

(2017) 11 PAT CK 0052

In the Patna High Court

Case No : 14567 of 2017

Ajay Kumar

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 30-11-2017

Acts Referred:

Constitution of India, Article 226, Article 226, Article 227, Article 227 -
All India Service Act, 1951, Section 3(1) -
Administrati

Citation : (2017) 11 PAT CK 0052

Hon'ble Judges : Ajay Kumar Tripathi, Rajeev Ranjan Prasad

Bench : DIVISION BENCH

Advocate : Piyush Lall, S.D. Sanjay, Kanak Verma, P.K. Verma

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the petitioner and learned Additional Solicitor General for the Union of India as also learned counsel for the State of Bihar.
2. The petitioner, in the present case, is aggrieved by the order dated 9th January, 2013 passed by learned Central Administrative Tribunal, Patna Bench, Patna (hereinafter referred to as "CAT Bench, Patna") in OA No. 36 of 2011 by which the application preferred by the petitioner for a direction to the respondent State of Bihar and its" authorities to allow promotion / upgradation of the applicant in the apex scale with effect from October, 2010 as

advised vide letter no. 14020/01/2010-AIS II dated 19.10.2010 (contained in Annexure P/3 to the application) and clarified vide letter no. 14020/01/2010-AIS II dated 17.01.2011 (contained in Annexure P/6 of the application) notionally and a further prayer that the applicant be allowed his pension and all the pensionary benefits in accordance with the same have been refused by the learned CAT Bench, Patna.

3. The applicant happened to be an IAS officer belonging to the Bihar Cadre. It is his case that he became eligible for promotion / upgradation to the apex scale, i.e., scale equivalent to that of the Chief Secretary, since he was due to retire on 31.01.2011, the applicant submitted a representation on 01.06.2010 to the Chief Secretary, Bihar and referring to the second proviso to Rule 4(2) of The Indian Administrative Service (Cadre) Rules, 1954 (hereinafter referred to as "the Rules") requested that the State Government may take a decision to create a temporary post in addition to the cadre post of Chief Secretary which may cease to exist on the retirement of the applicant. It was submitted by the applicant that in absence of a vacancy in the apex scale, the State Government, taking recourse to the said provision of the Rules, is competent to temporarily add to the cadre post in the apex scale and allow the applicant the benefit of the said temporary addition to the cadre post till the date of his retirement.

4. The representation filed by the applicant was sent to the Department of Personnel and Training (DoPT) in Government of India for advice and necessary action vide letter dated 29.09.2010, the emphasis of the argument on behalf of the applicant is that while referring the matter of the applicant to the DoPT, Govt. of India, the State Government admitted that the applicant was otherwise eligible for promotion to the scale of Chief Secretary but in absence of the probable vacancy occurring before the date of his retirement on

31.01.2011, the advice was sought for. The Director (Services), Govt. of India, DoPT vide letter dated 19.10.2010 advised the State Government to add one post to IAS cadre in the apex scale upto 31.01.2011 as, according to the DoPT, the State Government is temporarily empowered to add to the cadre post by virtue of the rules referred above. According to the petitioner, on a further query raised by the General Administrative Department Govt. of Bihar, the Govt. of India Department of Personnel and Training (DoPT) vide its letter dated 17.01.2011, as contained in Annexure P/6, pointed out that the difference between "temporary addition" and "creation of ex-cadre posts" has been clarified in the department's letter dated 23.04.1998.

5. The grievance of the applicant was that despite the fact that DoPT, Govt. of India reiterated its earlier advice, the applicant was not given the apex scale and he was made to retire on 31.01.2011. It was further alleged that in case of Anil Kumar, who was also of 1976 batch, he was given apex scale from 18.01.2011, therefore, it is a case of discrimination.

6. During the pendency of the Original Application, the reliefs prayed for by the applicant were amended vide MA No. 69/2011 as the applicant prayed for a direction to the respondent authorities, as has been taken note of at the top of this judgment.

