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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 01.11.2018
Pronounced on: 28.11.2018

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W.P.(C) 8910/2014

UNION OF INDIA & ORS. Petitioners

Through : Mr.Arun Bhardwaj, Adv.

versus

P.B. SINGH

..... Respondent

Through : Mr. S.P. Singh, Sr. Adv. with Mr. P.B. Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The Union Government (hereafter “UOI”) is aggrieved, and by this writ petition, challenges an order of the Central Administrative Tribunal (“CAT”) which held that a vacancy in the post of Additional Secretary in the Ministry of Law and Justice is to be filled by seniority and not on the basis of selection through a committee constituted for the purpose.

2. The respondent (hereafter “the applicant”) was the senior-most Joint Secretary and Legal Counsel (“JS& LC” hereafter) in the Legislative Department, Ministry of Law and Justice. He claimed entitlement to hold the post of Additional Secretary in the Legislative Department in terms of a Union Cabinet decision dated 11.10.2007 whereby one post of JS&LC was upgraded to that of the Additional Secretary to be held by the senior-most JS&LC in the Legislative Department. Since the creation of that post, there is a precedent that the senior-most JS&LC is promoted to hold the post of

Additional Secretary while the other posts in Law Commission cadre, Government Advocates Cadre and Legislative Cadre Departments were filled by Search-cum-Selection method in terms of the Circular of the DOP&T issued on 02.09.1999. The applicant urged that all the posts in three Legislative Departments of the Indian Legal Service (“ILS”) ought to be filled by circulars of the UOI relating to promotion as Additional Secretary following due process. The applicant had filed OA No.1692/2013 for enforcement of his rights. The said OA was dismissed by this Tribunal by order dated 15.07.2014. He filed a review application against the said order of the CAT. However, the post of Additional Secretary in the Legislative Department fell vacant w.e.f. 07.08.2013 on account of appointment of Shri N.L. Meena, the then incumbent of the post, as Member Secretary, Law Commission. The applicant argued that through rules and by convention, he ought to be elevated to the post of Additional Secretary being the senior-most JS&LC. He therefore approached the CAT.

3. The applicant had urged that under Rule 13 of ILS Rules, 1957 [hereinafter referred to as Rules of 1957], the conditions of service of the members of the service in respect of matters for which no provision is made in the rules shall be the same as are applicable from time to time to officers of the Central Civil Services, Class-L. The instructions of the DOP&T are applicable for appointment to the higher grade of Additional Secretary by virtue of Rule 13 of the Rules of 1957. Wherever instructions provide for appointment through seniority, the right of consideration for appointment accrues, and its denial amounts to violation of Articles 14 and 16 of the Constitution. The applicant had alleged that Sh. P.K. Malhotra, Secretary of the Legislative Department was prejudiced against him because the applicant had challenged his appointment as Secretary in the Department. The applicant consequently, challenged inaction of the Government in not

appointing him to the post of Additional Secretary of the Legislative Department being discriminatory in character as in that post similarly situated persons had been appointed on the basis of seniority.

4. The UOI's position was that in 2004, there was one post of Secretary, one post of Additional Secretary and six posts of JS&LC in the Legislative Department. In view of the increasing workload in the Legislative Department, one post of JS&LC was upgraded to that of Additional Secretary to be held by the senior-most JS&LC with the approval of the Cabinet. This post was initially held by one Z.S. Negi, the senior-most JS&LC in the Legislative Department, till his superannuation on 31.08.2005. The said post remained unfilled for more than one year and it was deemed to have been abolished w.e.f. 31.08.2006. Then the approval of the Cabinet was solicited to operationalize/revive the post of Additional Secretary for being held by the senior-most JS&LC of the Legislative Department and it was approved in the meeting dated 11.10.2007.

5. The UOI admitted that the applicant was the senior most Joint Secretary and that a meeting was scheduled for 06.09.2013 for selection of a candidate to the post of Additional Secretary; that meeting was postponed. Later on 29.08.2013, a note was sent to Cabinet Secretariat informing that the post of Additional Secretary in Legislative Department which had fallen vacant on 08.08.2013 was not to be filled by the process of Search-cum-Selection Committee but to be held by the senior-most JS&LC in the Legislative Department. The Cabinet Secretariat was requested to clarify whether the Department may go ahead with the proposal for filling up the post by way of appointment of senior-most JS&LC, the Cabinet Secretariat, in turn, informed that the matter may be taken up with the Cabinet for filling up the post through Search-cum-Selection Committee procedure so that there may not be any ambiguity in the matter. The UOI stated that the

Cabinet Secretariat was contemplating that the post of Additional Secretary in the Legislative Department should be filled up by the process of Search-cum-Selection Committee. In view of the proposal for changing the mode of selection process for filling up the post of Additional Secretary from the senior-most JS&LC in the Legislative Department to that of Search-cum-Selection procedure, it urged the inadvisability of filling up the post, but to await the outcome of the proposed policy.

