
(2018) 04 GAU CK 0062
In the Gauhati High Court
Case No : WP© 2187 of 2014

THE UNION OF INDIA

APPELLANT

Vs

N. ASHOK KUMAR and 2 ORS

RESPONDENT

Date of Decision : 19-04-2018

Acts Referred:

Indian administrative service (cadre) Rules, 1954 — Rule 5(1), 5(2)

Citation : (2018) 04 GAU CK 0062

Hon'ble Judges : AJIT SINGH C.J, ACHINTYA MALLA BUJOR BARUA

Bench : Single Bench

Final Decision : Allowed

Judgement

AM Bujor Barua, J.

1. Heard Mr. S.C. Keyal, learned ASGI for the petitioner as well as Mr. M.G. Singh, learned counsel for the respondent No.1. None appears for the proforma respondent Nos. 2 and 3 although the notices were issued by registered post with A/D.

2. The respondent No.1 appeared in the Civil Services Examination of 2003 and secured the 130th rank in the OBC (non-creamy layer) category.

Accordingly by an order of 03.09.2004, he was appointed to the Indian Administrative Service (IAS) and was allocated to the Manipur/Tripura IAS

Joint Cadre. The respondent accordingly, accepted such appointment without any protest and he continued to serve as such.

3. Allocation of cadre to the members of the IAS is governed by Rule 5 (1) and 5(2) of the IAS Cadre Rules, 1954. Rule 5(1) provides that "The

allocation of cadre officers to various cadres shall be made by the Central Government in consultation with the State Government or the State

Government concerned, whereas, Rule 5(2) provides that "The Central Government may, with the concurrence of the State Government concerned transfer a cadre officer from one cadre to another."

4. As required under Rule 5(1), the allocation of cadre to the incumbents selected for appointment as IAS officers is done in a manner that up to a particular merit position the cadre in the home State of the candidate is allocated, by also taking into consideration the law of reservation, and thereafter the cadre allocations are made in a particular roster format based upon the merit position of the candidates.

5. In the given year of 2003, one Sri Inbasekar secured the merit position 60, whereas, the present respondent had secured the merit position of 130 and another candidate namely, Sri Rakesh R Yadav had secured the merit position 164, in the All India merit list.

6. As per the merit position of 60, Sri Inbasekar was entitled to be appointed also in the Indian Foreign Service (IFS) as an unreserved candidate. But at the same time Sri Inbasekar who was a candidate in the OBC category, under the law of reservation as applicable to OBC, was also entitled to be appointed to the IAS. Sri Inbasekar accordingly made a claim that he be also considered for appointment to the IAS as an OBC candidate, which was infact his first preference. Although such claim was made, a question had arisen as to whether Sri Inbasekar belonged to the creamy layer category within the OBC so as to disentitle him from being considered as an OBC candidate.

7. In the process, a situation had arisen before the petitioner authorities where they were required to make the cadre allocation as per the roster format in the category of allocation in other state cadres, whereas on the other hand, the final decision as to whether Sri Inbasekar belonged to the non-creamy layer within the OBC category was yet to be finalized. In the resultant situation, the petitioner authorities had blocked one cadre post in the Andhra Pradesh cadre as per the roster format in favour of Sri Inbasekar. While so blocking one cadre post in Andhra Pradesh cadre, the petitioner authorities allocated the state cadres to the other candidates below Sri Inbasekar in order of merit in the OBC category, as per the roster format applicable.

8. A consequence of such procedure being adopted was that the candidate

immediately below Sri Inbasekar in order of merit in the OBC category was allocated the next State cadre as per the roster format, whereas, on the other hand had the cadre post in the Andhra Pradesh cadre being not blocked as indicated above, the said candidate below Sri Inbasekar would have otherwise being allocated the Andhra Pradesh cadre. Accordingly, the blocking of one cadre in favour of Sri Inbasekar had a chain effect that all such candidates in the OBC category below Sri Inbasekar were allocated a cadre in the roster format, which was the cadre next in order.

9. In the resultant situation, the present respondent being at overall merit position of 130 was allocated the Manipur/Tripura cadre, whereas, Sri Rakesh R Yadav who had secured overall merit position of 164 was also allocated Manipur/Tripura cadre, as per the roster format.

