
(2018) 05 CAT CK 0050

In the Central Administrative Tribunal

Case No : Original Application No. 3310 Of 2016, Miscellaneous Application No. 664 Of 2017

Anil Kumar Singh Billawria

APPELLANT

Vs

Union of India And Ors

RESPONDENT

Date of Decision : 23-05-2018

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Constitution Of India, 1950 — Article 14, 16

Citation : (2018) 05 CAT CK 0050

Hon'ble Judges : Dinesh Gupta, J;K.N. Shrivastava, Member (A)

Bench : Division Bench

Advocate : R N Singh, Amit Sinha, Vaibhav Pratap Singh, S M Zulfiqar Alam

Final Decision : Allowed

Judgement

K.N. Shrivastava, Member (A)

1. Through the medium of this O.A. filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for the following main reliefs:-

"(b) Declare the order/letter No.AV.13024/939/2015-AS dated 10.2.2016 passed by the respondent No.1 and communicated vide letter No.File No.A-32018/1/2015-Personnel Section-BCAS0-Part(2) dated 11th April, 2016 [Annexure-A (colly) Impugned] dated 11th April, 2016 [Annexure-A (colly) Impugned] of respondent No.2 as illegal, arbitrary and discriminatory and consequently quash the same;

(c) Declare that the applicant is entitled for counting of past services as Officer on Special Duty (Intelligence) which was subsequently re-named as Dy. Director (Intelligence) under the respondent No.2 on deputation basis and later on absorbed as such under the respondent No.2 with consequential benefits, including direction to the respondents herein for issuance of a seniority list in the grade of Dy. Director (Civil Aviation) under respondent No.2 and place the

applicant at appropriate place after counting his services as Officer on Special Duty (Intelligence) which was subsequently re-named as Dy. Director (Intelligence) under the respondent No.2 and consider him for the promotional post of Sr. Deputy Commissioner of Security (CA) (re-designated as Joint Director/Regional Director)."

2. The factual matrix of the case, as noticed from the records, is as under:-

2.1 The applicant joined Border Security Force (BSF) as Sub Inspector (SI) in October, 1985. He secured his regular promotions in BSF and finally was promoted to the rank of Deputy Commandant in BSF on 11.09.2008 in the Pay Band-3 - `15600-39100 with Grade Pay of `6600/-.

2.2 Pursuant to Annexure A-3 communication dated 19.04.2007 wherein it was informed that Bureau of Civil Aviation Security (BCAS) - respondent No.2 has required services of Officer on Special Duty (Intelligence) [OSD (I)], the applicant applied for the post. He was selected and joined BCAS as OSD (I), on deputation basis, on 22.06.2009.

2.3 The BCAS, vide its Annexure A-6 Notification dated 15.12.2010, invited applications for filling up of 4 posts of Deputy Commissioner of Security (Civil Aviation) [DCoS (CA)] on deputation/absorption basis. The applicant also applied for the said post, for which his parent organization BSF issued "No Objection". He was selected for the post on absorption basis and joined as such on 21.01.2013.

2.4 As the records would indicate, before absorption as DCoS (CA) in BCAS, the applicant had already rendered 3 years and 7 months of service as OSD (I). Incidentally, the pay scales of Deputy Commandant in BSF, OSD (I) and DCoS (CA) were the same, i.e., Pay Band-3 - `15600-39100 with Grade Pay of `6600/-.

2.5 On 31.12.2013, one Senior DCoS (CA) superannuated. The applicant requested the higher authorities through his representations for considering him for promotion against the vacant post of Senior DCoS (CA) in BCAS. In the meanwhile, respondent No.2, vide its Vacancy Circular dated 09.06.2015 (Annexure MA-1), invited applications for filling up of two posts of Senior DCoS (CA) in BCAS. The Vacancy Circular indicated that the posts are to be filled up from amongst eligible officers of Central or State Governments or Union Territories, including officers from Central Police Organizations. It had provided the following eligibility criteria:

"(a) (i) Holding analogous posts on regular basis in the parent cadre/ department; or

(ii) With five years service in the grade rendered after appointment thereto on a regular basis in posts in Pay Band 3 in the scale of pay of Rs.15600-39100 with grade pay of Rs.6600 or equivalent in the parent cadre or department; and

(b) Possessing five years experience in security duties including intelligence gathering."

2.6 The aforesaid posts were to be filled up in accordance with the Ministry of Civil Aviation (BCAS) Senior Deputy Commissioner of Security (CA), Group "A" Post, Recruitment Rules, 2010 notified on 11.10.2010 (Annexure A-14).