6. The CAT, by its impugned order, noticed that the UOI had not considered the applicant for appointment to the post of Additional Secretary which fell vacant w.e.f. 07.08.2013 as the mode of recruitment was to be finalized. The impugned decision traced the chronology of events, with respect to occurrence of vacancy, its upgradation and the previous decision that the seniority principle would prevail. It reasoned that in view of the judgments in *Y. V. Rangaiah & Ors. Versus Sreenivasa Rao & Ors.*, 1983 (3) SCC 285; *P. Mahendran & Ors. Versus State of Karnataka & Ors.*, (1990) 1 SCC 411 and *Deepak Agarwal & Another versus State of Uttar Pradesh & Others* [2011 (6) SCC 725], held as follows:

“Looking to the facts of the instant case, we find that the applicant being the senior-most JS&LC has a right to be considered for promotion against the post of Additional Secretary which had fallen vacant w.e.f. 07.08.2013. Though his case had been put up for promotion, but he was not considered despite his having the eligibility and vigilance clearance. It is also a fact that the applicant is due to retire on 30.11.2014. We feel that though it is the prerogative of the Government to bring a change in the rules including the method of recruitment, yet the proposed amendment qua appointment to the post of Additional Secretary by Search cum- Selection Method has not yet been materialized and is under process. Therefore, so long the change in the method of appointment does not take place, the right of consideration of the applicant to the post of Additional Secretary shall remain in place. In this regard, we are fully guided by the decision of the Hon'ble Supreme Court in the case of Deepak

Agarwal & Another versus State of Uttar Pradesh & Others (supra). Considering the fact that the applicant is due for retirement shortly, he may not have a long tenure to serve with but is likely to have enhancement in pensionary benefits.”

7. The UOI argues that in 2004, one post of Additional Secretary was created in the Legislative Department by upgrading one of the existing post of Joint Secretary & Legislative Counsel to be held by the senior most JS & LC. In 2007 this post was revived for its being held by senior most JS & LC instead its being filling by applying the Search-cum-Selection Committee procedure and the senior most Joint Secretary was recommended to the post of Additional Secretary. It is submitted that since two different methods came to be in use for filling up of the posts of Additional Secretary, an ambiguous situation was created and this ambiguity in the selection procedure necessarily was required to be removed so that a transparent system of filling up of the post of Additional Secretary could be put in place. Accordingly, by note dated 29.08.2013, proposal was moved to fill the vacancy by appointing the senior most Joint Secretary and legislative counsel as Additional Secretary. However, it was decided that the matter for temporary/permanent upgradation of the post to the level of Additional Secretary for being filled up through the Search-cum-Selection Committee Procedure could be considered the Cabinet to avoid ambiguity in the matter.

8. Referring to the Government of India (Transaction of Business) Rules, 1961 (“Transaction Rules”) counsel for UOI argued that *per* Rule 1 (i), all appointments to the post of a particular grade (and above) spelt out in the Annexure to the schedule to those rules are to be mandatorily filled by decision of the Appointments Committee of the Cabinet (ACC). This would mean that no post above the rank of Joint Secretary and above can be filled on an application of the principle of seniority alone; rather, it would have to

be filled based on merit and suitability, which apply to all posts of such rank and status. It was argued that the UOI in fact decided – by order dated 29 October, 2014 that the post of Additional Secretary in question would be filled by applying the search cum selection mode. Counsel relied on *Sankersan Dash v. Union of India*, AIR 1991 SC 1612 and submitted that no public officer has a vested right in insisting that a particular rule or policy should continue and that the executive government may well not decide to fill a post even if a candidate or a number of candidates have been declared selected, as long as the decision (not to so fill the post) is grounded on reason.

