

CASE NO.:
Appeal (civil) 2082 of 2003

PETITIONER:
SATYA NARAIN SHUKLA

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT: 11/05/2006

BENCH:
B.N. SRIKRISHNA & LOKESHWAR SINGH PANTA

JUDGMENT:
JUDGMENT

SRIKRISHNA, J. :

These two appeals impugned the same judgment of the Division Bench of the Allahabad High Court and are in the nature of cross appeals. Hence, they are being disposed of by this common judgment.

These appeals arise out of an order of the Central Administrative Tribunal, Lucknow, (hereinafter referred to as 'the Tribunal'), which was moved by Satya Narain Shukla, (appellant in Civil Appeal No. 2082/2003 (hereinafter referred to as 'the appellant')). The Tribunal declined any relief to the appellant and dismissed his original application. The appellant carried a writ petition to the High Court and the Division Bench granted him partial relief. There is an appeal by the appellant in respect of the relief denied to him and there is an appeal by the Union of India in respect of that part of the relief granted to the appellant by the High Court.

The Facts

The appellant was selected as an officer of the Indian Administrative Service (IAS) and was allotted UP cadre in the year 1967. He held different postings and was promoted to the Super Time Scale in the year 1982. In September 1996, the appellant was considered for empanelment as additional Secretary to the Government of India, but was not empanelled. Several representations were made by him to the authorities against his exclusion from the panel of Additional Secretaries to the Government of India on the ground that his case had been considered on the basis of wrong appreciation of the character rolls and ACRs, which had not been recorded in accordance with the All India Service (Confidential Rolls) Rules, 1970. In December 1977 the appellant's case was reviewed along with those of several other officers of the 1967 batch of IAS officer. His representations were not placed before the Special Committee of Secretaries (SCoS) and the Appointments Committee of the Cabinet (ACC). He was not, however, empanelled.

The appellant filed Original Application (OA) NO. 38/1998 before the Central Administrative Tribunal, Lucknow, on 28.1.1998. He alleged that the failure of the authorities to include him in the panel for Additional Secretaries to the Government of India was illegal on several grounds including mala fides on the part of some of the reporting officers. He also sought a direction from the Tribunal to the authorities for streamlining the system of recording annual confidential reports (ACRs) and to make the procedure for empanelment objective, fair and transparent. The tribunal made an interim order on 24.2.1998 directing that further empanelment and postings of 1967 and 1968 batch IAS officers junior to the appellant shall be subject to the decision of the OA. The appellant also submitted a memorial to the President for review of his case for empanelment as Additional Secretary to the Government of India but got no relief.

On 15.09.1998, the appellant sought an amendment for amending the relief clause in his OA and prayed for a direction to reconsider his case for empanellment as Additional Secretary to the Government of India and also to consider him for empanellment as Secretary to the Government of India. These amendments were allowed on 23.3.1999. On 1.5.1999, he sent another representation to the Cabinet Secretary to decide his earlier memorial addressed to the President and to give him justice by empanellment as Secretary to the Government of India.

On 12.5.1999, the Tribunal made a further interim order directed to authorities to complete the appellant's character roll (CR) and to take a decision on his representations dated 31.8.1998 and 6.3.1999 before considering him for empanellment to the post of Secretary to the Government of India. On 29.7.1999, the Tribunal made a further direction that the appellant's representation dated 1.5.1999 should be decided before finalising the empanellment for the post of Secretary to the Government of India. On 31.8.1999, the Government of India informed the appellant that his CR had been completed and the ACR for 1993-94, about which he had some grievance, had been cancelled. The Government of India, however, declined to deal with and take action on his representations on the ground that the matter was sub judice before the Tribunal.

In September 1999, the SCoS met for empanellment for the post of Secretary to the Government of India and after considering his record the appellant was not included in the panel.

On 11.1.2000, the appellant made a statutory memorial to the President alleging that he had been wrongly excluded from the panel for the post of Secretary to the Government of India. However, he got no relief therefrom.