10. Subsequently, when the stage came for bringing an end to the process of allotment of service and sending the candidates for their respective training and it was found that the final decision as regards the question as to whether Sri Inbasekar belonged to the creamy layer or not had not yet been taken, Sri Inbasekar by a letter 25.08.2004 made a request that he may be allotted to the IFS as an unreserved candidate. In the resultant situation, the request of Sri Inbasekar was accepted and he was allotted to the IFS. As the cadre allocation in the IAS had already been made in the meantime, as indicated above, the cadre post blocked in favour of Sri Inbasekar in the Andhra Pradesh cadre remained unutilized and was carried forward for the next selection.

11. In the aforesaid situation, Sri Rakesh R Yadav made a representation dated 10.05.2005 before the petitioner authorities, wherein a claim was made that a mistake was committed in the allocation of the cadre and had one cadre post of Andhra Pradesh cadre been not blocked in favour of Sri Inbasekar, Sri Rakesh R Yadav as per the roster format would have been allocated to the Gujrat cadre and because of the said mistake, he was allocated to the Manipur/Tripura cadre. Accordingly, request was made that the mistake be rectified and Sri Rakesh R Yadav be allocated to the Gujrat cadre, to which he was otherwise entitled under the roster format.

12. When the request of Sri Rakesh R Yadav was not acceded to, an application being OA No.507/2006 was preferred before the learned Central Administrative Tribunal, Guwahati Bench, (CAT Guwahati). The original

application was given a final consideration by the order dated 05.06.2007

requiring the petitioner authorities to give a consideration to the claim of Sri Rakesh R Yadav for an allocation to the Gujrat cadre, with all

consequential benefits. The petitioner authorities upon giving the consideration as required by the order dated 05.06.2007 of the CAT Guwahati, had

rejected the request for a change from the Manipur/Tripura cadre.

13. Against such order of rejection, another original application was preferred before the Central Administrative Tribunal, Principal Bench at New

Delhi (CAT-PB), which was numbered as OA No.1804/2008. The OA No.1804/2008 was given a final consideration by the CAT-PB by its order

dated 19.03.2009. In the order of 19.03.2009, the CAT-PB arrived at a conclusion that the petitioner authorities had made a mistake by showing

unnecessary hurry in allocating the cadres, which had infact been admitted by them. The CAT-PB concluded that as on 28.07.2004 the authorities had

arrived at a conclusion that Sri Inbasekar was not entitled to the benefit of reservation as an OBC candidate and on 18.08.2004 the decision was taken

to not allow him the benefit of reservation as an OBC candidate. According to the CAT-PB, in between, there was sufficient time for the authorities

to take into consideration the aforesaid factor of the rejection of Sri Inbasekar as an OBC candidate, before the cadre allocation was made to the

other candidates. The CAT-PB accordingly concluded that it was the mistake on the part of the petitioner authority and also that there was no fault on

the part of Sri Rakesh R Yadav, which resulted in he being allocated to the Manipur/Tripura cadre.

14. In the order of 19.03.2009, the CAT-PB had also arrived at a specific conclusion in paragraph 14 of its order, which is as follows:-

14. While the Applicant has followed up his case from May, 2005 onwards and has approached this Tribunal also earlier in OA No.507/2006, the

other candidates have not been alert like him about their rights. At this stage, they cannot claim that cadre has been allotted to some of them unjustly.

Those who are not alert about their rights and are lethargic, need not be considered after considerable lapse of time for change of cadre, even though

they might have been meted out a raw deal. But a person who has been alert and persistent about his right deserves to be given what is rightfully his

due.

15. The said conclusion clearly reveals that the CAT-PB was inclined to go in favour of Sri Rakesh R Yadav on the ground that he had pursued his claim for appropriate cadre allocation from May 2005 itself, whereas, the other candidates who also may have been similarly affected had not been as alert as him as regards their rights and that such other candidates cannot make any further claim that the cadre allocation was done in an unjust manner. The CAT-PB was also of the view that the other candidates who were not alert enough and had not made a claim for change of cadre need not be considered for the same after a considerably long period of time. But on the other hand, Sri Rakesh R Yadav who was alert and persistent all through deserves the benefit of his entitlement. Accordingly, the petitioner authorities were directed to create an additional vacancy in the Gujrat cadre by withdrawing one future vacancy and in the resultant additional vacancy to be created, Sri Rakesh R Yadav be allocated.

