

## ANIL KUMAR CHOWDHURY

v.

## STATE OF ASSAM &amp; OTHERS

March 7, 1975

[A. N. RAY, C. J., K. K. MATHEW AND V. R. KRISHNA IYER, JJ.]

*I.A.S. (Appointment by promotion) Regulations, 1955—Rule 3(3)(b)—Whether holding posts equivalent to cadre post but not declared to be so sufficient compliance with rule 3(3)(b)—Whether gap of one week breaks the continuity in service.*

The petitioner joined Assam Civil Service Class I in 1949 and was confirmed as such in 1957. In 1961 he was included in the Select List prepared under the provisions of the I.A.S. (Appointment by Promotion) Regulations, 1955. He was admittedly functioning in senior posts equivalent to cadre posts reserved for I.A.S. personnel right from the year 1960 till he was inducted in I.A.S. cadre except for a week's gap in 1966. The petitioner claims to be placed in the I.A.S. Gradation List above Serial No. 34 and not at Serial No. 65 on the ground that the services rendered by him between 1960-67 should be taken into consideration for determining his real length of service. Rule 3(3)(b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954 reads as under :

“Rule 3(3)—The year of allotment of an Officer appointed to the service after the commencement of these rules shall be :

(b) Where the Officer is appointed to the service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the service in accordance with rule 7 of these rules, who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former.

Provided that the year of allotment of an officer appointed to the service in accordance with sub-rule (1) of Rule 8 of the recruitment rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the service in accordance with rule 7 of these rules, so started officiating, shall be determined *ad hoc* by the Central Government in consultation with the State Government concerned.

Provided further that an officer appointed to the service after the commencement of these rules in accordance with sub-rule (1) of rule 8 of the recruitment rules shall be deemed to have been officiating continuously in a senior post prior to date of inclusion of his name in the ‘Select List’ prepared in accordance with the requirements of the Indian Administrative Service (Appointment by Promotion) Regulations framed under sub-rule (1) of rule 8 of the Recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission.

*Explanation 1.*—The officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the Senior Grade he continues to hold without any break or reversion, a senior post otherwise than as a purely temporary or local arrangement.”

The various posts held by the petitioner during the period 1960-67 were cadre posts rankwise. Those posts were not formally declared equivalent to cadre posts as required by rule 3(3)(b). In effect some of the posts held by the petitioner during the period in question were superior to the cadre posts.

HELD : Although the petitioner has occupied responsible positions vis-a-vis cadre post, the formal requirements of rule 3(3)(b) are basic to his claim for pre-dating his entry into the I.A.S. Secondly, the rule requires as a condition

**A** precedent that officiation must be in a particular post declared as cadre post by the State Government with the approval of the Central Government. The argument that the declaration of the State Government must be inferred from the counter affidavit filed in this Court was negated on the ground that the Government's speak and act formally and in solemn writing and not informally. Even if it is assumed that the State Government has made such a declaration in the counter affidavit no such declaration has been approved by the Central Government as required. [883 D-E, G-H; 884 D]

**B** HELD FURTHER : The petitioner's officiation was not continuous since there was a gap of one week and that, therefore, the legal ingredient of continuity in service is not covered up. It was observed that this Court hopes that the State will have compassionate regard to the substantial fulfilment of the qualifications for pre-dating petitioner's seniority in the I.A.S. when promotional prospects arise not because the petitioner has a right but because his past should not altogether be lost. [884 D-F]

**C** ORIGINAL JURISDICTION : Writ Petition No. 379 of 1972.

Petition Under Article 32 of the Constitution.

*Sachin Choudhury, U. P. Singh, Sukumar Mitter and S. N. Choudhry*, for the Petitioner.

**D** *S. K. Nandy*, for respondent No. 1.

*L. N. Sinha, Solicitor General of India, P. P. Rao and Girish Chandra*, for respondent No. 2.

*D. N. Mukherjee and G. S. Chatterjee*, for respondent Nos. 3, 4, 8, 9, 11, 12, 15, 19, 22, 26, 31 & 32.

