posts available from three different sources, in accordance with Rule 6 and then take steps for filling up the posts in accordance with the prescribed procedure.....that the High Court had made the calculation on the basis of

percentage of the cadre strength. This, on the face of it, unsustainable, in view of the clear and unambiguous language in Rule 6, as we have discussed earlier. The very basis of calculation being incorrect, necessarily, it has resulted in gross injustice.

Para 26..... As has been stated earlier, the High Court committed a serious mistake in calculating the number of direct recruits to be recruited on the basis of 15% of the cadre strength and such basis is erroneous being in the teeth of the language in Rule....."

55. If one has regard to the above rules under proviso of Article 309 has statutory force of law and are to be necessarily followed while filling up the quota in Grade-IV as regards DR and DPQs are concerned. The ratio of DPQ is to be maintained yearwise on the basis of vacancies occurring in the particular year. The filling up of DPQ is not dependent and has no concern with the cadre strength. This quota is also not concerned with any direct recruitment made or not in the particular year. If it is so then while recalculating the vacancies as reflected from the additional affidavit filed by the respondents in CP-368/2002 from 1995-1996 onwards whereas there were vacancies in Grade-IV yet no recruitment had taken place in both the quotas for the year 1995-1996 and 1997-1998 and for the year 1995-1996 the quota has not been assigned to DPQs. In 1997-1998, 1998-1999 there was direct recruitment but no vacancies were year marked for DPQ. This position perpetuated in 1999-2000 as well as 2000-2001.

56. If one has regard to the Constitution Bench decision while recalculating the vacancies as directed by the Tribunal, it was obligatory upon the respondents to have meticulously followed the recruitment rules of 1961 and even if there was no recruitment in the years in so far as DR quota is concerned as per available vacancies 40% DPQs should have been adhered to while recalculating the vacancies in such a manner which is in consonance with rules as well as law on the subject.

57. As regards calculation of vacancies and preparation of select panel is concerned as per DOP&T guidelines of 1989 promotion against vacancies is to be made which occurred during the course of an year. Whether DPC could not be held in previous years the vacancies shall be determined for each year separately. DPC is to be dispensed with when there is no vacancy to be filled by promotion. Accordingly, if in given year vacancies are available not filling the vacancies in so far as DPQs is concerned on the ground that no direct recruitment has taken place is de hors the instructions. Apex Court in N.R. Banerjee & Ors. U.O.I. (1997 SCC(L&S) 1194) held as follows:-

"Para 12.....The preparation and finalisation of the yearly panel, unless duly certified by the appointing authority that no vacancy would arise or no suitable candidate was available, is a mandatory requirement. If the annual panel could not be prepared for any justifiable reason, yearwise panel of all the eligible candidates within the zone of consideration for filling up the vacancies made in accordance therewith....."

58. Respondents' calculation of vacancies and their justification is not logical. Their arrival on 13 vacancies of promotion quota for the year 2000-2001 and 2002-2003 on matching quota formula is not correct as instead of commuting 40% of total vacancies, the vacancies calculated for DPQ under 40% vacancies quota have been proportionately recommended to the UPSC. What has been held is that when there is no direct recruitment in an year, no DPQ was exhausted. The excess and deficit of DPQ has been arrived by deducting the actual induction of DPQ from the notional promotion of 30% DPQ. The respondents have submitted the total excess from the total deposit to arrive at a difference 6 vacancies under DPQ. This has resulted in clubbing of the 15 years i.e. 1986 to 2001. The respondents have also clubbed 15 years period as one year unit of vacancies not to effect the promotional quota from 1995 onwards.

59. Apex Court in Vinod Kumar Sangal Vs. U.O.I. (1995(3) SLJ 143) observed as under:-

"Para 5. In view of the aforesaid explanation that has been offered by the respondents for non-holding of the DPC during the period the reorganisation of the Department was under process may be justified. But when the DPC met in 1985 was it not required to make the selections on yearly basis for the vacancies of each particular year? The Office Memorandum dated December 24, 1980 clearly postulates that where the DPC is unable to meet on regular intervals for reasons beyond control the first DPC that meets thereafter shall determine the actual number of regular vacancies that arose in each of the previous year/years and the actual number of regular vacancies proposed to be filled in the current year separately and consider in respect of each

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of the years those officers only who would be within the filed of choice with reference to the vacancies of each year starting with the earliest year onwards and prepare a consolidated select list....."

60. If one has regard to the above, clubbing of the vacancies is not a permissible procedure. The counting of earlier recruitment as a result of detracting vacancies in the later years, those earlier recruited officers may or may not be eligible to be promoted against vacancies of later years. The calculation arrived at by the respondents of 13 DPQ vacancies under 40% quota is not in consonance of statutory rules of 1961.

