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Om Prakash

... Petitioner

versus

Union of India & Ors.

... Respondents

Advocates who appeared in this case:

For the Petitioner

: Mr.K.G.Sharma, Advocate

For Respondents

: Mr.Ravinder Agarwal, Central Government

Standing Counsel

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

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1. The petitioner, a Sub Inspector in Border Security Force, has sought direction against Director General, Border Security Force and the Inspector General (Communication & IT) not to discriminate the petitioner in promotion to the rank of Inspector against the newly created posts and to consider him for promotion by allotting 37 posts out of 170 newly created posts of Inspectors on proportionate basis (in the ratio of 283:62) to the Cipher branch. The petitioner has also prayed for directions to the respondents not to order any further promotions from Sub Inspectors to Inspectors in the Communication & IT Directorate of Border Security Force in respect of newly created 170 posts till the decision of the present writ petition.

2. The petitioner contended that he joined Border Security Force on 18th November, 1980 and was promoted to the rank of Assistant Sub Inspector on 5th May, 1993. He has been serving as Sub Inspector (Cipher) since 8th November, 2007 and is presently posted in 24th Battalion, BSF, at Chedima, Nagaland. According to the petitioner, there are three branches in the Department of Communication in the Border Security Force, i.e Radio Operators, Radio Mechanics and Cipher.

3. The petitioner alleged that there were 283 sanctioned/authorized posts of Inspectors (Communication) which is the combined strength of Inspectors promoted from Radio Operators, Radio Mechanics branch and 62 posts of Inspectors (Cipher) promoted from the Cipher branch. The channel of promotion in the Radio Operators branch is from Head Constable to Assistant Sub Inspector (ASI) on completion of Course-II and from Assistant Sub Inspector to Sub Inspector on completion of Course-I.

4. In Radio Mechanics branch, the Assistant Sub Inspectors are inducted directly and Assistant Sub Inspectors after successfully completing Course I, are promoted to the rank of Sub Inspector (Radio Mechanics).

5. In Cipher branch, a Head Constable on completion of Course-II is entitled for promotion to the post of Assistant Sub Inspector and the promotion from the post of Assistant Sub Inspector to Sub Inspector is after completion of Course-I. The petitioner also alleged that in order to become Inspector, the Sub Inspectors in all the three branches, i.e Radio Operators, Radio Mechanics and Cipher, have to pass the Senior Supervisor's Course (SSC), which is combined for all the three branches and this combined course runs jointly for Sub Inspectors from all the three branches.

6. The petitioner also disclosed that on promotion from Radio Operators and Radio Mechanics branches the Sub Inspectors become Inspector (Communication) and from Cipher branch the Sub Inspectors who are promoted are given the rank of Inspector (Cipher).

7. It was further asserted that in the year 2011, 170 new posts of Inspectors (IT) were sanctioned/created in the Directorate/Department of Communication & Information Technology. The posts so created, according to the petitioner, were never circulated and the decisions were taken in secrecy. The plea of the petitioner is that no eligibility criterion has been laid down for direct appointment to the post of Inspector (IT) nor any special technical qualification has been prescribed for appointment on promotion from Sub Inspector (Radio

Operator/Radio Mechanic/Cipher) to the post of Inspector (IT) and the only apparent criterion for promotion is successful completion of the Senior Supervisor's Course.

8. According to the petitioner, in 2011, 170 posts of Inspector (IT) had been merged with the post of Inspector (Communication) and after the merger, 11 Sub Inspectors of Radio Operator branch and 62 Sub Inspectors of Radio Mechanic branch have been promoted to the rank of Inspectors by order dated 18th October, 2011. *However, not a single Sub Inspector from Cipher branch has been promoted against the newly created posts.* The petitioner's claim is that the Sub Inspectors from all the three branches - Radio Operator, Radio Mechanic and Cipher are promoted on the criterion of passing the combined Senior Supervisor's Course. The petitioner also alleged that there are many Assistant Sub Inspectors in the Cipher branch who are senior in service to those who have been promoted though these Assistant Sub Inspectors in the Cipher branch have also done Senior Supervisor's Course. The ground on which the petitioner has sought that the newly created vacancy should have also been released in the Cipher branch are that there are no special technical qualifications or experience specified in the rules for promotion to the newly created post of Inspector (IT) which have been merged with the post of Inspector (Radio Operator and Radio Mechanic) and the only criterion is passing of Senior Supervisor's course. The plea of the petitioner is that the Cipher branch is an

integral part of Communication branch and the people working in it cannot be ignored arbitrarily and completely in the matter of promotion. The petitioner has also challenged the merger of 170 posts of Inspectors (IT) with the post of Inspector (Radio Operator and Radio Mechanic) on the ground that the respondents cannot carve out a segment out of a homogenous group of employees who have all passed the common course of SSC and the Sub Inspectors in Cipher branch cannot be discriminated in the facts and circumstances.

9. According to the petitioner, merging of 170 posts of Inspectors (IT) with the post of Inspector (Radio Operator and Radio Mechanic) and ignoring completely the Sub Inspectors of Cipher branch amounts to giving entry through back door and doing injustice to personnels working in Cipher branch including the petitioner and in the circumstances the reliefs as detailed hereinabove have been prayed by the petitioner.