2.7 The BCAS underwent cadre restructuring and an order to that effect was issued on 04.02.2016. The Post of Senior DCoS (CA) was re-designated as Joint Director. 24 posts of Joint Director were sanctioned for BCAS, 4 of them for BCAS Headquarters and 20 for its Regional Offices. The Regional Offices were to be headed by Joint Directors. Further, the Joint Director heading a Regional Office is called Regional Director.

2.8 The respondents notified new Recruitment Rules (RRs) for the post of Joint Director/Regional Director vide Notification dated 08.05.2017. According to it, one post out of 24 posts is to be filled by way of composite method [deputation (ISTC) plus promotion] and the remaining 23 posts by way of deputation (ISTC).

2.9 The applicant's representation for promotion to the post of Senior DCoS (CA) was forwarded by respondent No.2 (BCAS) to respondent No.1 (Ministry of Civil Aviation) vide its letter dated 27.10.2015.

2.10 The respondent No.1, vide its impugned order dated 10.02.2016 (p.24), which was communicated to the applicant by respondent No.2 vide letter dated 11.04.2016, rejected his representation for promotion to the post of Senior DCoS (CA). The reasons indicated in the impugned letter are extracted below:-

"2. It has been noticed that Shri Billawria has earlier represented to BCAS. However, BCAS has turned down the same on the ground that as per RRs for the post of Sr. Dy. Commissioner of Security (Civil Aviation) in BCAS, minimum of five years" regular service in the post of Dy. Commissioner of Security (CA) in PB-3 with Grade Pay of Rs.6600/- is required. As Shri Billawria has been appointed to the post on 21/1/2013, he doesn't meet the requisite length of service. Moreover, Shri Billawria was earlier holding the post of Officer on Special Duty (Intelligence) on deputation basis in BCAS, which had been re-designated as Dy. Director (Intelligence) in 2009.

3. From the facts, it is seen that Shri Billawria does not meet the requirement of RRs of having five year service in the rank of Dy. Commissioner of Security (CA) and thus he does not qualify for promotion sought for now by him."

Aggrieved by the impugned Annexure A-1 (colly.) communications, the applicant has filed the instant O.A. praying for the reliefs, as indicated in paragraph (1) above.

3. The applicant, in support of the reliefs claimed, has pleaded the following important ground:-

The respondents have failed to note that the applicant was holding analogous Group "A" posts on deputation/absorption basis in BCAS as OSD (I) and DCoS (CA). Hence, in terms of the law laid down by the Hon"ble Supreme Court in the

following judgments, the applicant was eligible for promotion to the post of Senior DCoS (CA):

- (i) R S Makashi & others v. I M Menon & others, (1982) 1 SCC 379,
- (ii) K Madhavan & another v. Union of India & others, AIR 1987 SC 2291,
- (iii) Renu Mullick (Smt.) v. Union of India & another, (1994) 1 SCC 373,
- (iv) S.I. Rooplal & another v. Lt. Governor through Chief Secretary, Delhi & others, JT 1999 (9) SC 597; and
- (v) Union of India & others v. K B Rajoria, (2000) 3 SCC 562,

4. Pursuant to the notices issued, the respondents entered appearance and filed their reply. The thrust of their averments in the reply is as under:-

4.1 Minimum regular service in the feeder grade required for consideration for promotion to the next higher grade is prescribed in the Recruitment Rules and has to be determined accordingly. Normally, the service referred to is the service rendered in the feeder grade after regular appointment on direct recruitment / absorption / promotion basis. Service rendered on deputation prior to absorption is not counted towards the regular service. It is not related to how the seniority is fixed on appointment as seniority may or may not correspond to date of joining.

4.2 Even if the seniority is related to the date from which the officer held an equivalent grade on regular basis in parent cadre, which may even precede date of appointment to present post on deputation basis, the regular service rendered in present post for purpose of consideration of further promotion will count only from date of absorption. However, the absorbed employee can avail the benefit of relaxation of required eligibility service under "senior-junior" clause, if such a clause is incorporated in the Recruitment Rules.

4.3 The applicant was appointed as DCoS (CA) on absorption basis on 21.01.2013 and, therefore, he has not completed the minimum 5 years of residency period as DCoS (CA), which could have entitled him for promotion to the grade of Joint Director (Senior DCoS (CA)). The applicant's period of OSD (I) on deputation basis in BCAS cannot be counted towards his regular service.

4.4 The Hon"ble Apex Court in the case of Union of India & others v. Deo Narain & others (Civil Appeal No.8019/2003) decided on 15.09.2008, has held that employees who voluntarily and unilaterally seek transfer foregoing their seniority and join another cadre with open eyes and are placed below the employees working in the transferred cadre, cannot make a grievance later on regarding their seniority. This decision has been reiterated by the Hon"ble Apex Court in Mrigank Joshi & others v. Union of India (Civil Appeal Nos.9316-9320 of 2013) decided on 10.07.2017.

