

(2002) 08 DEL CK 0079

In the Delhi High Court

Case No : CWP No"s. 508 and 888 of 1999 and 223 of 2001

M. Ganesan and Others

APPELLANT

Vs

A.K. Belwal and Others
 B.D. Viridi and Others Vs
Nagesh Singh and Others
 V.I. Velayudhan and
Another Vs Union of India (UOI)

RESPONDENT

Date of Decision : 14-08-2002

Acts Referred:

Administrative Tribunals Act, 1985 — Section 15, 17, 20(2), 27, 28
Constitution of India, 1950 — Article 14, 16, 16(4), 16(4)(A), 226
Economic Service Rules, 1961 — Rule 13, 8, 8(1), 9C

Citation : (2002) 08 DEL CK 0079

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Shyamalla Pappu, R. Krishnamoorthi and Osg Prasuna, for the Appellant; Geeta Luthra, K.K. Rai, R.V. Sinha and Rajinder Nischal, for the Respondent

Judgement

S.B. Sinha, C.J.—These three writ petitions involving identical questions of fact and law were taken up for hearing together and are being disposed of by this common judgment.

2. The basic fact of the matter is not in dispute. The writ petitioners are direct recruits of Indian Economic Service ("IES" for short). The appointment and promotion of IES is done under the statutory rules known as IES Rules, 1961. The ratio of recruitment to the service is 60% by way of direct recruitment i.e. through the examinations conducted by the Union of Public Service Commission and 40% by way of promotion. Indian Statistical Service ("ISS" for short) and IES contain identical service rules. As the ratio of appointment and promotion was not being maintained, a few promotee officers who were continuously officiating in the entry grade of IES and ISS approached the Supreme Court of India in a case known as Narender Chadha and Others Vs. Union of India and Others,

3. Before the Supreme Court, the principal question which arose for consideration was as to whether the promotees were to be treated as juniors although they had officiated in the posts for a long time. It was held that when an officer has worked for a long period, as in that case for nearly 15 to 20 years in the post and had never been reverted, it cannot be held that the officer's continuous officiation was a mere temporary or stop-gap arrangement even if the order promotion states so. In such circumstances, the entire period of officiation had to be counted towards seniority. It is stated by the petitioners:-

"(a) Hon"ble Supreme Court in its order of February, 1986 decided the issues relating to induction of departmental promotees from different Department of the Government of India to Grade IV (the entry level) of IES and ISS and fixing of inter se seniority between direct recruit and promotees in Grade IV of IES/ISS.

(b) The Apex Court ordered assigning seniority of promotees in the respective cadre with effect from the dates of their continuous officiating in the IES/ISS posts.

(c) The Apex Court also desired that the direct recruits shall be given seniority with effect from the date on which their names were recommended by the Union Public Service Commission for appointment to IES/ISS.

(d) If further enjoined upon the Union of India to prepare a seniority list of direct recruits and promotees accordingly.

(e) The Hon"ble Supreme Court had explicitly enjoined on the Union of India that all appointments shall be made in accordance with the Rules and the seniority of all officers to be appointed hereafter shall be governed by Rule 9-C of the Rules.

(f) The Apex Court instructed the Union of India to review all promotions made so far from Grade IV to higher posts in the light of the new seniority list so made."

4. As far back as 8th May 1986, an official seniority list of Grade IV Officers of IAS was circulated.

5. The seniority list of IES Cadre was revised on 8th May 1986. Department of Economic Affairs issued a list of IES officers promoting them from Grade IV to Grade III on 11th June 1986 pursuant where to 250 officers were appointed, the list whereof was published in the Gazette of India on 5th July 1986. While granting promotion to 250 IES officers, reservation was granted in terms of DOPT instructions dated 27th November 1972.

6. Shri. B.S. Kapila and others serving as Economical and Statistical Investigators in various Departments/Ministers of Government of India filed a writ petition bearing No. CWP 825/1986 wherein a prayer of issuance of writ of mandamus directing the respondents to promote and confirm the Investigators eligible till 11th February 1986 was made. It was further prayed that a direction of promotion of all eligible Investigators who had been denied promotion as a result

of ban on promotion between 1981 to 1985 to Grade IV Class I posts with all consequential benefits, was issued. The petitioners therein were asked to move the Central Administrative Tribunal.