**E** The Judgment of the Court was delivered by—

**F** KRISHNA IYER, J.—A senior civil servant of the Indian Administrative Service, brought in by promotion and borne on the cadre of the Assam State (now of the joint cadre of Assam & Meghalaya), seeks, in this petition under Art. 32, redress of alleged infraction of his fundamental right to equality under Art. 16, *vis a vis* certain direct recruits. We will proceed to scan the case to see if, on the merits, this public servant has suffered a big illegal blow by diminishing his length of service, that being the core of the controversy. For this reason, we are not disposed to rebuff the petitioner *in limine* on the preliminary objection urged by the learned Solicitor General To bar the processual doors of justice like harsh judicial janitors—if one has a right to relief—is the reluctant refuge of a Court—and *that* at the instance of the State, at the final stage.

**G** Stripped of details and in simple terms, the gravamen of the petitioner's grievance is that while he is eligible to be placed above serial number 34 in the I.A.S. Gradation List (Annxure F), he has been illegally pitch-forked into serial number 65. His real length of service has been lopped off by denial of a considerable period spent in posts equivalent in status & responsibility to I.A.S. cadre posts and in violation of Rule 3(3) of the I.A.S. (Regulation of Seniority) Rules, 1954. We will amplify this case and examine the alleged infraction of his right.

**H**

The story of the Indian Administrative Service, its genesis, the sources of recruitment and kindred matters have been delineated in some detail in a case where rule 3(3) (b) aforesaid fell for consideration. That is *R. P. Khanna v. S. A. F. Abbas*<sup>(1)</sup>. We need not go over, the ground once again since the necessary rules and regulations have been fully set out in that judgment so that we will confine ourselves to the specific provision that needs a close look.

The 1954 Cadre Rules defined 'cadre post' to mean any of the posts specified in item 1 of the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations. Another term which crops up in the various rules is 'senior post' which means, according to the Regulation of Seniority Rules, 1954, a post included and specified under item 1 of the Cadre of each State in the Schedule to the Fixation of Cadre Strength Regulations, 1955. The question of seniority as between promotees and direct recruits is covered by r. 3(3) (b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954. The crucial rule that is decisive may be extracted to facilitate further discussion :

"Rule 3(3)—The year of allotment of an Officer appointed to the service after the commencement of these rules shall be :

\* \* \* \* \*

(b) Where the officer is appointed to the service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the junior most among the officers recruited to the service in accordance with rule 7 of these rules, *who officiated continuously* in a Senior Post from a date earlier than the date of commencement of such officiation by the former.

Provided that the year of allotment of an officer appointed to the service in accordance with sub-rule (1) of Rule 8 of the recruitment rules who started officiating continuously in a senior post from a date earlier than the date on which any of the Officers recruited to the service in accordance with rule 7 of these rules, so started officiating shall be determined *ad hoc* by the Central Government in consultation with the State Government concerned.

Provided further that an officer appointed to the service after the commencement of these rules in accordance with sub-rule (1) of rule 8 of the recruitment rules *shall be deemed to have been officiating continuously in a senior post prior to the date of inclusion of his name in the 'Select List' prepared in accordance with the requirements of the Indian Administrative Service (Appointment by Promotion) regulations framed under sub-rule (i) of rule 8 of the recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission.*

(1) [1972] 3 S.C.R. 548.

A *Explanation I.*—The officer shall be deemed to have officiated continuously in a Senior Post from a certain date if during the period from that date to the date of his confirmation in the Senior Grade he continues to hold without any break or reversion, a Senior post otherwise than as a purely temporary or local arrangement.”

B (emphasis, ours)

The four-fold components of the ‘year of allotment formula’ emerging from the cumbrous rule are (a) the year of allotment of the juniormost among the officers recruited to the service by the direct method; (b) the year from when the claimant officer ‘officiated continuously in a senior post from a date earlier than the date of commencement of like officiation by the juniormost direct recruit of the year; (c) the promoted shall be deemed to have been officiating continuously in a senior post even prior to his inclusion in the select list ‘if the period of such officiation is approved by the Central Government in consultation with the (Union Public Service) Commission’; and (d) the deemed continuous officiation in a senior post shall have its genesis on that date from which ‘he continues to hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement’. The applicant has thus four hurdles to surmount before he can link his prior officiating service and ante-date his baptism into the IAS category.

