

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH : NEW DELHI

OA No.3060/2001

Date of decision: 29.08.2002

M.S. Khanna

.. Applicant

(By Advocate: Shri K.B.S.Rajan)

versus

Union of India & Others .. Respondents

(By Advocate: Shri S. Rajappa)

CORAM:

The Hon'ble Smt. Lakshmi Swaminathan, Vice Chairman(J)

The Hon'ble Shri M.P. Singh, Member(A)

1. To be referred to the reporter or not? Yes
2. Whether it needs to be circulated to other Benches of the Tribunal?


(M.P. Singh)
Member(A)

(16)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.3060/2001

New Delhi, this 29th day of August, 2002

Hon'ble Smt. Lakshmi Swaminathan, Vice-Chairman(J)
Hon'ble Shri M.P. Singh, Member(A)

M.S. Khanna
149, RPS Flats, Sheikh Sarai-I
New Delhi .. Applicant

(By Shri K.B.S. Rajan, Advocate)

versus

Union of India, through

1. Secretary
Dept. of Secondary Education & Higher Education
Shastri Bhavan, New Delhi
2. Vice-Chairman
Navodaya Vidyalaya Samiti
Room No.437, C Wing
Shastri Bhavan, New Delhi
3. Navodaya Vidyalaya Samiti
(Through Joint Director (Admn.)
A-39, Kailash Colony, New Delhi
4. M.L. Sharma
Deputy Director (through R-3) .. Respondents

(By Shri S. Rajappa, Advocate)

ORDER
Shri M.P. Singh, Member(A)

The applicant is before us in a second round of litigation challenging his transfer from Delhi to Shillong.

2. Applicant has earlier filed OA No.438/2001 challenging the order dated 3.1.2001 passed by Respondents whereby he has been transferred from the post of Deputy Director(Admn.), Navodaya Vidyalaya Samiti (NVS, for short) Hqrs. to the post of Deputy Director at NVS Regional Office, Shillong. That OA was disposed of by a Single Bench of this Tribunal vide its order dated

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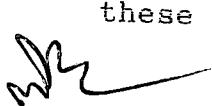
9.8.2001 with a direction to the respondents to dispose of the appeal of the applicant within a period of one month and till then respondents shall not insist upon the applicant to join at Shillong and applicant may avail of any leave which was due to him as per the leave rules. By the said order, interim stay order dated 23.2.2001 in respect of the transfer order dated 3.1.2001 was also vacated. In pursuance of Tribunal's order dated 9.8.2001, R-2 has passed an order dated 5.11.2001 rejecting the representation of the applicant dated 5.1.2001 against the transfer order. That is how the applicant is before us seeking directions to quash and set aside the original transfer order dated 3.1.2001, the relieving order dated 5.1.2001 and rejection order dated 5.11.2001 with further directions to the respondents to allow the applicant to function as Deputy Director (Admn.) at NVS Hqrs., New Delhi.

3. We have heard the learned counsel for the parties and perused the records. We have also carefully gone through the averments made by the parties in OA/reply/rejoinder as well as the judgement dated 9.8.2001 in OA 438/2001(supra). We find that most of the points raised by the parties have been discussed at length in the judgement dated 9.8.2001 and therefore we do not deem it necessary to discuss those points again. However, we would like to dwell on certain points which are vital and relevant for the purpose of proper adjudication of the present case. They are discussed as under.

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4. At the outset, the learned counsel for the respondents has taken the preliminary objection that the present OA is hit by the principle of resjudicata as the applicant is agitating on the same points which have already been adjudicated upon by the Tribunal vide its order dated 9.8.2001. However, the learned counsel for the applicant has contended that the present OA is against the rejection order dated 5.11.2001 which has given the applicant a fresh cause of action. The learned counsel further contended that while passing the order dated 9.8.2001, the Tribunal has given its findings only with regard to the vacation of interim order. So far as the disposal of the OA is concerned, the findings of the Tribunal are given in the last para of the aforesaid judgement directing the respondents to dispose of the appeal of the applicant. Moreover, the Vice-Chairman of the NVS while rejecting the appeal of the applicant has given her own findings which are in violation of statutory Rules. Hence, for these reasons, the OA is not barred by the principle of resjudicata but on the other hand the findings arrived at by the Tribunal are per incuriam. Although the Tribunal in its aforesaid judgement has not specifically granted the liberty to re-agitate the matter but that right is always available with the applicant as per law.

5. The contention of the applicant is that there are three different categories of Deputy Directors (DDs) in NVS. Out of 13 posts of DDs, 11 are designated as DD(Academics), one each is designated as DD(Admn.) and DD(Finance). Recruitment Rules and the functions of these three categories of DDs are entirely different.



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The feeder cadre of ADs and the seniority list of ADs are also entirely different. Only one post of DD(Admn.) is available at Hqrs. of NVS against which the applicant has been promoted and has been working as such. According to the applicant, he joined the post of Assistant Director (AD) in the Administration Wing of NVS on deputation on 2.7.1990 and has been absorbed on permanent basis in NVS as AD on 1.5.1991. Recruitment Rules provide for separate posts of AD(General), AD (Academic) and AD(Finance). The method of recruitment for the only post of DD(Admn.) available at Hqrs. is by promotion from amongst AD(Admn.) with 3 years regular service in the grade in NVS. The applicant was promoted as DD and posted as DD(Admn.) by order dated 29.7.1994. However, by the order dated 3.1.2001, he has been transferred from the post of DD(Admn.), Delhi to the post of DD(Academic) at the Regional Office, Shillong. Shri M.L. Verma (R-4) was a petitioner before the High Court of Punjab & Haryana in which case, respondents had affirmed that there are three different cadres and the post of DD(Admn.) is not vacant and as such a person from academic side is not eligible for that post.