7. In opposition, the State of Bihar & Principal Secretary, General Administration Department, Govt. of Bihar (respondents no. 3 & 4) took a stand as contained in Annexure P/4. The respondents answered the submissions of the applicant in the following words in paragraph 10 of the Written Statement. Paragraph 10 of the Written Statement is quoted hereunder for a ready reference:-

"I. In the year 2009-10 promotions to IAS officers of 1975 batch of the Bihar Cadre were granted by the State Govt. which was beyond the authorized strength. These promotions were granted in view of promotions granted by the Central Govt. to IAS officers of 1975 batch working under the Central Staffing

Scheme in Govt. of India.

II. AG, Bihar objected and expressed his inability to issue pay slip to the officers granted promotions beyond the authorized strength.

III. A writ petition bearing No. 1271/2009 (Kishori Das V/s Bihar State & others) was filed in this regard.

IV. The Govt. of India also declined to approve the promotions which were beyond the authorized strength.

V. A bare perusal of rule would reveal that there is no such provision for creation of a Cadre post only for granting promotion to a particular officer.

VI. It was also felt that such promotion if granted to the applicant by creating a temporary post it would be a bad precedent."

8. Learned CAT Bench, Patna thereafter dealt with the submissions of the applicant and the respondents as pleaded before the CAT Bench, Patna and finally took a view that only for accommodating the applicant and to grant him promotion direction cannot be given to create a post in the apex scale, even temporarily so that he can derive a higher pension. The case of Anil Kumar of 1976 batch, who belonged to Maharashtra Cadre, was also distinguished by the learned CAT Bench, Patna holding that the promotional avenue and policy may differ in different States, thus, on the basis of an example of another State the plea of discrimination cannot be considered as tenable.

CONSIDERATION

9. We have heard learned counsel representing the petitioner as well as the respondents and perused the records.

10. First of all, we would take note of the admitted factual position that there are only four cadre posts in the apex scale (i.e. Chief Secretary's scale) in the State of Bihar. Besides this cadre posts, there are four ex-cadre posts which could have been created by the State Government in the apex scale. There is no denial of the fact that all the eight posts were filled up at the relevant point of time and those

officers, who were given the apex scale, were all senior to the present applicant. The fact that neither any post was vacant in the apex scale when the applicant represented his case nor any of the juniors to the applicant was promoted in the apex scale has not been disputed. The Rules has been framed by the Central Government after consultation with the Govt. of the States concerned, by virtue of the powers conferred by sub-section (1) of Section 3 of the All India Service Act, 1951. Rule 4 of the Rules is quoted hereunder for a ready reference:-

"4. Strength of Cadres- 4(1) The strength and composition of each of the cadres constituted under rule 3 shall be determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made, shall be as in force immediately before the commencement of these rules.

4(2) The Central Government shall, ordinarily at the interval of every five years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit:

Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time:

Provided further that State Government concerned may add for a period not exceeding "two year and with the approval of the Central Government for a further period not exceeding three years to a State or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts."

11. It is the specific case of respondents no. 3 and 4 in

their Written Statement that the Govt. of India vide its letter reference

MHA6/9/63 AIS (II) dated 09.02.1965 has clarified the second

proviso to Rule 4(2) of the Rules. The clarification has been quoted in

the written statement which we place hereunder for a ready reference:-

"The second proviso requires that the posts added temporarily to the cadre should carry duties and responsibilities of a like nature of cadre posts. The exercise of this power by the State Government with reference to a post involves an objective assessment of the nature of the duties and responsibilities attached to that post in comparison to those attached to cadre post. This post can not be temporarily added to the Cadre unless such posts already exist in the Cadre."

It is further mentioned in the clarification letter that "the scale of pay of the posts, temporarily added to the cadre, should also be the same as that of the cadre post to which it corresponds. Thus, where the pay of the post of Secretary in the Cadre is in the Senior Time Scale, it would not be in order, to add temporarily to the Cadre post of Secretary in the Super Time Scale."