Back to the facts. The petitioner came into the Assam Civil Service, Class I, in 1949, was confirmed as such in 1957 and since then spiralled his way up to fill a set of responsible positions. By the end of 1961 he was included in the Select List prepared under the provisions of the I.A.S. (Appointment by Promotion) Regulation, 1955. Although this officer was admittedly functioning in senior positions equivalent to cadre posts reserved for IAS personnel, his actual induction into this coveted Indian Administrative Service took place only on February 1, 1967 and his confirmation therein, in the Senior Scale, only a year later. The dispute centres round the claim of the petitioner to credit for alleged continuous officiation in his offices, equivalent to cadre posts, while fixing his date of birth into this privileged All India Service. His official horoscope and even post-retirement prospects will very much depend on the year of entry into this close IAS preserve.

The impressive set of posts occupied by the petitioner do credit to his claim. They begin with June 2, 1960 and run on without a break upto when he was regularly promoted into the IAS except for a week’s gap early in March 1966. The contra-temps is that while rank-wise these offices are cadre posts when the petitioner filled them, no declaration as demanded by the relevant rule 3(3) (b) had been made. This legal omission is being pressed into service by the Solicitor General to deny what in morality belongs to the petitioner.

H The bone of contention is that these posts were not formally declared equivalent to ‘cadre posts’ with the Union Government’s approval and service therein was insufficient to back the right set up.

Moreover, there was an interregnum of a week when, on his own showing, he was not officiating in a cadre post. A miss is as good as a mile and continuity means continuity. The short hiatus destroys the credential for seniority accumulated by long officiation. We will deal with these submissions in opposition in the background of the relevant law.

The capacities in which the petitioner served Government since 1960 are catalogued by him and asserted to be 'factually equivalent to the post of Additional District Magistrate and in fact superior to that post'. The Additional District Magistrate's post is a cadre post reserved for IAS personnel. The short issue here is whether *legally* these various posts were declared cadre posts. They were not.

We have no doubt that the petitioner has occupied responsible positions *vis-a-vis* cadre posts. Even so, the formal requirements of the rule just quoted are basic to his claim for adding special antecedent merit to pre-date his entry into the IAS. We may safely proceed on the facts affirmed in the counter-affidavit of the Union of India since no exception can ordinarily be, or has been, taken to that course. Paragraph 3.1 of that affidavit states :

"On a careful scrutiny of the relevant records, however, it is seen that the petitioner, Shri Anil Kumar Choudhary, was actually officiating in the *non-cadre post* of Additional Deputy Commissioner, United Mikar and North Cachar Hills and held the current charge of the post of Deputy Commissioner, United Mikar and North Cachar Hills. When the proposal for the appointment of Shri Anil Kumar Choudhary and the determination of his seniority was sent for the first time by the Government of Assam, under their No. AAI/56/64 dated 1st June, 1966, the Government of Assam had indicated that Shri Anil Kumar Choudhary was holding the *non-cadre post* of Additional District Magistrate, United Mikar and North Cachar Hills with effect from 9-12-1964 to 3-3-1966. A copy of the proposal sent by them is given as Annexure S-II to this Supplementary Counter Affidavit. Subsequently, the Government of Assam issued orders on 19th August 1966 appointing Shri Anil Kumar Choudhary retrospectively appointing the petitioner to officiate as Deputy Commissioner, United Mikar and North Cachar Hills, with effect from the 10th December, 1964 to the 2nd March, 1966. A copy of the said order of the Government of Assam is exhibited as Annexure S-II to this Supplementary Counter Affidavit."