9. Mr. S.P. Singh, learned senior counsel for the applicant, urged this court not to interfere with the order of the CAT. He submitted that the facts of this case clearly attracted the ruling in *Y. V. Rangaiah and Deepak Agarwal*. It was pointed out that the relevant procedure applicable as on the date of occurrence of vacancy determined the norm applicable for filling the post of Additional Secretary. As on that date, the policy decision of 2007, whereby the post was to be filled by the senior most JS& LC, existed. Counsel urged that according to the rulings of the Supreme Court, a subsequent change in the policy could not affect the applicant's right, which in fact had vested in him. Counsel also relied on the decision in *Chairman Railway Board v C. Rangadhamaiah*, 1997 (6) SCC 623.

10. This court is of the opinion- for reasons to be outlined hereafter, that the impugned order is in clear error. The sequence of facts would show that a post of JS & LC was upgraded pursuant to a decision of the Union Cabinet; the order of 29 June, 2004, *inter alia*, states that

“The post of Joint Secretary and Legislative Counsel (Grade I of Indian Legal Service) in the Legislative Department shall stand upgraded to the post of Additional Secretary with effect from the date of appointment senior most Joint Secretary and Legislative

Counsel in the Legislative Department to the said upgraded post of Additional Secretary.”

11. It is a matter of record (undeniably, since the applicant did not also dispute it) that on 2 September, 1999, the Prime Minister had approved and sanctioned the method of filling the post of Secretary and Additional Secretary in the Indian Legal Service; this included the Cabinet Secretary, as chair and other ranking officers as well as an outside expert. Separate committees were to appraise for the two posts. If seen in the context of this order, the upgradation order of 2004 was an exception. The order of 2007, reviving the post, is as follows:

“In this regard it may be relevant to point out that since seniormost Joint, secretary & Legislative Counsel in, the Legislative Department has already reached the basic pay equivalent to the scale of pay of Additional Secretary. i.e. Rs. 22.400'wai effect from 1st September, 2006- and therefore will not- be any financial implication on the revival of the post of Additional Secretary in view of the reasons stated above, the approval of the Cabinet is solicited to operationalize/ revive the post of Additional Secretary in the Legislative Department for its being held by the senior- most Joint Secretary & Legislative Counsel of the legislative Department as approved by the Cabinet on 15th June, 2004”

12. In the opinion of this court, the order of June, 2004 merely upgraded a post to that of Additional Secretary; that upgradation carried with it the incumbent, who later retired. The post thereafter was abolished, in a sense. The order of 2007, which approved the above note, merely revived the post. However, no separate procedure to fill the post was carved out; the order of 2007 does not reflect a decision to override the search cum selection mode approved by the PM on 02-09-1999. If we see these facts it is apparent that the procedure carved out through the orders of 2004 and 2007 were one time measures or exceptions. They could not have been invested with the

invulnerability of a vested right of a candidate facing public selection on merits, who is confronted with a changed criteria. The *Rangaiah* and *Deepak Agarwal* decisions are clear authorities on the proposition that the rules of selection (akin to the rules of a game) cannot be changed *after the selection procedure has commenced*. However, in this case, the temporary upgradation of a post (its revival signifies its temporary nature) did not carry with it any permanence as to the mode or procedure of filling. On the other hand, the order of 2 September, 1999 clearly envisioned the adoption of a selection method to fill the concerned post. Furthermore, the Transaction Rules clearly posit that all posts of Joint Secretary and above are to be filled by approval of the ACC. The ILS Rules, especially Rule 13, refer to “orders of government” with respect to filling of posts of a particular pay grade and above. Clearly, therefore, the applicant could not have claimed a vested right to the post merely because he was the senior-most JS & LC.

13. This court is also of the opinion that the UOI’s view, or considered decision, not to fill the post of Additional Secretary till a final decision, clarifying the situation is also *ipso facto* not reviewable. *Sunkersan Dash* (supra) is a Constitution Bench judgment and authority on the point that the government or a public agency is not obliged to appoint someone or many even after the completion of the recruitment process, if there a *rationale* for such decision. In this case, there is no compelling rule or binding legal norm which obliged the UOI to fill the vacancy of Additional Secretary (revived after the incumbent had retired). Having regard to the facts available, it decided not to presently fill the post. The subsequent order issued by it is that the post would be filled according to the procedure prescribed by the 02-09-1999 decision and in accordance with the

Transaction Rules. There is no infirmity in such a view; it is reasonable and valid.

14. For the above reasons, it is held that the impugned order of the CAT cannot be sustained; it is hereby set aside. The writ petition is, accordingly allowed without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATEEK JALAN
(JUDGE)**

NOVEMBER 28, 2018



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