5. The applicant has filed a rejoinder to the reply filed on behalf of the

respondents. Besides reiterating the averments in the O.A., the applicant has also stated that new RRs of 2017 are not applicable to the present case since the vacancies for the post of Senior DCoS (CA) were notified prior to 2017 RRs and hence, in terms of law laid down by the Hon"ble Apex Court in Y.V. Rangaiah & others v. V.J. Sreenivasa Rao & others, AIR 1983 SC 852, the posts are to be filled up in terms of the old RRs only.

6. The applicant has also filed M.A. No.664/2018 stating therein that the respondents have taken action to fill up 2 posts of Senior DCoS (CA), now re-designated as Joint Director, without considering the name of the applicant for the 3rd available vacancy, which is meant for promotion quota. He has, thus, prayed for restraining the respondents from filling up of the 3rd post without considering his candidature in accordance with law.

7. The respondents have filed reply in the said M.A. wherein they have again reiterated their earlier stand that the applicant is not eligible for the post since he has not completed requisite 5 years of residency period.

8. On completion of pleadings, the case was taken up for hearing the arguments of learned counsel for the parties on 15.05.2018. Arguments of Mr. R N Singh, learned counsel for applicant and that of Mr. S M Zulfiqar Alam, learned counsel for respondents were heard.

9. Mr. R N Singh, learned counsel for applicant submitted that the Hon"ble Apex Court has laid down a clear ratio of law in S.I. Rooplal's case (supra), which is relevant to this case, as under:-

"19.....It is to be noted that the law in regard to the right of a deputationist to count his service for purpose of seniority in the transferred Department was settled as far back as in the year 1982 itself in the cases of R.S. Mokashi and Ors. and Wing Commander J. Kumar (supra) (if not earlier). Therefore, it is reasonable to expect that a deputationist when his service is sought to be absorbed in the transferred department would certainly have expected that his seniority in the parent department would be counted. In such a situation, it was really the duty of the respondents, if at all the conditions stipulated in the impugned Memorandum were applicable to such person, to have made the conditions in the Memorandum known to the deputationist before absorbing his services, in all fairness, so that such a deputationist would have had the option of accepting the permanent absorption in Delhi Police or not. The very fact that such steps were not taken, shows that this Memorandum was, in fact, never acted upon. Apart from the above question of equity, the appellants have challenged the constitutional validity of the above Memorandum on the ground that the same violates Articles 14 and 16 of the Constitution. One of the grounds raised is that their vested right of counting the seniority in the deputed Department, after absorption in an equivalent post, is arbitrarily taken away, if the Memorandum in question is applicable to them. Therefore, they had prayed for a declaration that the Memorandum be declared as ultra vires to (he extent it

offends their fundamental right.

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23. It is clear from the ratio laid down in the above case that any Rule, Regulation or Executive Instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned Memorandum in its entirety does not take away the above right of the deputationists and by striking down the offending part of the Memorandum, as has been prayed in the writ petition, the rights of the appellants could be preserved, we agree with the prayer of the petitioners/ appellants and the offending words in the Memorandum "whichever is later" are held to be violative of Articles 14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned Memorandum. Consequently, the right of the petitioners/appellants to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub- Inspector (Executive) in the Delhi Police, is restored."

10. He further stated that based on the law laid down by Hon"ble Supreme Court in the case of S.I. Rooplal (supra), the Department of Personnel & Training (DoPT) has tweaked its O.M. dated 29.05.1986 and issued a new O.M. dated 27.03.2001 (p. 107) wherein it is clearly stated that if an officer has been holding already (on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he would be given seniority from the date he has been holding the post on deputation or the date from which he has been appointed on a regular basis to same or equivalent grade in his parent department, whichever is earlier (emphasis added).

11. Mr. R N Singh vehemently argued that it is admitted position that the applicant has been in analogous post as that of DCoS (CA) since the date of his promotion as Deputy Commandant in BSF, and that he came to BCAS on deputation as OSD (I) in the same grade and was absorbed finally in BCAS as DCoS (CA). Hence, in terms of the dictum of Hon"ble Apex Court in S.I. Rooplal (supra), his period of deputation as OSD (I) in BCAS would also be considered for deciding his residency period as DCoS (CA) for further promotion to the next grade of Senior DCoS (CA), now re- designated as Joint Director. He further argued that the applicant's case is also supported by the judgments of the Hon"ble Apex Court, referred to in paragraph (3) above.