Sometime in February 2000, the ACC met and accorded approval to the recommendations made by the SCoS for the panel of 1967 batch for the post of secretary to the Government of India. Again on 7.3.2000, the appellant sent another memorial to the President against his exclusion from the panel of the post of Secretary to the Government of India while two other officers junior to him, and allegedly of lesser merit, had been empanelled. On 28.4.2000, the Tribunal Dismissed the OA holding that the post of Additional Secretary to the Government of India or Secretary to the Government of India was not a promotional post for an all-India Services' officer of State cadre, and therefore, most of the contentions urged, which proceeded on the footing that the empanellment to the post of Additional Secretary to the Government of India or the Secretary to the Government of India was a promotional post, were irrelevant. The Tribunal also held that once the appellant was considered for empanellment for the post of Secretary to the Government of India, as he had become eligible for such consideration, there was no point in directing the respondent authorities to consider his case for empanellment for the post of Additional Secretary to the government of India. The Tribunal took the view that the posts of Additional Secretary and Secretary to the Government of India were very high and responsible posts for which only officers with outstanding entries in ACRs and excellent recommendations should be considered. It was also held that the ACRs were not the only consideration for empanellment. The Tribunal was satisfied that the SCoS had taken into consideration the change made in the ACR consequent to the direction of the Tribunal and it had considered the empanellment of the appellant for the post of Secretary to the Government of India after the representation dated 1.5.1999 had been decided. The challenge made by the appellant to the constitution and validity of the Central Staffing Scheme was declined by the Tribunal. The Tribunal also dismissed the allegations of mala fides and arbitrariness in not considering the appellant for empanelemnt and dismissed his petition.

The High Court party allowed the petition and the appellant. It held that all relevant papers including the representations made by the appellant, appreciation letters written in his favour and the memorials made by him

against downgraded entries and outstanding entries should have been placed by the authorities before the SCoS which should have applied its free and independent mind to arrive at the best possible conclusion for empanellment. The High Court declined to entertain and enter into the contention that the Central Staffing Scheme was violative of the provisions of the Constitution of India. But, taking the view that empanellment to the post of the level of Secretary to the Government of India was a promotional post, directed consideration of the appellant's case afresh for empanellment as Additional Secretary/Secretary to the Government of India by taking into consideration all relevant records as such his confidential report dossiers, letters of appreciation including memories etc.

We have heard the appellant in person as well as counsel for the Union of India. Despite the somewhat lengthy written arguments filed by the appellant, the points which need consideration are only the following :

- I. Whether the Central Staffing Scheme is unconstitutional;
- II. Whether para 14 of the Central Staffing Scheme is ultra virus Articles 309 and 312 of the Constitution of India;
- III. Whether the post of Additional Secretary to the Government of India and above are promotional posts for IAS officers;
- IV. Whether the appellant's non-empanellment to the above post is arbitrary and vitiated on account of mala fides, arbitrariness or violative of applicable rules.

I. Constitutional validity of the Central Staffing Scheme

The appellant strongly urged that his case falls under the procedure prescribed in the Central Staffing Scheme, which is wholly unconstitutional and illegal. According to the appellant, the service conditions of IAS officers are governed by the provisions of the All India Services Act, 1951 (AIS Act) and the Rules framed thereunder. The appellant contended that it was not permissible for the Government of India to prescribe any procedure therefor other than by way of rules framed strictly in accordance with the AIS Act. In his submission, no executive order made in respect of a matter under Article 309 or 312 could be inconsistent with the statutory rules framed under the AIS Act. The Central Staffing Scheme was neither the provisions of any legislative enactment nor a supporting legislation framed under the AIS Act, and, therefore, to the extent of inconsistency with the said Act or the Rules framed thereunder, it was illegal. For this contention, the appellant relied on the judgment of this Court in *G.K. Rao and Others v. S. Bhattacharya*¹ and *A.B. Krishna v. State of Karnataka*².

Article 312 of the Constitution provides that the Parliament may by law provide for the creation of one or more all-India Service common to the Union and the State, and, subject to the other provisions of that Chapter, regulate the recruitment and the conditions of service of persons appointed, to any such service. Further, the IAS and the IPS are deemed to be services created by the Parliament in order to enable the Parliament to deal with the service conditions of the members of the said services. Section 3 of the AIS Act provides as under:

"Section 3. Regulation of recruitment and conditions of service -

(1) the Central Government may, after consultation with the Governments of the States concerned including the State of Jammu and Kashmir and by notification in the Official Gazette make rules for the regulation of recruitment, and the condition of service of persons appointed to an All-India Service."