61. Respondents had held DPC in 1997 for 91 posts from DPQ in Grade-IV against panel years 1990-91, 1993-1994. These incumbents were promoted to Grade-III which has been upheld by the Tribunal in OA-999/1999 (Lalit Kumar Vs. U.O.I.).

62. Due to the decision of the government as to down sizing on restructuring of fresh recruitment does not in any manner affected the promotional avenues as per the notification dated 16.5.2002. In para-3, the other modes of recruitment including promotion has been observed to be adhered to. This, as a natural consequence lays down that the promotional quota cannot be suspended. Though the abolition of posts and down sizing the cadre strength is the prerogative of the respondents but same should be in accordance with rules. Although we find that in 1991-1992 and 2000 from a strength of 237 the strength

has been brought down of Grade-IV cadre to 100. Respondents have miserably failed to show any notification or amendment in the rules to that effect. The aforesaid reduction in Grade-IV can be viewed from another angle as there is no genesis of reduction. Simultaneously, promotional posts in Grade-IV have not been reduced. However, we do not want to dwell further on the aforesaid issue.

63. Applicants had worked from August 1998 till May 2000 on ad hoc basis prior to the restructuring of cadre strength on 6.9.2000. It was mandatory upon the respondents to hold DPC for each year from 1995 to 2000. A notification retrospectively amending the cadre strength on 6.2.2004 by no stretch of imagination could have defeated the claim of the applicant who had worked on ad hoc basis for regular promotion from 1995 onwards. Apex Court in UOI & Ors. Vs. Tushar Ranjan Mohanty & Ors. (1994 SCC(L&S) 118) held as under:-

"Para 14.....When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenging the same in the Court of law, the legitimate cannot render the said right and the relief obtained nugatory by enacting retrospective legislation....."

64. We also find that in OA-751/2001 the decision to freeze the vacancies has not been upheld by the Tribunal rather the decision to take 115 vacancies in consideration in Kapila's case was deprecated. We do not find any yearwise select panel under 40% DPQ against 67 vacancies as alleged by the

applicants during the years 1995 to 2000. Applicants had continued to work on permanent vacant posts Grade-IV IES within 40% quota and it is not a case that this quota was meant for DR. The aforesaid action of the respondents deprived eligible officers being considered for promotion from 1995 onwards. The methodology adopted by the respondents in recalculating the vacancies despite directions of the Court to hold it yearwise with regard to yearwise vacancies was erroneous de hors the directions. High Court of Delhi in UOI Vs. Central Administrative Tribunal (ATJ 2004(1) 112 held as follows:-

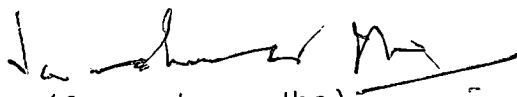
"Para 10. As a matter of fact no occasion requiring application of promotion with retrospective effect should arise as it is provided in the rules for scientific posts that assessment board shall meet once a year to consider the case of in-situ promotion. When the department fails in its duty to hold assessment board which are to meet every year, it cannot take advantage of its own wrong. Respondent Nos. 2 and 3, in the instant case became eligible for promotion to the next higher post of director after rendering ten years as PSO although they became eligible as PSO in 1990 and although as per the government's own directive assessment board should have met that very year, the DPC was held in 1996. If 1996 is granted as the year of seniority, respondent Nos. 2 and 3 are bound to suffer. On the other hand, had they been granted promotion in 1990 they would have become eligible. It is this hardship which is taken care of by the Supreme Court in N.R. Banerjee's case while holding that in such cases the order of eligibility should be treated as seniority....."


65. We have no hesitation to hold that the recalculation of vacancies by the respondents was not only against IES Rules of 1961 but also against the

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established law as discussed above. Hyper technical pleas resorted to by the respondents would be misconceived and will have of no consequence.

66. For the foregoing reasons, we dispose of this O.A. by holding recalculation of DPQ under 40% quota by the respondents as not ^{legally} sustainable. Accordingly, we direct respondents to recalculate the vacancies yearwise forming yearwise panel having regard to IES Rules 1961 and the law on the subject. In the event the applicants as per their eligibility subject to rules are found fit shall be considered for promotion and in that event they would be given appointment against the vacancies of the year to which they are entitled to with all consequential benefits. The aforesaid directions shall be complied with within a period of three months from the date of receipt of a copy of this order. No costs.


(Sarweshwar Jha)
Member(A)


(Shanker Raju)
Member(J)

/vv/