7. Pursuant to the said direction, two Original Applications were filed before the Tribunal which were marked as OA 698/86 and OA No. 1156/86 wherein by an order dated 8th June, 1987, it was directed:

"Though the directions given by the Supreme Court in Narender Chadha's case cannot operate as resjudicata against the applicants for they were not parties to it, if this Tribunal were to give any directions in favor of the applicants only because they were not parties to the case before the Supreme Court in Narender Chadha's case and their claim is not barred resjudicata, as contended by the applicants' learned counsel, that would disturb the seniority list which has been prepared in compliance with the directions of the Supreme Court. It is not open to this Tribunal to give any directions of the Supreme Court or disturb the seniority list which has been prepared in compliance with the Supreme Court directions. The grievance of the applicants, in our opinion, is very genuine and cannot be brushed aside; but the equities can be adjusted only by appropriate directions of the Supreme Court. It is in this view of the matter that this Tribunal is constrained to reject the applicants' claim."

8. In an appeal preferred before the Apex Court from the said decision being SLP CA Nos. 4612-13/1990 and CA No. 4614/1990, the Apex Court by an order dated 11th September 1990 directed:

"After the matter was heard at length we had suggested to the Union of India that in view of the palpable injustice which the appellants before us in these appeals have been exposed to in the matter of fixation of their seniority - obviously for no mistake of theirs - the benefit of promotion on the basis of their own entitlement should be conferred on them and they should not be made to suffer. We are happy that on instructions from Mr. N. Thyagarajan, Deputy Secretary to the Ministry concerned who is present in Court, Mr. A. Subba Rao appearing for the Union of India, informs us that the suggestion made by us has been accepted subject to the condition that the appellants who get the benefits and others similarly situated who are entitled to the benefit would not claim consideration of their past service for readjustment of inter-se seniority. When they are promoted to the higher grade, their seniority will count from the date of such promotion and they would be entitled to all benefits on the basis of such promotion until superannuation..... We make it clear that apart from the promotion to the higher post and benefits accruing in future no past benefit is available to the appellant. Mrs. Pappu appearing for the appellants has assured us that no such claim would even be laid.

Mr. Subba Rao has agreed that the promotion shall be given effect to from 1st October, 1990. He indicates to us that apart from the appellants, if there be any who are entitled to this benefit, such persons would be free to approach the

concerned Ministry and on being moved they would also be entitled to the same benefit."

9. ISS and IES Service Rules were amended on 22nd September 1989 and 20th September 1989 respectively from 27th November 1972 to regularize the reservations in promotion of SC/ST officers by amending Rule 13.

10. However, the service promotion granted from Grade IV to Grade III subsequent to the judgment of Narender Chadha's case purported to be in terms of amended Rule 13 was questioned by Shri T.R. Mohanty, an ISS before the Calcutta Bench of the High Court, which was marked as OA No. 336/1988. The said Original Application was allowed by order dated 28th November 1988 where against Union of India preferred an appeal. By order dated 14th July 1994, the said appeal was dismissed and the Apex Court observed as under:

"...Respectfully following the law laid-down by this Court in the judgments referred to and quoted above, we are of the view that the retrospective operation of the amended Rule 13 cannot be sustained. We are satisfied that the retrospective amendment of Rule 13 of the rules takes away the vested rights of Mohanty and other general category candidates senior to respondents 2 to 9. We, Therefore, declare amended Rule 13 to the extent it has been made operative retrospectively to be unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. We strike down the retrospective operation of the rule. In the view, we have taken on the point it is not necessary to deal with the other contentions raised by Mohanty."

11. The Apex Court observed that those officers belonging to the general category who were similarly situated with Shri Mohanty despite the fact that they were not parties to the Original Application, would be granted the same relief. Subsequently, an Interlocutory Application was filed being No. 9/1995 and by an order dated 27th March 1995, it was directed:

"...After hearing the learned counsel for parties, we are of the view that the judgment of this court upholding the judgment of the Tribunal has to be implemented. Appearing the difficulties high-lighted by the Union of India in this application, we are of the view that the Union of India should make all efforts to protect the promotions of Scheduled Castes candidates, if possible. We are further of the view that if in the implementation of the directions given by this Court it becomes necessary to revert the Scheduled Castes candidates from the higher posts to which they have been promoted under the existing rules (unamended) or under the amended rules, that may be done and we modify the Tribunal's judgment to that extent. We, however, make it clear that any financial benefit is given to the Scheduled Caste candidate while working in the higher posts, shall not be withdrawn and be protected as personal to them. We further make it clear that Mr. Mohanty shall be entitled to the relief keeping in view his position in seniority so far as the general category candidates are concerned. If in the process he is reverted to the lower post no recovery shall be effected from

him in respect of money already paid to him."