On 17.10.1957, the Central Staffing Scheme was formulated by a resolution of the Government of India and was intended to make "adequate arrangements

for staffing senior administrative posts of and above the rank of Deputy Secretary to the Government of India." This staffing scheme has been amended from time to time by resolutions of subsequent dates and the last one relevant to us, which was challenged by the appellant, was dated 5.1.1996. The contention of the appellant is that when the Central Staffing Scheme was formulated on 17.10.1957 it was clearly mentioned therein that it had been done "in consultation with the State Government and other authorities concerned". The appellant contended that section 3 of the AIS Act also requires consultation with the States for making of rules. The impugned Central Staffing Scheme contained in the OM dated 5.1.1996 does not, in terms, say that it has been issued after consultation with the State Governments. Hence, the contention is that it is ultra virus Section 3 of the AIS Act.

In our view, the contention raised by the appellant has no merit. Section 3 is an enabling power of the Central Government to make Rules for the regulation of recruitment and the conditions of service for persons appointed to the all-India services. This enabling power is hedged in with the requirement that before doing so there has to be consultation with the State Governments concerned and every rule made in such fashion is to be placed before both the Houses of the Parliament as required by sub-section (2) thereof. It is not possible to accept the contention of the appellant that the Central Staffing Scheme is either a rule or a Regulation within the meaning of Section 3 of the AIS Act, nor is it possible to accept that there is no other power available to the executive to deal with the recruitment and conditions of service otherwise than by a validly made rule under Section 3 of the AIS Act.

It is not well established that the Central Government's executive power extends to the same subjects and to the same extent as that of the Parliament, as long as it does not infringe any provision of any law made by the Parliament or of the Constitution. In *Rai Sahib Ram Jawaya Kapur and Others v. The State of Punjab*, this Court has observed (vide para 12):

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes residue of governmental functions that remain after legislative and judicial function are taken away.

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organs or part of the State, to functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."

Hence, we are unable to accept the contention that the Central Staffing Scheme is unconstitutional.

II. Constitutional validity of Para 14 of the Central Staffing

The selection of Additional Secretary/Secretary to the Government of India has been carried out in accordance with para 14 of the Central Staffing Scheme. Para 14 reads as under :

"Additional Secretary/Special Secretary/Secretary

14. Selection for inclusion on the panel of officers adjudged suitable for the appointment to the posts of Additional Secretary or Special Secretary/Secretary to the Government of India and posts equivalent thereto, will be approved by the ACC on the basis of proposals submitted by the Cabinet Secretary. In this task, the Cabinet Secretary may be assisted by a Special Committee of Secretaries for drawing up proposals for the consideration of ACC. As far as possible panels of suitable officers will be drawn up on an annual basis considering all officers of a particular year of allotment from one service together as a group. Inclusion in such panels will be through the process of strict selection and evaluation of such qualities as merit, competence, leadership and a flair for participating in the policy-making process. Posts at these levels at the Centre filled according to the Central Staffing Scheme are not to be considered as posts for the betterment of promotion prospects of any service. The need of the Central Government would be paramount consideration. While due regard would be given to seniority, filling up of any specific post would be based on merit, competence and the specific suitability of the officer for a particular vacancy in the Central Government."

Para 14 of the Central Staffing Scheme makes it clear that empanelment will be through the process of strict selection and evaluation of "merit, competence, leadership and a flair for participating in the policy-making process". It is also made clear therein that posts at these levels in the Centre filled according to the Central Staffing Scheme are not to be considered as posts for the betterment of promotion prospects of any service and that the need of the Central Government would be the paramount consideration. While due regard would be given to seniority, filling of any specific post would be based on merit, competence and specific suitability of the officer for a particular vacancy in the Central Government.

The appellant contended that this provision of the Central staffing Scheme is ultra virus Articles 309 and 312 of the Constitution. Amplifying this it is urged by the appellant that several Rules have been framed by the Central Government in exercise of its statutory powers under AIS Act, 1951, i.e. Indian Administrative Service (Cadre) Rules, 1951; Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955; Indian Administrative Service (Pay) Rules, 1954; Indian Administrative Service (Regulation of Seniority) Rules, 1987; Indian Administrative Service (Probation) Rules, 1954; and that these Rules occupy the whole field of executive discretion, and, therefore, by the doctrine of occupied field there is no scope left for exercise of executive action outside the purview of these Rules. It is difficult to accept this contention. Each one of these Rules is intended to take care of a specific facet of the IAS. No set of these Rules is exhaustive by itself of all the service conditions applicable to the IAS. It is, therefore incorrect to contend that the field of possible executive action is completely occupied by the statute or the statutory rules framed thereunder, deriving force from Article 309 read with Article 312 of the Constitution of India. We have not been shown any provisions in these Rules which deal specifically with the subject of the procedure for selection of officers from the said cadre for the post of Additional Secretary/Secretary to the Government of India. This is a subject in respect of which the field does not appear to be occupied. Consequently, it was very much open to the executive of resort to executive instructions by way of an office memo for dealing with this subject. The contention, therefore, must fail.