10. The writ petition and the reliefs prayed by the petitioner are contested by the learned standing counsel, Mr. Ravinder Agarwal, who has appeared on advance notice, contending that the posts of Inspector (IT) have been merged with the post of Inspector (Radio Operators and Radio Mechanic) according to the exigencies of service and the requirement in the said two branches. The learned counsel has contended that there is no rule or regulation under which the petitioner

can claim that the newly created 170 posts of Inspectors (IT) ought to have been merged equally or in any specific ratio, as has been alleged by the petitioner, in all the three branches, i.e. Radio Operators, Radio Mechanics and Cipher branch. The learned counsel also contended that whether the merger of posts made by the Government is right or wrong is not to be determined by the Court as the matter is exclusively within the province of the Government. The counsel contended that for merger of the posts, where there are no similar cadres, the factors which are to be taken into consideration in determining the equation of posts are as under:-

- (a) Nature and duties of a post;
- (b) Powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;
- (c) The minimum qualifications, if any, prescribed for recruitment to the post and;
- (d) The salary of the post.

He contended that the only question which the Court can enquire into is whether the principles as detailed hereinabove have been properly taken into account or not. The jurisdiction of the Court is narrow and limited within which the supervisory jurisdiction of the Court can be exercised.

11. This Court has heard the learned counsel for the parties and have perused the writ petition and the annexures filed by the petitioner. Prima facie the only arguments advanced by the petitioner is that the posts of Sub Inspector (Radio Operators, Radio Mechanic and Cipher) are part of the Department of Communication. If these three cadres are under the Department of Communication, it does not lead to any inference that the newly created posts have to be distributed equally or in accordance with the ratio in which the posts existed earlier. The posts of Sub Inspector (Radio Operators, Radio Mechanic and Cipher) are not equatable on the factors as has been alleged by the petitioner. Merely because for promotion to the posts of Inspector, in all three cadres of Radio Operators, Radio Mechanics and Cipher, the eligible candidates have to qualify the SSC (Senior Supervisor's Course) does not lead to any inference that the newly created posts have to be distributed equally or in accordance with the ratio of the existing post in these cadres.

12. The Supreme Court while dealing with the plea of merger in the State of Maharashtra and Anr. v. Chandrakant Anant Kulkarni & Ors, MANU/SC/0446/1981 considered the question of integration of Government servants allotted to the services of the new States when the different states of India were re-organized and approved the principles for effective integration of services of different states. The principles which were approved by the Court were that in the matter of equation of

posts, (1) where there are regularly constituted similar cadres in the different integrating units, the cadres will ordinarily be integrated on that basis but (2) where there are no such similar cadres, the factors e.g nature of duties of a post; powers exercised by the officers holding the post to the extent of territorial or other charge held or responsibilities discharged; the minimum qualification, if any, prescribed for recruitment to the post and the salary of the post have to be considered.

13. In *Assn. for the Officers of the W.B. Audit and Accounts Service v. W.B. Audit and Accounts Service Assn.*, 1995 Supp (4) SCC 44, at page 46 the Supreme Court had held as under :

1. The Audit and Accounts Department of the State of West Bengal consists of three services, namely, the West Bengal Higher Audit and Accounts Service (Higher Service), the West Bengal Audit and Accounts Service (State Service) and the West Bengal Junior Audit and Accounts Service (Junior Service). The members of the Junior Service sought a mandamus from the Calcutta High Court to the effect that the Junior Service and the State Service be merged and reconstituted as single service. A learned Single Judge of the High Court allowed the writ petition and directed the merger of the two services with effect from 27-3-1971. The learned Judge further directed that after the unification of the two services, the seniority of the unified cadre be fixed with effect from 27-3-1971. Two appeals, one by the State of West Bengal and the other by the Association of the officers were filed against the judgment of the learned Single Judge. A Division Bench of the High Court dismissed both the appeals and upheld the judgment of the learned Single Judge. These appeals by way of special leave are against the judgments of the High Court.

3. During the pendency of the appeal the Division Bench directed the State of West Bengal to file an affidavit

clarifying its position. Secretary to Government, Finance Department, filed an affidavit dated 7-11-1990 wherein he stated that the State Government had fully examined the question of merger of the two services and had taken a conscious decision to the effect that such merger was not in the interest of the administration. We have been taken through the affidavit wherein elaborate reasons have been given for rejecting the demand for merger of the two services. It is not open to the High Court to go into the merits of the reasoning of the State Government. After going through the reasons given in the affidavit we are of the view that each one of the reasons given therein is cogent and the High Court was wholly unjustified in not taking the same into consideration. The Division Bench became wholly oblivious of the affidavit filed by the Finance Secretary and did not even notice the same in its judgment.