16. The said order of the CAT-PB was duly complied by the petitioner authorities and appropriate notification was published in the website whereby, the change of cadre of Sri Rakesh R Yadav from Manipur/Tripura cadre to Gujrat cadre was notified.

17. In the aforesaid factual background, the present respondent upon noticing the notification pertaining to Sri Rakesh R Yadav, as published in the website had submitted a representation dated 11.11.2009, raising a claim that he also be given the same benefit as given to his batch mate Sri Rakesh R Yadav. The respondent averred that had the mistake as accepted by the CAT-PB been not made by the petitioner authorities, the respondent would have otherwise been allocated to the Maharashtra cadre as per the roster format. Therefore appropriate orders were requested to be passed in his favour by making a change in cadre allocation and to allocate him to the Maharashtra cadre. In his representation the respondent also referred to the notification pertaining to Sri Rakesh R Yadav and that such change of cadre allocation was made as per the order of the CAT-PB.

18. But by the communication dated 15.03.2010 of the petitioner authorities the respondent was informed that he was allocated the Manipur/Tripura cadre strictly in compliance of the cadre allocation policy of the Govt. of India and that the existing policy is a chain process, where, the cadre allocation of one candidate determines the allocation of the others. In the communication, it was stated that if the allocated cadre of any candidate is

changed, it would disturb the whole chain of cadre allocation of the other candidates. A further stand was taken that the respective candidates are

given the training as per their cadre allocation and therefore, a subsequent change in the cadre is not in the interest of the administration. The

petitioner authorities in response to the reference of the respondent to the order dated 19.03.2009 of the CAT-PB, had relied upon the aforementioned

paragraph of 14 of the said order which deals with the aspect of Sri Rakesh R Yadav being alert about his rights whereas, the other similarly situation

candidates were not so alert.

19. Against the communication of 15.03.2010 by which the claim of change of cadre allocation of the respondent was rejected, an original application

being OA No.220/2010 was preferred before the CAT Guwahati. The OA No.220/2010 was given a final consideration by the order dated

28.06.2012.

20. In the order dated 28.06.2012 the CAT Guwahati had accepted the conclusions of the CAT-PB made in its order dated 19.03.2009 to the extent

that it was an admitted mistake on the part of the petitioner authorities in blocking one cadre post in the Andhra Pradesh cadre in faovur of Sri

Inbasekar, which had resulted in infringing the entitlement of the other candidates as regards their cadre allocation. As regards the question on delay,

the CAT Guwahati in its order of 26.08.2012 had arrived at a conclusion that the respondent had for the first time got the information from the website

that his batch mate Sri Rakesh R Yadav, who was also originally allocated to Manipur/Tripura cadre was changed to the Gujrat cadre by the

notification dated 09.10.2009. It was also concluded that soon after getting the said information the respondent had made his representation dated

11.11.2009 and prior to 09.10.2009, there was nothing on record to indicate any basis upon which the respondent could have known about the mistake

that had occurred in the cadre allocation. Accordingly, the CAT Guwahati concluded that it cannot be said that the respondent was not alert and

vigilant as to his rights regarding cadre allocation.

21. The CAT Guwahati relied upon certain legal maxims that justice should be done even though heaven falls (FIAT JUSTITIA RUAT COELUM);

law assists those who are vigilant and not those who sleep over their rights (VIGILANTIBUS, NON DORMIENTIBUS, JURA SUBVENIUNT)

and no man can take advantage of his own wrong (NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPIA) and interfered with

the communication dated 15.03.2010 by directing the petitioner authorities to allocate Maharashtra cadre to the respondent. The Tribunal also

concluded that the change of cadre can be done under Rule 5(2) of the IAS Cadre Rules 1954 and the petitioner authorities may endeavour to create

an additional vacancy in the Maharashtra cadre for making the allocation and take away a future vacancy in Maharashtra.

22. The present writ petition has been preferred against the order dated 28.06.2012 of the CAT Guwahati in OA No.220/2010.