12. It is in the aforesaid background that when the State Government was advised to add one post, i.e., post of Development Commissioner to the IAS cadre in the apex scale temporarily upto 31.01.2011 invoking second proviso to Rule 4(2) of the Rules vide letter no. 14020/01/2010-AIS-II dated 19.10.2010 enclosed as Annexure A/3 to the O.A. for purpose of the applicant, the respondents examined the same and came to a conclusion that there was no justification or rule to create a cadre post or for granting promotion to a particular officer. The State Government had never approved such a kind of creation of post in the fixed scale on any earlier occasion and, therefore, the Govt. of Bihar was not in favour of adding a temporary post as, according to them, it would have set a bad precedent. There is also a specific statement in the Written Statement that the Govt. of Bihar vide it's letter no. 12606 dated 22.12.2010 requested the Govt. of India, "DoPT" to clear the position on previous advice but the reply of the said letter no. 12606 was still awaited officially. It was also pointed out by the respondents that it seems from Annexure A/5 to the O.A. that in the said letter dated 17.01.2011 the Govt. of India sought to refer its earlier letter where the difference between "temporary additions" and "creation of posts" was said to have been explained. The statement made by respondents no. 3 and 4 about non-receipt of the letter as contained in Annexure A/5 has not been seriously denied by the applicant - petitioner and the only plea which has been taken by the applicant is that the reply of the Govt. of

Indian is on the record as Annexure A/5 and in any case it could have been obtained by giving a call and the letter could have been obtained / received by FAX.

13. The submission of the learned counsel representing the petitioner that the Govt. of Bihar changed its stand because somebody powerful in the government decided to deny the applicant his due does not impress us because the notings in the file or correspondences between the Central Govt. and the State Govt. in course of consideration of an issue if any made at one stage cannot be a ground to bind the government with the said notings and correspondences unless a decision based on that notings and correspondences is finally taken by the government at appropriate level and the same is issued / communicated to the concerned person / employee.

14. In the present case, we have noticed that as soon as a representation was made by the petitioner vide his letter dated 01.06.2010 as contained in Annexure P/1, the same was sent to the Govt. of India, DoPT vide Annexure P/2 in which the claim of the present application was reiterated and a guideline in this regard was sought for from the Govt. of India. The Govt. of India vide its letter dated 19.10.2010, as contained in Annexure P/3, advised the Govt. of Bihar to add one post to the cadre, i.e., post of Development Commissioner in the apex scale temporarily upto 31.01.2011 invoking second proviso to Rule 4(2) of the Rules. When this advice as contained in Annexure P/3 was received in the General Administration Department, Govt. of Bihar, a question was raised that Rule 4(2) of the Rules or the decisions taken by the Govt. of India under this rule are not showing that there is any provision for addition to a cadre post, that too, for purpose of giving promotion to one officer. The General Administration Department, Govt. of Bihar, vide its letter dated 22.12.2010 (Annexure P/4 to the Writ Application)

while referring the aforesaid issues also pointed out that on an earlier occasion in the year 2008-2009 when promotions were granted to some of the officers in the apex scale beyond the number of cadre posts, the Accountant General had raised objections and the posts created over and above the fixed number of posts were not recognized. Apparently, the facts and the issues mentioned in the letter dated 22.12.2010 of the General Administration Department, Govt. of Bihar were not brought to the notice of the Govt. of India, DoPT on earlier occasion. If it was subsequently brought to the notice of the Govt. of India, DoPT and a clarification was sought with regard to their previous advice, nothing wrong may be inferred from this correspondence.

15. Neither before the CAT Bench, Patna nor before us the petitioner has been able to show that there is any rule or guideline of the Govt. of India, DoPT which provides for addition of a post to the cadre post, if not a creation of ex cadre post is permissible, particularly with a view to give benefit of the apex scale to a retiring officer such as the petitioner only for the purpose of higher pension. The petitioner is also unable to demonstrate any hostile discrimination inasmuch as there is no denial of the categorical statement of respondents no. 3 and 4 that the State Govt. has not given this benefit to any officer by adding up a post temporarily to the cadre post till the date of retirement of an officer nor any person junior to the present petitioner has been promoted to the apex scale. In view of this specific stand of the Govt. of Bihar, the petitioner cannot allege discrimination. The petitioner is thus unable to show any legal right vested in him which may compel us to take a reverse view against the decision of the CAT Bench, Patna and to issue a direction to the Govt. of Bihar to add a temporary post to the cadre post of the Chief Secretary.