12. Per contra, learned counsel for respondents argued that in terms of 2010 RRs, the applicant is not eligible for promotion to the post of Senior DCoS (CA) / Joint Director since he has not completed the requisite period of residency, i.e., 5 years in the grade of DCoS (CA) and that he would acquire eligibility in the year

2019 after he completes the residency period.

13. The learned counsel emphatically asserted that the law laid down in S.I. Rooplal's case (supra) is relating to determination of seniority and not for promotion, and as such, it does not apply to the instant case, inasmuch as the issue involved is whether the applicant is eligible for promotion to the post of Senior DCoS (CA) / Joint Director or not.

14. We have considered the arguments of learned counsel for the parties and have also perused the pleadings.

15. Admittedly, the applicant on his promotion to the post of Deputy Commandant in BSF came in the Pay Band-3 - `15600-39100 with Grade Pay of `6600/-. He came on deputation to BCAS to the post of OSD (I) on 22. 06.2009 and after rendering about 3 years and 7 months of service, he was absorbed as DCoS (CA). All these 3 posts, namely, Deputy Commandant, in BSF, OSD (I) and DCoS (CA) in BCAS are undoubtedly analogous posts, as they are in the same Pay Band-3 - `15600-39100 with Grade Pay of `6600/-.

16. In S.I. Rooplal's case (supra), it is clearly held by the Hon"ble Apex Court that for reckoning the seniority of a government servant, service rendered by him in analogous / equivalent grade on regular basis is also to be counted. The applicant joined BCAS on deputation as OSD (I) and has since been continuing to work in that organization. No doubt, he has been absorbed in the cadre of DCoS (CA) after rendering 3 years and 7 months service as OSD (I), but it cannot be said that his experience of working in BCAS is to be completely discarded for determining his residency period for his further promotion to the post of Senior DCoS (CA), simply on the ground that his residency period is to be reckoned from the date of his absorption as DCoS (CA) on 21.01.2013. The applicant has been gaining knowledge about and functioning of BCAS during his tenure as OSD (I), and hence this experience has also to be taken into consideration in view of the fact that OSD (I) and DCoS (CA) are analogous posts, inasmuch as they are in the same pay grade.

17. No doubt in the O.M. dated 27.03.2001 (p.107), whereby the law laid down by the Hon"ble Apex Court in S.I. Rooplal's case (supra) has been implemented by the Central Government, only the seniority aspect has been dealt with, but then seniority and RRs are the basis for carrying out any promotion. We do not agree with the arguments of Mr. S M Zulfiqar Alam, learned counsel for respondents that the law laid down in the case of S.I. Rooplal (supra) by the Hon"ble Apex Court is only for reckoning seniority and it has no bearing on promotion. Such an interpretation would be a narrow interpretation and deserves to be discarded.

18. We are of the view that the period of working of the applicant as Deputy Commandant in BSF could be restricted to just determination of his seniority but his experience of working as OSD (I) in BCAS is to be considered both for determination of seniority and for determination of residency period for the next

promotion. In other words, the experience of the applicant as OSD (I) on deputation basis in BCAS and his experience after absorption in BCAS against the post of DCoS (CA) are to be taken for determining his residency period for promotion to the post of next higher grade of Senior DCoS (CA), now re-designated as Joint Director.

19. The records would indicate that there is one post of Joint Director, earlier called Senior DCoS (CA), meant for promotion. The respondents had intended to fill up 2 posts of Senior DCoS (CA) vide Vacancy Circular dated 09.06.2015 (Annexure MA-1). Obviously, these posts were to be filled up in terms of 2010 RRs.

20. As held by us in the previous paragraphs, the applicant was eligible for promotion against the post, as he has completed the required residency period after his deputation period as OSD (I) in BCAS of 3 years and 7 months is also taken into consideration. Therefore, these vacancies are required to be filled up in accordance with the 2010 Rules only. On this issue, the Hon'ble Supreme Court in Y.V. Rangaiah's case (supra) has laid down the following ratio of law:

"9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 3 to 15 would not have been deprived of their rights of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the Statewide basis and therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

21. In the conspectus of discussions in the foregoing paragraphs, this O.A. is allowed. The respondents are directed:

(i) to consider the applicant for promotion to the post of Senior Deputy Commissioner of Security (Civil Aviation), now re-designated as Joint Director. For this purpose, the applicant's service of 3 years and 7 months as Officer on Special Duty (Intelligence) with respondent No.2 shall also be counted for determination of his residency period.

(ii) The applicant shall be considered for promotion in accordance with 2010 RRs.

(iii) The directions at (i) & (ii) above shall be implemented within a period of 3 months from the date of receipt of a copy of this order.

There shall be no order as to costs.