

Krishna Kumar Vs. Union of India (Uoi) and ors.

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Court : Central Administrative Tribunal CAT Mumbai

Decided On : Dec-03-2002

Reported in : (2004)(2)SLJ133CAT

Judge : L Swaminathan, S A Shanta

Appellant : Krishna Kumar

Respondent : Union of India (Uoi) and ors.

Judgement :

1. This application is regarding promotion to the post of Additional Director General of Works in Military Engineering Service (MES). The applicant is aggrieved that he has not been promoted to the post of Additional Director General of Works which has been vacant since 1.7.2002 only on the ground that the applicant is left with less than three months of service before superannuation. He has therefore challenged the panel dated 6.9.2002 whereby two officers namely Shri Suresh Dhiman and Shri D.S. Saxena have been promoted.

2. The applicant is Civilian Group 'A' officer of M.E.S. department of Ministry of Defence and is presently working as Chief Engineer and is posted in the office Panel of Arbitrators (Pune). He was directly appointed to the post of Assistant Executive Engineer in 1962 and was thereafter promoted as Executive Engineer, Superintending Engineer and Additional Chief Engineer in August 1988 and November, 1995 respectively. Finally he was promoted as Chief Engineer on 9/10.12.1997. The next promotion for the applicant is to the post of Additional

Director General of Works. According to the applicant there are in all three posts of Additional Director General of Works earmarked for Civilian Officers. The applicant submits that he is fully eligible for promotion to one of these posts in terms of the Indian Defence Service of Engineers (Recruitments and Conditions of Service) Rules, 1991. According to the applicant he stands at Serial No. 4 in the All India seniority of Chief Engineers published for 2001-2002 whereas the respondent No. 4 has been listed at Serial No. 7 of the above list. Yet respondent No. 4 has been promoted as Additional Director General of Works.

3. The applicant's date of birth is 22.12.1944 and he is due to retire on 31.12.2002. The first vacancy for the Additional Director General of Works fell in July, 2002 and it has been filled by promoting Shri Sudesh Dhiman. The next vacancy has fallen on 1.11.2002. The respondents have promoted respondent No. 4 against the second vacancy and there is a third vacancy still left.

4. The applicant submits that he made enquiries as to why his name had not been included in the panel for the post of Additional Director General of Works when the vacancy had become available on 1.11.2002. He learnt that the DPC had considered his case and his name had been included in the panel recommended by the DPC along with the names of Shri Sudesh and respondent No. 4. However, he learnt that the proceedings of the DPC were sent to the Appointment Committee of Cabinet (ACC) and finally the applicant was not promoted on the ground that he would not be having at least three months service in the post of Additional Director General of Works from the date of his promotion till his date of retirement.

5. The respondents submit that it is true that the applicant was recommended for inclusion in the panel of Additional Director General of Works. However, since the applicant is left with less than three months service, he could not be promoted. The respondents are justifying their action on the basis of the DOP&T O.M. No. 27(4)ED/ 85(ACC) dated 12.4.1988 which specifically lays down that the person to be promoted to the post of Higher Administrative Grade (HAG) and higher post has to be cleared by the ACC and further he should be left with minimum three months of service before his retirement. In the present case, vacancy in question

has arisen on 1.11.2002. Since the applicant is due to retire on 31.12.2002, the vacancy cannot be filled in by the applicant.

6. The applicant contends that the deletion of his name from the panel is totally erroneous and illegal because the recruitment rules framed under Article 309 of the Constitution prescribe only three years of regular service as Chief Engineer for next promotion. There is no condition or proviso in these rules that the promotion to the post of ADG will not be given if the officer has less than three months of service from the date of promotion to the date of retirement. Therefore any condition now introduced by an administrative order either by DOP&T or by the Ministry of Defence or by the Cabinet Secretariat would amount to altering the eligibility of Chief Engineer for their next promotion, cannot be adopted or followed unless the Rules are amended accordingly.

7. The applicant has also alleged that assuming that the DOP&T order stipulates the condition of minimum three months period left prior to retirement, there have been cases where the respondents have promoted officers even though they had less than three months service prior to superannuation. The applicant submits that one Shri S.K. Gupta, Chief Engineer was promoted as Additional Director General of Works on 12.10.2000 and he superannuated on 30.11.2000. Similarly, one Shri R.K. Caplash, Additional Chief Engineer was promoted as Chief Engineer in October 1997, and he retired on 30.11.1997. This is an example of how the respondents are not following the recruitment rules uniformly in respect of the officers in the M.E.S. and how they are practising discrimination amongst officers.

8. The applicant has further brought to our notice a judgment of the Calcutta Bench of the Tribunal in the case of Shri Battacharya v. Union of India, 2002(2) SLJ 294 wherein the Tribunal found that there were no specific and cogent reasons for fixing the minimum of three months period to give promotion before one retires. The Tribunal held such condition as violative of Articles 14 and 16 of the Constitution of India.

9. The applicant further submits that he submitted a representation to respondent No. 2 on 9.9.2002 against his non-inclusion in the impugned panel for promotion to the post of Additional Director General of Works. However, since the time was

short for him to retire, he has rushed with the present O.A.10. The applicant has further stated that perhaps such business Transaction Rules prescribe that promotion panel for posts carrying the scale of pay of Rs. 2,500-2,750 (pre-revised) and above prepared by D.P.C. require the approval or clearance by the Appointment Committee of Cabinet. However, exemption is given for above A.C.C. approval for posts belonging to M.E.S. cadres. Therefore, according to him there was no need for the DPC recommended panel to be sent for approval to ACC by Ministry of Defence. Further, he has reiterated the same in his rejoinder.