The further contention that para 14 of the Central Staffing Scheme leaves room for arbitrary executive action for want of clear cut guidelines has no merit. The guidelines indicated therein are sufficiently clear enough to steer clear of the charge of possible arbitrary use.

III. Whether the post of Additional secretary to the Government of India

and above are promotional posts for IAS Officers;

It is next contended by the appellant that the post of Additional Secretary/Secretary to the Government of India is a promotional post of IAS officers. Strong reliance is placed on the judgment of this Court in *Debash Chandra Das v. Union of India*⁴. This was a case of an IAS officer of the Assam cadre, who was appointed as Special Secretary to the Government of India, but later on reverted to Assam services, which resulted in reduction of his pay, and the other option given to him was to continue in Central Government service in a lower pay scale. This was considered to be a lower ranked post because as a Special Secretary at the Central Government services he was enjoying higher pay, emoluments and status. Being reverted to the State cadre, according to this Court, amounted to reversion to a lower post accompanied by a stigma, in the peculiar facts of the case, particularly when the appointment of the appellant as Special Secretary was for a tenure of 5 years and was terminated before expiry thereof. In these circumstances, this Court took the view that reverting the appellant-officer to the State cadre amounted to reversion with stigma, which required action in accordance with Article 311(2) of the Constitution, and, that not having been done, the action of reversion was held to be illegal. We notice that the Central Staffing Scheme was not even referred to or considered by the judgment. We are, therefore, unable to accept the contention that this judgment supports the proposition canvassed.

Reliance was placed on the judgment of this Court in *State of Mysore v. Krishna Murthy*⁵. This was a case where members of the same service belonging to the same cadre were treated differently for promotional purposes merely on the ground that they came from different streams. Hence, his judgment is of no relevance to us.

Para 14 of the Central Staffing Scheme read in the light of the judgment of this Court in *Union of India v. Samar Singh*⁶ also suggests that appointment to the post of Additional Secretary/Secretary to the Government of India is not a promotion for an IAS officer.

We are, therefore, unable to accept that empanellment of a State cadre officer for the post of Additional Secretary/Secretary to the Government of India is a promotion as contended. If the argument of the appellant is accepted, then an officer of the State cadre who is appointed to the Government of India can never be sent back to his State cadre, for the benefit of promotion once given cannot be withdrawn unless for extraordinary reasons. For all these reasons, we are unable to agree with the appellant's contention that the post of Additional Secretary/Secretary to the Government of India is a promotional post for an IAS officer.

IV. Whether the appellant's non-empanellment is vitiated

The last contention urged by the appellant is that his non-empanellment to the post of Additional Secretary/Secretary to the Government of India was arbitrary, vitiated by mala fides and violative of applicable rules. The first argument in respect of his contention is that no reasons have been given for his non-empanellment or for empanellment of officers junior to him. *Union of India v. Samar Singh* (supra) was a case of empanellment of an IAS officer under para 14 of the Central Staffing Scheme. In that case the respondent contended that the committee constituted under the provisions of the Central Staffing Scheme had wrongly and unjustifiably not chosen the respondent for empanellment as Secretary to the Government of India. After referring to para 14 of the Central Staffing Scheme and the observations as to the limited nature of review for selection for appointment indicated in *Dalpat Abasaheb Solunke v. Dr. B.S. Mahajan*⁷; *Jai Narain Misra (Dr) v. State of Bihar*⁸ and *Major General I.P.S. Dewan v. Union of India*⁹, this Court observed in para 11 as under:

"This would show that the Committee, keeping in view the record and experience including the conceptual and leadership abilities, achievements

and potential for general management positions, had recommended 19 IAS officers for holding the post of Secretaries and 7 IAS officers for holding non-secretarial post. Merely because the minutes of the Committee do not contain the reason for non-selection of the respondent does not mean that there has been no proper consideration of the merits and suitability of the respondent and as a result the selection is vitiated. From the minutes of the Special Committee it is evident that in the matter of empanellment of officers the Special Committee has taken into account the criteria that are laid down for holding such selection in para 14 of the Central Staffing Scheme and, therefore, it cannot be said that the said selection is vitiated on account of non-inclusion of the name of the respondent in the panel."