23. Mr. S.C. Keyal, ASGI appearing for the petitioner authorities contends that the order of 28.06.2012 of CAT Guwahati is unsustainable because

change of cadre as ordered to be made under Rule 5(2) of the IAS Cadre Rules, 1954 would be inapplicable inasmuch as, the circumstances under

which a cadre change can be made under Rule 5(2) had been provided in the O.M.No.13017/16/2003-AIS-I dated 8th November, 2004 and in the

instant case, the circumstances so provided are not satisfied. Mr. Keyal further contends that as per the law laid down by the Supreme Court in Union

of India and Ors., -vs- Rajiv Yadav, IAS and Ors., reported in (1994) 6 SCC 38, wherein, in paragraph-6 it is provided that a selected candidate has

the right to be considered for appointment to the IAS but he has no such right to be allocated to a cadre of his choice or to his home State and that

allotment of cadre is an incidence of service, and as such the direction of the CAT Guwahati in the order dated 28.06.2012 is not sustainable.

24. Mr. Keyal also contends that the respondent was not alert enough to have raised the claim for change in cadre allocation at the earliest and further

a change of cadre allocation if made as of now would disturb the chain of allocation which has been in place for a considerable period of time.

25. Mr. M.G. Singh, learned counsel for the respondent on the other hand contends that in the instant case it is not the claim of the respondent for a

change in cadre allocation but on the other hand it is a claim for a cadre allocation as per his entitlement under the roster format, which if it would

have been made in a correct manner would have entitled him to an allocation to the Maharashtra cadre. Consequently, it is also the contention that the

ratio of the law laid down by the Supreme Court in Rajiv Yadav's case (supra) is inapplicable, as in the said case a claim was made for a change

in cadre allocation, rather than a claim to a cadre to which the candidate was entitled.

26. Regarding the question of the respondent being not alert enough to have made a claim earlier, Mr. M.G. Singh contends that till the notification

dated 09.10.2009 providing for change of cadre of Sri Rakesh R Yadav appeared in the website, the respondent had no occasion to get the knowledge

that there was a mistake on the part of the petitioner authorities in making the cadre allocation.

27. Considered the rival submissions of the petitioner as well as of the respondent.

28. As regards the contention that a change of cadre under Rule 5(2) of the IAS Cadre Rules, 1954 is inapplicable in the present case, it is noticed

that the OM dated 8th November 2004 provides as follows:-

i) Inter-cadre transfer shall continue to be permitted for members of All India Service officers on marriage to another member of an All India Service,

where the officer or officers concerned have sought a change. Inter cadre transfer shall also be permitted on grounds of extreme hardship in the

rarest of cases.

ii) Inter-cadre transfer shall not be permitted to the home state of the officer.

iii) In cases of inter-cadre transfer on grounds of marriage, efforts should be made in the first instance to ensure that the cadre of one officer accepts

his or her spouse.

iv) Only in instances where both States have refused to accept the other spouse will the officers be considered for transfer by the Government of

India to a third cadre subject to the consent of the Cadres concerned for such transfer.

v) Inter cadre transfer shall not be permitted to All India Service officers on marriage to an officer serving in a central Service/State Service/ Public

Sector Undertaking/any other organization.

vi) "Extreme hardship" for purposes of inter-cadre transfer, should be defined to include (a) threat to the life of the officer or his immediate

family and (b) severe health problems to the officer or his immediate due to the climate or environment of the State to which he is allotted.

vii) In cases of request on grounds of threat or health, the Central Government shall have the genuineness of the request assessed by an independent

Central Agency or group of at least two independent experts.

viii) If a request on grounds of threat or health is found to be genuine, the Central Government may initially send the officer on a three years

deputation to a State of its choice. The situation may be re-assessed after the three years period. If the situation so warrants, the Central Government

may permanently transfer the officer to the State.

29. The said OM having clearly provided that a change of cadre is permissible only on two grounds, i.e., when after marriage the spouse of an officer

in one cadre is in a cadre different from such officer or where it is a case of extreme hardship which again has been defined to include a threat to the

life of an officer or his immediate family or severe health problem of an officer or his family due to the climate or environment of the State where he

is allotted, the grounds upon which Rule 5(2) can be invoked is circumscribed.

30. In the instant case, as none of the aforesaid two grounds are satisfied for a claim of change in cadre of the respondent, Rule 5(2) of the IAS

Cadre Rules, 1954 cannot be invoked to order a change of cadre as done by the CAT Guwahati in the order dated 28.06.2012.

