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

Reserved on: 7th November, 2019
Decided on: 22nd November, 2019

W.P.(C) 6132/2017 & C.M. APPL. 25479/2017 (stay)

UNION OF INDIA

.....Petitioner

Through: Mr. Arun Bhardwaj, CGSC for UOI
with Mr. Nikhil Bhardwaj, Advocate.

Versus

MAQBOOL AHMED QURESHI & ORS.

... Respondents

Through: Mr. Jagdish Bhagat (R-2) in person.
Mr M. K. Tiwari, Mr R. Mishra, Mr.
Sanjiv Kumar Saxena and Mr.
Abhishek Rana, Advocates for R-6.
Mr. Naresh Kaushik, Ms. Akshita
Rao and Ms. Vibhuti Tyagi,
Advocates for R-7.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. The present petition by the Union of India is directed against an order dated 23rd September, 2016, passed by the Central Administrative Tribunal ('CAT'), disposing of O.A. No. 1518/2012 filed by the Respondents.

2. The Respondents are Direct Recruit Officers of the Civil Construction Wing ('CCW') of Prasar Bharati, who have been working as Chief Engineers (Civil) (Level-II) and Superintending Engineers (Civil) in the

CCW of All India Radio. The Association itself is a co-Respondent. The main prayer in the application before the CAT by the Respondents herein was as under:

“pass an order directing the respondents to revive and fill up the post of Chief Engineer (Level-I) in Civil Construction Wing, All India Radio as per Recruitment Rules within a fixed time frame by considering the eligible departmental candidates.”

3. The background facts have been set out succinctly in the impugned order of the CAT as follows:

“The brief facts of the case are that there is a Civil Construction Wing (CCW) under the Ministry of Information and Broadcasting looking after the civil work of All India Radio, Doordarshan and other Media Units. According to Para 3.5.3 of the AIR Manual, the Chief Engineer (Civil) is the Head of the Department of CCW for the purpose of Delegation of Financial Powers Rules (DFPR), 1978 and Fundamental and Supplementary Rules (SR). He enjoys financial powers equivalent to DG (Works), CPWD. There are two posts of Chief Engineer (Civil), one is designated as Chief Engineer (Level-I) and the other as Chief Engineer (Level-II) [hereinafter referred to CE (Level-I) and (Level-II) respectively]. It is the contention of the applicants that from 1992 onwards, the post of CE (Level-I) has been held by the incumbents on current charge basis as the officers in the feeder cadre never fulfilled the eligibility condition for regular promotion to that post. According to the existing instructions a post which remains unfilled for one year or more is deemed as abolished and revival of such post requires the approval of Department of Expenditure (respondent no. 2). The post of CE (Level-I) was also deemed as abolished. When a proposal to revive the post was taken up by the Ministry of Information and Broadcasting (respondent No.1) it was not agreed to by the respondent No.2.”

4. In the first round of litigation, the Respondents herein filed O.A. No.806/2010 before the CAT for directions to the Petitioners herein to fill up the post of CE (Level-I) within a fixed time period. That OA was disposed of by the CAT with the following directions:

“9. It is trite that once a post is created; recruitment rules to fill the post is notified; and eligible candidates are available for consideration to fill up the post by promotion, the legitimate expectations of the eligible candidates needs to be recognized and considered for the same. In the present case, the only obstacle is the deemed abolition of the post due to non availability of eligible persons to be promoted to the said post. We are aware of our limits in the matters of creation/abolition/revival of posts which come within the exclusive domain of the executive. But we notice that the first respondent has not shown to us the action taken on the above note of the Department of Expenditure. The intention of the above note seems to examine the 1st respondent’s proposal with reference to Para 2.6.2 of the OM dated 22.07.2006. Such examination does not seem to have reached the logical conclusion. Hence, we have to issue appropriate directions in the matter.

10. Taking into consideration the totality of facts and circumstances of the case, we direct the first Respondent to consult the Department of Expenditure on the issue of revival of the Chief Engineer (Level-I) post in CCW of AIR and come to a definite decision as expeditiously as possible but preferably within a period of nine weeks from the date of receipt of a certified copy of this order. In case the said post gets revived, during the next three months, the 1st and second respondents would consider the eligible applicants along with others as per the Recruitment Rules to convene DPC for the said post and decide the promotion issue. In case the post does not get revived, the applicants are entitled to receive a speaking and reasoned order within the said period which, they have the liberty to challenge in appropriate proceedings as may be advise.”

5. The Ministry of Information & Broadcasting ('MIB') was directed to take up the issue with the Ministry of Finance's Department of Expenditure ('DoE'). However, the DoE did not agree to the revival of the post. On 31st January 2012, an order was passed by the MIB, in purported compliance with the directions issued by the CAT on 24th October 2011, whereby the refusal of the DoE to the proposal of the MIB was set out. It was this order dated 31st January 2012 that was challenged by the Respondents herein in the second round of litigation before the CAT.