11. The respondents while pressing their stand referred to ACC No.27(4)ED/59(ACC dated 11.4.1989. The said order of the Government has been issued by the ACC which is Chaired by the Prime Minister who is the supreme executive of the Union of India as a policy decision.

According to the respondents, the action of the Government is not contradicting the recruitment rules since the rules do not lay down any minimum period required to be left before retirement the O.M. has only supplemented the rules and therefore, it cannot be held violative of the recruitment rules. ACC is the final authority in the country for deciding upon the competence of the officers for the highest post in the country. It is further submitted that for some other senior posts, the requirement is even more than 90 days service. Respondents contend that the applicant's claim of violation of Articles 14 and 16 by the respondents is not tenable because he is not being discriminated vis-a-vis another officer who also has 90 days of service for retirement. Therefore he cannot allege discrimination against those who are left with more than 90 days of service prior to retirement.

12. The respondents submit that all promotions recommended by the UPSC are required to be approved by the Appointing Authority i.e. Ministry of Defence and in the case of Higher Administrative Grade and higher post they are required to be approved by the ACC. There is a valid reason and nexus that there should be atleast three months service left for an officer who is being promoted to highest position to make some contribution to the post. It cannot be held to be irrational or arbitrary. No public interest can be served if a man is promoted to the HAG and above with less than three months service left. The respondents also clarify that

there is no proviso for exempting the promotions to the post of ADG and above in the M.E.S. for approval by the ACC.¹³ Coming to the alleged cases where officers were promoted when they were left with less than three months service, the respondents submit that Shri S.K. Gupta had more than 90 days service from the date when the DPC met and also the vacancy was for more than 90 days. As regards Shri S.M. Bajpai, SSW, was promoted as Chief Surveyor of posts, for one day only, however, he had more than 90 days when the DPC met and the vacancy was also available for more than 90 days. In the case of Shri R.K. Caplash, he was promoted from Additional Chief Engineer to Chief Engineer and he did not require clearance by the ACC. Thus, the applicant is not being singled out for purported discrimination as alleged by him.

14. The applicant in his rejoinder has reiterated the earlier arguments and has rebutted the contentions of the respondents. According to him the respondents are following pick and choose policy in regard to the officers having less than three months service to retire.

15. The respondents on the other hand are relying on a judgment in *Union of India v. P.K. Lambodaran Nair*, 2002 (SCC) L&S 84 a similar case was before the Supreme Court. The Tribunal had held the view that in view of the O.M. dated 18.5.1977 the executive instructions, have no application where promotions are governed by statutory rules and therefore, the Central Government ought to have approved the name of respondent for the post of IPS. The petition was allowed. However, the Supreme Court while holding that the view taken by the Tribunal does not appear to be correct view of law observed that since the Central Government had implemented the decision of the Tribunal and the respondents had continued to work on the promoted post and was to retire shortly after about five months, was not inclined to interfere with the matter and the appeal was dismissed. Further, the respondents have relied on judgment in *Union of India v. K.P. Joseph and Ors.*, AIR 1973 SC 303=1973 SLJ 1 (SC). In this judgment, the Hon'ble Supreme Court held that generally speaking an administrative order confers no justiciable right but this rule, like all other general rules is subject to exceptions. It was similarly held in *Santramv. Union of India*, (1968) 1 SCR 111, that although Government cannot supersede the statutory rules by administrative

instructions yet if the rules framed under Article 309 of the Constitution are silent on any particular point, the Government can fill up the post in accordance with the rules already framed and these instructions will govern the conditions of service.

According to the respondents, in the present case also they have tried to fill a gap in the recruitment rules.

16. The applicant on the other hand placed reliance on the judgment of the Calcutta Bench in the case of Sunil Battacharya v. Union of India in O.A. No. 1523/1996. The Tribunal discussed at length the O.M. dated 11.4.1989 and 25.1.1990 of the Department of Personnel providing that a person having less than three months time before superannuation cannot be promoted, the Tribunal came to the conclusion that the rule must be rational and scientific. Depriving promotion and status of a post at a time when an employee who has been found fit to hold the post on the ground that the employee is not having three months service, is illegal, arbitrary, unjust and unfair.

17. Though the Tribunal intended to strike down the O.Ms, dated 11.4.1989 and 25.1.1990 of the DOP&T, it expressed a view that the O.Ms, should not come in the way of the present applicant to get promotion to the post on the basis of the other reasons given, i.e. not constituting the DPC in time on account of the fault of the authorities themselves for which the applicant should not be denied the opportunity.

18. We have heard the learned Counsel for the applicant as well as the respondents. The only issue for consideration is whether the respondents are justified in denying promotion to the applicant on the sole ground that he is left with less than three months service prior to his superannuation.

19. In our considered view, the applicant cannot be denied promotion on the aforesaid ground. It is rather an arbitrary ground to be taken. In this respect the judgment of the Calcutta Bench has given its view after careful reading of all the material available. We do not see any reason to disagree with the above judgment. No doubt the statutory rules can be supplemented but not supplanted with a view to clarify or to fill in the gaps. In the present case, the recruitment rule

is very clear. It does not stipulate any condition of three months of service left before retirement coming in the way of promotion. Introducing the new element of minimum three months service left prior to superannuation cannot be said to be supplementing the rules. The statutory rules have not been amended further. We do not find any nexus to the object of this particular provision. Accordingly, we quash and set aside the O.M. dated 12.7.1988 prescribing the minimum service of three months prior to superannuation and hold the applicant entitled to the promotion as he has already been recommended by the DPC which is not denied, for promotion with effect from the date the vacancy has arisen with all consequential benefits such as arrears of pay, etc. The O.A. is allowed. No costs.

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