12. Before the learned Tribunal also Shri Nagesh Singh and Shri B. Bhandari filed Original Application No. 1206/1993 questioning the said OM dated 25th May 1988 and 7th July 1988 whereby and whereunder the official respondents No. 2 to 7 from Grade IV to Grade III therein who were promoted in IES purported to be in violation of Rule 8(1)(b)(1) and Rule 13 of IES Rules 1961. A further prayer was made therein to quash the Notification dated 22nd September 1989 whereby and whereunder Rule 13 of IES Rules was amended and for their promotion to Grade III in IES from the date their juniors were promoted. Similar application was filed by Dr. A.K. Belwal which was marked as OA No. 1288/1993.

13. The learned Tribunal by reason of the impugned judgment dated 7th January 1999 allowed the said OAs in the following terms:

"36. In the light of the above, respondents are directed to review the impugned promotions and consider the cases of the applicants for promotions from the date the impugned promotions were made, with all consequential benefits. While doing so the respondents should make all efforts to protect the promotions of reserved category candidates to the extent possible, but if it becomes absolutely necessary to revert them from the higher posts to which they have been promoted under the unamended or amended Rules, that may be done. While doing so, however, any financial benefits given to them while working in the higher posts should not be withdrawn and should be protected as personal to them.

14. CWP 508/99 and CWP 888/99 have been filed questioning the said judgments of the learned Tribunal as, allegedly in the name of implementation of the judgment of the Tribunal, the seniority list was sought to be upset which had been approved by the Supreme Court in Narender Chadha's case. A separate writ petition was filed by the petitioners being CWP 223/2001 claiming inter alias the following reliefs:

"(a) to read down Rule 13 of Indian Economic Service Rules 1961 as to hold the promotions valid under O.M. No. 27/2/71-Estt.(SCT) dated 27.11.72 of the Department of Personnel issued in pursuance of the mandate of Articles 16(4), 16(4)(A), 46 and 335 of the Constitution of India is legal; and to declare the CAT Order dated 7.1.1999 as illegal;

(b) to quash the O.M. No. 110616/1/99-IES dated 17.12.1999 of IES Division in the Department of Economic Affairs, Ministry of Finance as this O.M. has reviewed and revised the 250 Grade III promotions already reviewed and revised on 11.6.1986 by the respondent in compliance with the order dated 11.2.1986 of the Hon'ble Supreme Court in Narender Chadha case; the said review seniority list was placed before the Hon'ble Supreme Court and approved by the Court; and quash the subsequent O.M. No. 11016/1/2000-IES dated 22.2.2000 and O.M. No. 11016/5/2000-IES dated 6.6.2000 of IES Division issued for revision of promotions from Grade III to Grade I and Grade I to NFSG;

(c) quash the Office Order No. 3-5/95-Admn. dated 1.9.2000 of the Department of Agriculture and Cooperation, Ministry of Agriculture as increment of the petitioner cannot be stopped if the O.M. dated 17.12.1999 is quashed; and to restore the annual increments already earned by petitioner No. 1"

15. Ms. Shyamala Pappu, learned senior counsel appearing on behalf of the petitioners would submit that the learned Tribunal misdirected itself in passing the impugned judgment in so far as it failed to take into consideration that the Tribunal while purporting to follow Mohanty's case (supra), could not have ignored the seniority list prepared on the basis of the decision of the Apex Court in Narender Chadha. Once the case of the petitioners is covered by Narender Chadha, the learned counsel would urge the said seniority list could not have been disturbed following Mohanty. In any event, contends the learned counsel, in Mohanty, the Apex Court merely held that retrospective effect given to Rule 13 was bad in law.

16. The learned counsel would contend that the Tribunal, Therefore, following Mohanty which was passed in relation to the officers belonging to ISS could not have refused to follow the judgment of the Apex Court in Narender Chadha. The learned counsel would argue that even if retrospective effect given to Rule 13 afore-mentioned be declared ultra vires, the same would not alter the seniority list inasmuch as at the relevant point of time, the matter of reservation was governed by executive instructions. The question, according to the learned counsel, will also have to be considered having regard to the executive policy of the Central Government as regards reservation to the candidates belonging to SC/ST in the light of Article 16(4A) of the Constitution. The learned counsel would contend that Rule 13 as it stood was required to be followed. Reliance in this connection has been placed on A.K. Bhatnagar and Others Vs. Union of India (UOI) and Others, .