6. Before the CAT, the DoE stuck to its stand and stated that the post of CE (Level-I) was never filled after 1992 on a regular basis and incumbents were holding routine charge only to mark papers etc. It was specifically stated that none of them were given any 'dual charge' under FR-49 to discharge functions of the post of Head of Office.

7. The CAT, in the impugned order, set out the exchange of correspondence and the orders issued by the MIB from time to time giving additional charge of CE (Level-I) to the Respondents. While setting aside MIB's order dated 31st January 2012, the CAT concluded that the decision of the DoE rejecting the proposal of the MIB on the ground of there being no 'functional necessity' could not be sustained. Accordingly, a direction was issued by the CAT to the MIB to fill up the post of CE (Level-I) on a regular basis in accordance with the relevant Recruitment Rules (RRs) "as if the post was never abolished". It was further directed that in the event any consultation was mandated with the DoE in terms of the Allocation of Business Rules, then upon a reference made to it, the DoE should consider the proposal

keeping in mind the views expressed by the CAT. The entire exercise was directed to be completed within four months.

8. At the first hearing of this petition on 21st July 2017, while directing a notice to issue in the petition, this Court stayed the operation of the impugned order of the CAT.

9. This Court has heard the submissions of Mr. Arun Bhardwaj, learned ASC for the Petitioner, Mr. Ruchir Mishra, Advocate for Respondent No.6, Mr. Naresh Kaushik for Respondent No.7 and Mr. J Bhagat, Respondent No.2 in person.

10. The question of functional necessity of a post cannot be determined solely on the basis that there have been orders passed from time to time asking a person to hold additional charge of that post. Under FR-49, certain guidelines have been formulated as regards entrusting the additional charge of the current duties of another post, which read as under:

“(3) Guidelines on additional charge of the current duties of another post under FR 49. –

As per FR 49 (iv), no additional pay is admissible to a Government servant who is appointed to hold current charge of the routine duties of another post irrespective of the duration of the additional charge. In practice it is observed that in a number of cases, officers are appointed to hold additional charge of current duties of another post but the duties are not defined in the order and therefore, the officer performs all the functions of the other post including even some statutory function. However, no additional remuneration is paid to him in view of the specific language of the order of his appointment. In certain other cases, an officer is asked to hold additional charge of

another post (which implies full charge of the other post), but he is not formally appointed to that post and, therefore, no additional remuneration is paid to him under FR 49. These have led to representations and litigations.

2. With a view to avoiding recurrence of such situations, the following guidelines may be followed while considering the question of entrusting additional charge of another post to an officer:

(i) When an officer is required to discharge all the duties of the other post including the statutory functions, e.g., exercise of power derived from Acts of Parliament such as Income Tax Act or the Rules, Regulations, By-Laws made under various Articles of Constitution such as FRs, CCS (CCA) Rules, CSRs., DFPRs., etc., then steps should be taken to process the case for getting the approval of the Competent Authority and formal orders appointing the officer to the additional post should be issued. On appointment, the officer should be allowed the additional remuneration as indicated in FR 49.

(ii) Where an officer is required only to attend to the usual routine day-to-day work of non-statutory nature attached to the post, an office order may be issued clearly stating that the officer will be performing only the routine day-to-day duties of non-statutory nature and that he would not be entitled to additional remuneration. The office order should also specify what duties he would be discharging or what duties he would not be discharging.

The Law Ministry has advised that an officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers, whether those powers are derived direct from an Act of Parliament, e.g., Income Tax Act or Rules, Regulations and By-Laws made under various Articles of the Constitution, e.g., Fundamental Rules, Classification, Control and Appeal Rules,

Civil Service Regulations, Delegation of Financial Powers Rules, etc.”

11. A detailed note dated 12th April, 2017 was prepared by the DoE in the form of an OM on the subject, “Compendium of Instructions for Creation/Revival/ Continuation/Transfer of posts”. As regards deemed abolition and revival of posts, the guidelines read thus:

“5.1 Deemed Abolition & Revival of posts:

- a. All posts, except newly created posts, kept in abeyance or remaining vacant for a period of more than 2 years in any Ministry/ Department/ Attached office/ Subordinate office/ Statutory body, would be considered as ‘deemed abolished’ unless an exemption has been given at the time of sanctioning the post.
- b. A post falling into the category of ‘deemed abolished’ cannot be filled up prior to obtaining its ‘revival’ from Department of Expenditure.
- c. Statutory posts, the name and level/ pay scale of which is specifically provided for in an Act of Parliament, are exempted from falling in the category of ‘deemed abolished’ on remaining vacant for a period of more than 2 years. Only the posts mentioned in Statute may be considered Statutory, not their support staff.
- d. Newly created posts (posts which have been sanctioned recently by Department of Expenditure/ Cabinet), which do not have RRs would fall under the category of ‘deemed abolished’ after a period of 3 years from the date of creation unless it is clarified that this relaxation would not be applicable to those newly created posts which have existing RRs.
- e. Revival of posts would be considered in rare and unavoidable circumstances only.

f. Proposals for revival of posts may be referred to this Department on file, along with the prescribed checklist issued by this Department (Annexure - II). Separate checklist may be prepared for each post. Proposals received without proper checklist would not be considered.

5.2 All Ministries/ Departments may submit to this Department, within 3 months, an Action Taken Report regarding abolition of posts which are vacant for more than 5 years in the Ministry/ Department and organizations under their administrative control. Further, while referring any proposal for creation/ revival of posts to this Department, Ministries/Departments may enclose a Certificate that all posts under their administrative control, vacant for more than 5 years on the date of referring the proposal, have been abolished.

The conditions for deemed abolition are provided in the following table:

S.No.	Type of Post	Post Live for
1.	Existing Post (held in abeyance / vacant for more than 2 year)	Post is deemed abolished.
2.	Newly created post – RRs Exist	2 years
3.	Newly created post – RRs do not exist.	3 years
4.	Existing Post vacant for 5 years	Post may be abolished immediately.
5.	Statutory posts	Do not fall under deemed Abolition.

12. Two aspects become clear from the above documents. One, is that a post that has been vacant for more than 2 years is “deemed” to be abolished. Second, for the revival of a post which is deemed to be abolished, the Competent Authority (‘CA’) is undoubtedly the DoE. In another words, if

the DoE does not agree, there is no way that the post can revive.

13. In the present case, the DoE has been approached by the MIB time and again only for this reason. It was also for this reason that this Court by its order dated 17th December, 2018 required the DoE to file a separate counter affidavit.

14. Pursuant thereto, the DoE has in fact filed its separate counter affidavit referred, *inter alia*, to the above OM dated 12th April, 2017, as well as the detailed notes on the file which indicate reasons as to why the DoE has not been amenable to the request of the MIB for revival of the said post. The principal reason is that the post of Civil Engineer (Level-I) in the CCW of AIR has been lying vacant since 1992. In the affidavit, it was *inter alia* stated as under:

“XV. From the proposal of the Petitioner Ministry in 2006, it was noted that the post of Chief Engineer Level I got vacant due to resignation of the officer on 13.03.1992 and that no officer in the feeder grade was eligible for the post. Despite the fact that no officer in the feeder grade was eligible for promotion to the vacancy in the post of Chief Engineer Level I, meaning thereby the vacant post could not be filled up by promotion, no effort was made by the Petitioner Ministry to fill the vacancy by way of deputation as per Recruitment Rules. Therefore, when no steps have been taken to fill the vacancy in the post of Chief Engineer (Level I) as per the Recruitment Rules, it implies that the work in CCW could be managed without Chief Engineer (Level I). It may be pointed out herein that the impugned order in paragraph 6 records that the proposal to revive the post of Chief Engineer Level I was made by the Petitioner Ministry when few officers in the feeder grade became eligible. Hence, had there been any functional necessity of the post of Chief Engineer (Level I) in the organization, all

steps would have been taken by the Petitioner Ministry to fill the vacant post by deputation as per the recruitment rules and the Petitioner Ministry would not have been waited till 2006 to fill the vacant post by promotion from amongst officers in the grade. It is reiterated that a post is not created or revived from the point of view of providing promotional avenues only.

XVI. From the decision dated 17.05.2007, it may be noted that the same was issued on due consideration on all facts including the functional justification/necessity of the post of Chief Engineer (Level I) in the organization.”

15. Having considered the submissions of learned counsel for the parties, the Court is not persuaded that there exist sufficient grounds for the directions to be issued to the Petitioners to revive the post of Chief Engineer (Level-I). In matters of administrative convenience, and in particular in the matter of the revival of a post that is deemed to be abolished, the Court should be slow to readily accept the case put forward for the functional necessity of a post that has been lying vacant since 1992. The competent authority to examine that aspect in the present case is DoE. The reasons given by it for not agreeing to revive the post, appear to the Court to be neither arbitrary nor unreasonable.

16. Consequently, the present petition is allowed. The impugned order dated 23rd September, 2016, passed by the CAT disposing of O.A. No. 1518/2012 is, therefore, unsustainable in law and is hereby set aside. The pending application is disposed of. No costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

November 22, 2019/rd/mw

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