Another contention urged by the appellant is that the appellant has an outstanding service record, and therefore, his non-empanellment is arbitrary. This Court has reiterated in *Samar Singh (supra)* that merely because an officer has an outstanding service record there is no automatic empanellment. After referring to para 14 of the Central Staffing Scheme, this Court observed (vide para 12) as follows :

"Apart from the record there are other matters that have to be considered, namely, merit, competence, leadership and flair for participating in the policy-making process and the need of the Central Government which is the paramount consideration. We are unable to hold that since the performance of the respondent after his promotion as Additional Secretary had been found to be excellent and outstanding, the non-inclusion of his name from the panel by the Special Committee must lead to the inference that there was no proper consideration of the merit and suitability of the respondent for empanellment by the Special Committee."

There is no merit in the contention that the non-empanellment of the appellant is arbitrary, as urged.

Finally, the appellant also urged that his non-empanellment was the result of mala fides. In support of this contention he has contended that his ACRs were not written fairly and in fact his excellent record had been spoiled by his superior officer on account of mala fides against him. When we repeatedly queried him as to what were the mala fides alleged before the Tribunal and the High Court, he contended that his ACRs had been left incomplete and his empanellment as Additional Secretary/Secretary to the Government of India was considered on the basis of incomplete ACRs. The appellant had made an application to the Tribunal that his empanellment should be considered only after the authorities are directed to complete his CR dossiers. As a matter of fact, the prayer made by the appellant was granted by the Tribunal and the authorities concerned were directed to complete the CR dossiers of the appellant and only thereafter to take a decision on empanellment. Thus, it is clear that the decision for empanellment for the post of Secretary was not based on incomplete ACRs.

The appellant then contended that some officer were biased against him and their assessment was vitiated by mala fides. When we asked him as to who the said officers were, he named a former Cabinet Secretary, T.S.R. Subramanian, and certain other officers who had written his CR dossiers. The reasons for mala fides alleged by him are that he had seriously disagreed with some of the policy decision taken by some of these officers, and therefore, they bore an animus against him. He also contended that the very officers who had written his downgraded entries, later on were involved in some scandals. In our view, neither of these grounds hold any water. From the records we do not see any strong motive for any of the officers to bear animus against the appellant to ensure that he was not empanelled. Dissent is the essence of democracy and merely because one disagrees with another, one cannot jump to the conclusion that the other harbors a grudge against the former.

The appellant also argued that the remarks made in the ACR were not

communicated to him. It was also urged by the appellant that this Court should direct the authorities to streamline the whole procedure so that even remarks like 'good' or 'very good' made in ACRs should be made compulsorily communicable to the officers concerned so that an officer may not lose his chance of empanellment at a subsequent point of his service. In our view, it is not our function to issue such directions. It is for the Government to consider how to streamline the procedure for selection. We can only examine if the procedure for selection as adopted by the Government is unconstitutional or otherwise illegal or vitiated by arbitrariness and mala fides.

After, careful application of mind to all the contentions urged before us, we are not satisfied that there are any vitiating factors affecting the decision of the Central Government in not empanelling the appellant for the post of Additional Secretary/Secretary to the Government of India.

The appellant in his enthusiasm cited a large number of other judgments both in his oral and written submissions. Having carefully perused them, we are of the view that they are hardly of any assistance to us a resolution of the dispute before us in the present appeals.

In the result, we hold as under :

1. The provisions of the Central Staffing Scheme including para 14 thereto are not unconstitutional;
2. In view of the express provisions of para 14 of the Central Staffing Scheme, read in the light of the judgment of this Court in Samar Singh (supra), the appointment of State cadre IAS officers for the post of Additional Secretary/Secretary to the Government of India does not amount to promotion.
3. The non-empanellment of the appellant for the post of Additional Secretary/Secretary to the Government of India was neither arbitrary nor contrary to the Rules nor vitiated by mala fides as alleged.

In the result, we allow Civil Appeal No. 2081 of 2003 and set aside that part of the impugned judgment of the High Court holding that the empanellment to the post of Additional Secretary/Secretary to the Government of India amounts to promotion and directing consideration of the appellant's case afresh for empanellment. The rest of the judgment is maintained. Civil Appeal No. 2082/2003 is hereby dismissed. There shall be no order as to costs.