17. It is now well settled that seniority of persons would be governed by the statutory rules. In A.K. Bhatnagar (supra), the law was stated in the following terms:-

"7. The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account. A dispute of this nature normally arises between recruits from two sources, namely, direct and promotees."

18. Dr. Gyan Prakash, learned counsel for the respondent No. 1 would submit that his client should be permitted to be added as party.

19. The learned counsel would contend that when the decision of the Apex Court in Mohanty was followed in the Indian Statistical Institute, the said principles had also been followed in the case of IES. Our attention was drawn to Annexure T/17 in terms whereof the seniority list of ISS was revised which had been followed in IES.

20. The learned counsel would contend that in Narender Chadha also, the Apex Court had not taken into consideration the matter relating to seniority of the officers of IES but also ISS.

21. Mr. K.K. Rai, the learned counsel appearing on behalf of respondents No. 1 and 2 in CW 508/1999 would contend that the rule will prevail over the executive instructions. Reliance in this connection has been placed on Paluru Ramkrishnaiah and Ors. v. Union of India and Anr., 1989 2 SCR 92. It was pointed out that although at the initial stage, his clients were superseded only by six persons, others who were affected had been imp leaded as parties in the Original Application. In this view of the matter, he would contend that the learned Tribunal has correctly held that the necessary parties have been imp leaded.

22. Mr. Sinha, learned counsel appearing on behalf of the Union of India would support the contention of the learned counsel for the other respondents.

23. Dr. Belwal who appeared in person in CW 508/99 submitted that although he filed the Original Applications but he had not been granted any benefit by the respondents.

24. Before we enter into the rival contentions, as noticed hereinbefore, we intend to consider the maintainability of the CWP 223/2001. The reliefs claimed for in the said writ petition have been noticed hereinbefore. In the said writ petition, contentions have been raised which were not the subject matter of the contentions before the learned Tribunal. Even the Office Memorandums, which were issued subsequent to the disposal of the writ petition by the learned Tribunal namely OM dated 7th December 1999 have been questioned.

25. Validity of OMs dated 22nd February 2000, 6th June 2000 as well as 1st September 2000 had also been questioned.

26. The Administrative Tribunals Act, 1985 is a self-contained code. It has been constituted in terms of Article 323A of the Constitution. It has all the requisite jurisdiction to determine all types of service disputes. Before it, even virus of statute or statutory rules can be questioned.

27. The Apex Court however, having regard to the fact that judicial review is a basic feature of the Constitution, in L. Chandra Kumar Vs. Union of India and others, held that the High Court and the Supreme Court will have the power of judicial review over the decision of the Tribunal. It was, however, directed that:

"99. In view of the reasoning adopted by us, we hold that Clause 2 (d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme

Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, Therefore, be open for litigants to directly approach the High Courts even in cases where they question the validity of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

28. Cause of action, which arose subsequent to the decision of the Apex Court will, Therefore, have to be agitated before the Tribunal at the first instance. The repudiation of this court under Article 226 in view of Chandra Kumar's case (supra), can be invoked only after approaching the Tribunal at the first instance and obtaining a decision by it.

29. A writ petition cannot be filed before this court directly for implementation of the judgment of the Tribunal. The Tribunal can execute its own order. It has also been observed in T. Sudhakar Prasad Vs. Govt. of A.P. and Others, that the Tribunal has the power under the Contempt of Courts Act. Sections 17 and 27 of the Administrative Tribunals Act are absolutely clear and unambiguous. The said provisions read thus:-

"17. Power to punish for contempt.--A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971, shall have effect subject to the modifications that-

(a) the references therein to a High Court shall be construed as including a reference to such Tribunal;

(b) the references to the Advocate-General in Section 15 of the said Act shall be construed,--

(i) in relation to the Central Administrative Tribunal, as a reference to the Attorney-General or the Solicitor-General or the Additional Solicitor-General; and

(ii) in relation to an Administrative Tribunal for a State or a Joint Administrative Tribunal for two or more States, as a reference to the Advocate-General of the State or any of the States for which such Tribunal has been established."

"27. Execution of orders of a Tribunal.--Subject to the other provisions of this Act and rules, the order of a Tribunal finally disposing of an application or an appeal

shall be final and shall not be called in question in any court (including a High Court) and such order shall be executed in the same manner in which any final order of the nature referred to in Clause (a) of Sub-section (2) of Section 20 (whether or not such final order had actually been made) in respect of the grievance to which the application relates would have been executed."