31. As regards the contention that the law laid down by the Supreme Court in Rajiv Yadav's case is inapplicable, inasmuch as in the said case, the

candidate therein, had sought for a change of cadre of his own choice, whereas, in the present case, the respondent claims for a cadre allocation as

per his entitlement and not as per his choice, the same may deserve a consideration. But without going into such question, it is also to be taken into

consideration that the respondent had accepted the allocation of Manipur/Tripura cadre without any protest at the time of its allocation or at any stage

immediately thereafter and had in the meantime, being provided with the training as required for the Manipur/Tripura cadre. In the circumstance it

cannot be said that the claim of the respondent is a claim simpliciter for a cadre allocation as per his entitlement, where due to the passage of time, the

claim also has an element of a claim for change in cadre.

32. The said aspect consequentially leads to the question as to at what stage the respondent had raised the claim that he was entitled to a cadre

allocation in the Maharashtra cadre. Admittedly the respondent had for the first time made such claim by his representation dated 11.11.2009.

33. When the claim of the respondent for a change in cadre allocation, being

made for the first time on 11.11.2009 is compared with that of Sri Rakesh R Yadav, who had made the same claim as far back as 10.05.2005, an irresistible conclusion would be that definitely the respondent was not alert enough to make his claim whereas on the other hand the other candidate Sri Rakesh R Yadav , who was allocated the same Manipur/Tripura cadre was alert enough to make his claim immediately after happening of the event resulting in the mistake in the allocation.

34. It would also be a relevant consideration that the CAT-PB in its order dated 19.03.2009 had also recorded a clear finding that Sri Rakesh R Yadav is entitled to the benefit of a direction for a cadre change inasmuch as he was alert enough to raise a claim immediately after the event of happening of a mistake in the cadre allocation, whereas no other candidate were alert enough like him about their rights. Only on the basis of the said conclusion that the CAT-PB had passed the order in favour of Sri Rakesh R Yadav directing for a change in cadre to Gujrat cadre.

35. As indicated above, in the absence of a similar factual circumstance of being alert enough immediately after the event of the mistake in cadre allocation, in the considered view of this Court the respondent is not entitled to a similar benefit as given to Sri Rakesh R Yadav by the CAT-PB in its order dated 19.03.2009 in OA No.1804/2008. In fact a clear distinction is also been made by the CAT-PB in its order dated 19.03.2009 that the other candidates who had not made a similar claim are not entitled to the relief given to Sri Rakesh R Yadav.

36. A further consequence of a similar relief being given to the respondent as given to Sri Rakesh R Yadav would be that the relief granted to Sri Rakesh R Yadav was in the nature of an onetime relief by creating an additional vacancy in the Gujrat cadre by taking away one future vacancy. If similar reliefs are subsequently given to the other candidates by creating additional vacancies and taking away one future vacancy in the other State cadres, the same would create an administrative imbalance for the petitioner authorities which would not be in the public interest. Therefore, necessarily a line has to be drawn as to which extent a similar relief is required to be given to the other candidates who had not made their respective claims at the first instance when the mistake was committed. From the said point of view also the aspect that the respondent was not alert enough to

make his claim immediately after the mistake was committed, would in the view of the Court be an acceptable reason not to give the same relief of directing a change of cadre of the respondent to the Maharashtra cadre, as granted to Sri Rakesh R Yadav in the order dated 19.03.2009. It is also to be taken note of that the conduct of the respondent in making the claim for cadre change to Maharashtra cadre was made only after the notification dated 09.10.2009 in respect of Sri Rakesh R Yadav was put up in the website. The said notification being the consequence of the order dated 19.03.2009 of the CAT-PB, it can also be construed that the respondent had indulged in sitting on the fence in respect of the claim made by Sri Rakesh R Yadav and only when it transpired that Sri Rakesh R Yadav had succeeded in his claim the petitioner also put forth his own claim by claiming to be similarly placed.

37. In such view of the matter, the order of the CAT Guwahati 28.06.2012 in OA No.220/2010 directing the petitioner authorities to change the cadre of the respondent to Maharashtra cadre by creating an additional vacancy is not sustainable and accordingly the order of 28.06.2012 is quashed. The petition is allowed. No order as to costs.