16. The Tribunal has rightly taken note of the clarification contained in the Govt. of India's letter dated 09.02.1965 which says inter alia that the scale of pay of the post, temporarily added to the cadre, should also be the same as that of the cadre post to which it corresponds. Thus, where the pay of the post of Secretary in the cadre is in Senior Time Scale, it would not be in order, to add temporarily to the cadre post of Secretary in Super Time Scale. The applicant is unable to show not only that there is any legal right vested in him for consideration in the apex scale despite there being no vacancy existing at the relevant point of time but also that even otherwise the post which he was holding in the Govt. of India was fit to be added to the cadre of post of Chief Secretary in view of the Govt. of India's clarification as contained in the letter vide MHA no. 6/9/93 AIS(I) dated 09.02.1965.

17. In view of the discussions here-in-above, we are of the considered opinion that the CAT Bench, Patna has not committed any error in dismissing the Original Application No. 36 of 2011 filed by the petitioner. No ground for interference with the impugned order is made out in our supervisory jurisdiction.

18. In the case of Umaji Keshao Meshram & Ors. Vs. Smt. Radhikabai & Anr., reported in 1986 (Supp) SCC 401, the Hon"ble Supreme Court has dealt with the difference between Article 226 and 227 of the Constitution of India and observed as under:-

"100. According to the Full bench even where Clause 15 to apply, an appeal would be barred by the express words of Clause 15 because the nature of the jurisdiction under Articles 226 and 227 is the same inasmuch as it consists of granting the same relief, namely, scrutiny of records and control of subordinate courts and tribunals and, therefore, the exercise of jurisdiction under these articles would be covered by the expression "revisional jurisdiction" and "power of superintendence". We are afraid, the Full bench has misunderstood the scope and effect of the powers conferred by these articles. These two articles stand on an entirely different footing. As made abundantly clear in the earlier part of this judgment, their source and origin are different and the models upon which they

are patterned are also different. Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any government. Under Article 227 every High Court has power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see *State of Gujarat v. Vakhatsinghji Vajesinghji Vaghela* [AIR 1968 SC 1481, 1488 : (1968) 3 SCR 692] and *Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand* [(1973) 1 SCR 185 ; (1972) 1 SCC 898 : AIR 1972 SC 1598]. The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different processes does not mean that these two processes are the same."

19. Scope of jurisdiction under Article 227 of the

Constitution came up for consideration in the case of *Chandrasekhar Singh & Ors. Vs. Siya Ram Singh & Ors.* (1979) 3 SCC 118. It has been held that the power of superintendence under Article 227 of the Constitution of India is not greater than the power under Article 226 of the Constitution. The Supreme Court also observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a Superior Court can do in exercise of its "statutory power of Appeal, the High Court cannot, in exercise of its" jurisdiction under Article 227, convert itself in a Court of Appeal.

20. Later, in *Baby Vs. Travancore Devaswom Board &*

Ors. (1998) 8 SCC 310, the Hon"ble Supreme Court clarified that the High Court had powers under Article 227 of the Constitution of India

to quash the orders passed by the Tribunals if the findings of fact had been arrived at by non-consideration of the relevant and material documents, the consideration of which could have led to an opposite conclusion.

21. In a case involving judicial review of judicial actions of a tribunal, the High Court is bound to interfere with a decision of the tribunal which suffers from non-consideration of relevant and material documents, or where it is a case of failure of justice or a case of grave injustice. In the facts of this case, we are convinced that the tribunal has considered all aspects of the matter, the materials available on the record and no grave injustice has been caused to the petitioner.

22. Power of judicial review is not fit to be exercised by this Court in the facts and circumstances of this case.

23. Writ Application has no merit. It is accordingly dismissed.