30. In that view of the matter, we are of the opinion that CW No. 223/2001 is not maintainable. The remedy of the petitioner, Therefore, would be to approach the Administrative Tribunal at the first instance. However, on a perusal of the prayer portion, it would appear that the judgment of the Tribunal dated 7th January 1999 had also been questioned. The said judgment has also been questioned in the afore-mentioned two writ petitions.

31. So far as the reservation for SC/ST is concerned, Rule 13 (unamended) IES Rules, 1961 reads as under:

"Reservation for SCs & STs etc.:-

Appointments to the service made otherwise than by promotion will be subject to orders regarding special representation in the service for SCs & STs issued by the Central Govt. from time to time."

32. The petitioners entered into the services in between 1971 and 1978. They were promoted from Grade IV to Grade III of IES in supersession of the claim of the unofficial respondents herein. Even they were shown to be senior in IES Grade III cadre in terms of the seniority list dated 24th August 1978 which came into force on 1st August 1978 as would appear from OM No. 13015/78-IES dated 24th August 1978. The said seniority list was issued by the then Cadre Controlling Authority namely the Department of Personnel and Administrative Reforms. The names of the petitioners No. 1, 2, 3, 4, 5 and 6 appeared at Sl. No. 309, 311, 308, 310, 313 and 314 respectively. The name of the respondent No. 1 did not occur in the seniority list. They were promoted to Grade III of the IES on the basis of reservation for promotion provided by OM No. 27/2/71-Estt.(SCT) dated 27th November 1972 in November 1978 whereas the first respondent was promoted in July 1979. This respondent was recommended by UPSC for appointment to Grade IV in IES on 8th March 1980.

33. Rule 8(b)(i) of the Rules is as follows:

"(b) Grade III - Deputy Director

"(i) Not less than 75 per cent of vacancies in this Grade shall be filled by promotion from amongst Grade IV Officers who have completed not less than 4 years of service in that grade. Promotions will be made on the basis of merit with due regard to seniority by the Controlling Authority on the advice of the Board."

34. The said Rule was amended in the following terms:

"4. In Rule 8 of the said rules in Clause (b), in Sub-clause (i) for the words beginning with "promotion will be" and ending with the words "of the Board", the

following shall be submitted namely:-

"Promotion shall be made in the order of seniority subject to rejection of the unfit by Controlling Authority on the advice of the Board."

35. It is also not in dispute that pursuant to or in furtherance of the directions of the Supreme Court in *Narender Chadha*, a list of 250 officers in IES and 178 officers in ISS was prepared. The question as to whether by reason of the subsequent judgment of the Apex Court in *Mohanty*, the effect and purport of the seniority list prepared in terms of the decision of the Apex Court in *Narender Chadha* had been taken away or not, has not been answered by the Central Administrative Tribunal. The question as to whether such seniority list having the blessings of the Apex Court could have been interfered with or not, is the question which should have been posed and answered by the learned Tribunal. Similarly, the learned Tribunal in its judgment has merely followed *Mohanty*. In that case, as noticed hereinbefore, the Apex Court merely struck down the retrospectivity of Rule 13. It did not say that the executive instructions operating in the field were also bad in law. No question was raised as regards the virus of the said executive instructions. Rule 13, as it stood before its amendment, clearly postulates that the policy of reservation can be given effect to by issuing executive instructions. Otherwise also, a policy of reservation can be effected by executive instructions. Reservation made in terms of Clause 4 of Article 16 of the Constitution of India, it is trite, need not be carried out only by a statute or statutory rules. Thus, although the legality of the promotion granted to the petitioners was thus, required to be judged not only on the touchstone of amended Rule 13 but also on the touchstone of the executive instructions which were operating in the field read with amended Rule 13.

36. Judgment of the learned Tribunal, Therefore in our opinion, cannot be sustained as these vital questions had not been determined by it. We have, Therefore, no other alternative but to set aside the judgments of the Tribunal and remit the matter back to it for consideration of the matter afresh.

37. For the views we have taken, it is not necessary to refer to the other decisions cited at the bar.

38. So far as the CM No. 5066/2001 in CW 223/2001 filed by Mr. Gyan Prakash, Advocate is concerned, we are of the opinion, in view of the order passed by us, it is not necessary to implead the applicant therein as party therein. He may file appropriate application before the Central Administrative Tribunal, which may be considered on its merits.

These writ petitions are disposed of accordingly without any orders as to costs.