5. This Court has repeatedly held **that merger of more than one cadre or division of one cadre into two or more cadres is an executive act and is entirely within the administrative sphere of the State Government.** This Court in *Reserve Bank of India v. N.C. Paliwal* held as under: (SCR Head note p. 379)

“The integration of different cadres into one cadre cannot be said to involve any violation of the equality clause. It is entirely a matter for the State to decide whether to have several different cadres or one integrated cadre in its services. **That is a matter of policy which does not attract the applicability of the equality clause.** The integration of non-clerical with clerical service sought to be effectuated by the Combined Seniority Scheme cannot, in the circumstances, be assailed as violative of the principle of quality.”

In *Inder Singh v. Vyas Muni Mishra*, the Supreme Court had again observed as under: (SCR Head note p. 973)

“The High Court exceeded its jurisdiction in directing the merger of the posts of Ganna Gram Sewaks and Cane Supervisors.

The merger or bifurcation of a cadre is an executive act. It is for the State to consider whether two groups

of persons working under two distinct posts perform the same kind of duties or not, and whether in implementing the Directive Principles, as contained in Article 39(d) of the Constitution, it is necessary to merge the two posts into one cadre post.”

14. In *Union of India v. Arun Jyoti Kundu*, (2007) 7 SCC 472, at page 481 the Supreme Court had again held that Central administrative tribunal or the High Court could not direct the merger of any cadre as it is a policy decision for the Government to take. So long as it is done according to the requirement and exigencies, it is not open to the Tribunal or the Court to issue directions in this regard. In the instant case, the Typists working in the Railways claimed merger of their cadre with the cadre of clerks consequent to grant of higher pay scale, which was denied by the Apex Court. The Supreme Court had held as under:

“20. When a concession was being extended as distinct from implementing a specific recommendation of the Pay Commission with reference to a particular point of time, it is open to the Government to provide that the benefit it proposes to give, would be available only from a notified date. As this Court has observed, neither the Central Administrative Tribunal nor the High Court, can direct the merger of any cadre. That is a policy decision for the Government to take. So long as it is not done, it is not open to the Tribunal or the Court to issue directions in that regard and to follow it up with what are thought to be consequential directions.

21. We may in this context notice that the Central Administrative Tribunal, Principal Bench, Delhi dealing with a similar claim took up the position on the basis of decisions of this Court, that the Tribunal would have no jurisdiction to issue the directions sought for by the employees. It is submitted that the correctness of the said

decision has been questioned in the High Court at Delhi. Therefore, it is not necessary for us to make any observation regarding that decision. But we note that, that Tribunal declined jurisdiction in similar circumstances.”

15. No doubt the minimum qualification for appointment to the post of Sub Inspector (Radio Mechanic, Radio Operator and Cipher) are similar, however, it cannot be held that the nature and duties of the different posts are similar and the power exercised by the officers holding such posts and the responsibility discharged by them are also similar. If that be so, though the posts of Inspector (IT) could be merged with the posts of Inspector (Radio Operator and Radio Mechanic), however, the petitioner cannot insist that some of the posts of Inspector (IT) ought to have been merged with the Inspector (Cipher).

16. The Apex Court in Chandrakant Anant Kulkarni (Supra) had held that it is not open to the Court to consider whether the equation of posts made by the Government is right or wrong, as this matter is exclusively within the province of Government and the only question that the Court can enquire into is whether the principles as enunciated by the Courts in different judgments have been properly taken into account or not. The scope of supervisory jurisdiction of the Court in the matter of merger of post is narrow and limited. The Apex Court relied on the ratio of Chandrakant Anant Kulkarni with approval in the matter of Union of India & ors. Vs. S.L.Dutta & anr. MANU/SC/0087/1991.

17. The learned counsel for the petitioner has failed to show any rule or any precedent which will mandate that some of the posts of Inspector (IT) necessarily have to be merged with the post of Inspector (Cipher). The nature of duties and the requirements of the officers exercising the powers as Inspector (Cipher) are different from Radio Operators and Radio Mechanic and the petitioner cannot insist about merger of some of the posts of Inspector (IT) with Inspector (Cipher). No precedent has also been cited and relied on by the learned counsel for the petitioner which will compel the respondents to maintain the ratio of the posts of Inspector in Radio Operator, Radio Mechanic and Cipher as it was before the 170 newly created IT posts were merged with the post of Inspector (Radio Operator and Radio Mechanic).

18. The newly created posts of Inspector (IT) have been merged in accordance with the requirement of Radio Operators and Radio Mechanic and the petitioner cannot insist that some posts ought to have been merged with the post of Inspector (Cipher). In any case, this Court in exercise of its supervisory jurisdiction will not compel the respondents to merge some of the posts of Inspector (IT) with the posts of Inspector (Cipher) in the facts and circumstances.

19. The merger has to be on the basis of the requirement in the different cadres and in case the posts of Inspector (IT) have not been

merged with the post of Inspector (Cipher), it cannot be inferred that there has been discrimination. The alleged discrimination, if any, is based on the requirement and the exigencies of the department of Communication and in the circumstances there is no ground for the petitioner to impugn the action of the respondents.

20. The writ petition in the facts and circumstances, and for the foregoing reasons is without any merit and it is, therefore, dismissed. All the pending applications are also disposed of.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

April 17, 2012
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