The plain consequence of this denial is disastrous because the posts he had occupied in the intervening years anterior to his appointment as IAS officer are non-cadre posts and cannot, therefore, possess the sanctity which officiation in cadre-posts may have. Secondly, the rule requires, *as a condition precedent*, officiation in a particular post

A declared as cadre post by the State Government plus approval thereof, by the Central Government. The affidavit on behalf of the Central Government has categorically stated thus :

B "From the 9th March, 1966, till the date of his appointment to the service that is 1st Feb. 1967, he held non-cadre post of Chairman, Gauhati Development Authority and Liaison Officer, Industries. His officiation in the cadre post was not approved and his officiation in the ex cadre post was not counted for the purposes of his seniority because the ex cadre post of Chairman, Gauhati Development Authority and Liaison Officer, Industries was not declared equivalent to a Cadre post by the State Government. Hence, the date of his appointment to the Service was the relevant date for the fixation of his seniority."

C (emphasis, ours)

D We have already pointed out with reference to the rule in question that the declaration of equivalence has to be made by the State Government. Counsel for the petitioner rightly argues that such declaration can be made *ex-post facto* and there is authority of this Court for that proposition vide *R. P. Khanna's Case*, (supra). However, Shri Sachin Choudhary is not able to put his finger on any specific declaration of equivalence made by the State Government except to state that in the counter affidavit by the State Government there is a statement admitting the post of Additional District Magistrate and those higher in rank claimed to have been occupied by the petitioner to be factually correct. Super-added is the State's averment which goes in E substantiation of the petitioner's contention and may well be extracted :

F "The posts mentioned in sub-para (i) to (v) are equivalent to cadre posts of Additional District Magistrate Deputy Secretary or Settlement Officer. The post mentioned in sub-para (vi) is a cadre post and the posts mentioned in sub-para (vii) were regarded in rank, status, and responsibility as above the cadre posts of Additional District Magistrate and Deputy Secretary. These posts are equivalent to the cadre post of Deputy Commissioners or Heads of Departments post like Commissioner of Taxes and Registrar of Co-operative Societies of the I.A.S. Cadre."

G Could there be a declaration without a formal notification to that effect? We think not. Governments speak and act formally and in solemn writing, not informally. In the present case no formal declaration is found but the State Government is prepared to go to the extent of helping the petitioner with the Statement :—

H "Formal declarations under Rule 9 of the I.A.S. (Pay) Rules, 1954, are not necessary when non cadre officers hold such ex cadre equivalent posts."

Shri Sachin Choudhary uses this averment to contend that the State Government's affidavit may be treated as a formal declaration of

equivalence but the difficulty is that there has been an amendment of the Rules in April 1967 whereby the power of the State Government to make retroactive declarations is deleted. Moreover, as the Solicitor General points out such declaration as is found to have been made by the State has reference to the Pay Rules and not the Seniority Rules which bear upon the present dispute.

Another impediment confronting the unfortunate petitioner is that the proviso to Rule 3(3)(b) requires not merely the State Government's declaration regarding the posts being equal to cadre post but such officiation must be with the approval of the Central Government; none such is forthcoming. And, indeed, the absence of such approval is the stand of the Central Government. The Solicitor General not content with these vital flaws points out two more shortcomings. In his submission, some of the posts occupied by the petitioner were purely temporary and this is testified by the record. And so such short-term *ad hoc* officiation is insufficient. Moreover, there is a break in the officiating service of the petitioner between March 3, 1966 and March, 9, 1966. Continuity once disrupted, the claim breaks down. Service for long years comes to nought merely because of a week's discontinuity. In law a short gap may prove a costly failure. The plea that this little interval was bridged by the joining time taken by the official may be good as an explanation for not taking charge immediately, but cannot cover up the legal ingredient of continuity in service.

True, on account of certain formal non-conformance with the strictness of the rules, the petitioner loses the battle, but we hope the State will have compassionate regard to the substantial fulfilment of the qualifications for pre-dating his seniority in the IAS the rules predicate. The long but unavailing officiating experience of the petitioner may judiciously be taken into account by the State when promotional prospects arise, is not because the petitioner has a *right* but because his past should not altogether be lost.

The writ petition is dismissed. Parties will pay and bear their own costs.

P.H.P.

*Petition dismissed.*

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