6. On the other hand, it is the contention of the respondents that the applicant was promoted as DD from the feeder cadre of AD and that on promotion he was posted as DD(Admn.) until further orders. Applicant was not promoted as a regular DD(Admn.). The post of AD(Admn.) was not in existence on 1.5.1991 when the applicant was absorbed in NVS, as is evident from the minutes of the Absorption Committee Meeting dated 29.4.1991. The post of AD(Admn.) came into existence for

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the first time on 7.6.1991 when the rules for regulating the method of recruitment to various posts in NVS were notified on 7.6.1991. As per the R/Rules, first eligible candidate for the post of DD(Admn.) will be available only in October, 2003 when the incumbent holding the post of AD(Admn.) will complete five years of regular service in NVS. There is no bar to assign the duties of the post of DD(Admn.) to any DD as a functional arrangement by making internal adjustment till the time person from the feeder cadre AD (Admn.) becomes eligible and appointed to the post of DD(Admn.). As per the seniority list issued on 2.9.1992 name of applicant is shown only as AD and not AD(Admn.).

7. Respondents have further submitted that the proposal put before DPC for the post of DDs has not been prepared correctly inasmuch as the name of the applicant was wrongly shown to be eligible for consideration to the post of DD(Admn.) and the DPC had accepted this proposal on its face value which resulted in wrongful inclusion of the name of applicant in the select panel against the post of DD(Admn.). However, this error was noticed timely while issuing the promotion orders of the applicant in which it has clearly been stated that applicant has been promoted as DD and was posted as DD(Admn.) at the HQs until further orders. Applicant has not represented against this order of promotion and therefore it does not lie in the mouth of the applicant at this stage to suggest that he was promoted as DD(Admn.) in the Samiti. The post of DD(Admn.) was in fact being operated by making internal adjustment which is amply clear in the proposal put before DPC for

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considering promotion from AD to DD. DDs including DD(Admn.) comprise a single cadre with all India transfer liability. As such, first eligible candidate for the post of DD(Admn.) to be available in October, 2003 will also be liable to serve at Regional Offices. All DDs are borne on a common cadre and there is no watertight compartment at this level. DDs in the Regional Offices have been given functional autonomy and total administrative and financial powers for the smooth functioning of the region. Duties of DDs in the regional offices mainly concern administrative and financial management of the region along with educational administration. DD in Regional Offices do not teach, as is being tried to be projected by the applicant while giving his own interpretation to the word 'Academic'. Applicant cannot evade the transfer on the pretext of stating that he has exclusively been promoted as DD(Admn.). As laid down in S.L. Abbas' case [1993(2) SLR 585], it is for the employee to decide who and when and at what point of time an employee has to be transferred. In view of this position, the present OA be dismissed.

8. It is a settled legal position that Tribunal cannot interfere in the matters of transfer unless it is established that there is some malafide in such transfer or that the transfer is against the statutory rules. Although it is contended by the respondents that there is no bar to assign the duties of the post of DD(Admn.) to any DD as a functional arrangement by making internal adjustment till the time a person from the feeder cadre AD (Admn.) becomes eligible and appointed to the post of DD(Admn.), the R/Rules notified on 7.6.1991 do not

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specify that the posts of DDs are interchangeable. Also it is not the case of respondents that the post of DD(Admn.) which is based at Hqrs. of NVS has been shifted to Shillong by a valid order against which the applicant has been transferred or that one of the posts of DDs at Regional Offices, particularly that of Shillong has been converted into DD(Admn.) to accommodate the applicant. Again, though it is contended by the respondents that the proposal put before DPC for the post of DDs has not been prepared correctly inasmuch as the name of the applicant was wrongly shown to be eligible for consideration to the post of DD(Admn.) and the DPC had accepted this proposal on its face value which resulted in wrongful inclusion of the name of applicant in the select panel against the post of DD(Admn.), it was open to the respondents to place the factual position before the DPC again and get DPC's recommendations corrected/ modified accordingly. When the respondents passed the order dated 29.7.1994 promoting the applicant as DD and posting him as DD(Admn.), they cannot expect the applicant to make any representation against the said order as the applicant was of the bonafide impression that he has been rightly promoted as DD(Admn.). Therefore, we are unable to accept the contentions of the respondents made to the contrary.

9. The main contention of the respondents is that the applicant has been transferred as Deputy Director and he has been asked to look after the work of Finance and Administration. It is also contended that the applicant had joined on deputation as AD and not as AD (Admn.) and he was not absorbed in NVS as AD(Admn.). The post of

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AD(Admn.) was not in existence on 1.5.91, i.e. the date when the applicant was absorbed in NVS. The posts of AD(Admn.) and DD(Admn.) came into existence for the first time on 7.6.1991, when the Recruitment Rules were notified on 7.6.1991. As per the R/Rules, the first eligible candidate for the post of AD(Admn.) was available on 1.5.1997, i.e. 6 years after 1.5.1991. Shri A.K. Singhal, being eligible and having put in more than 6 years of regular service as SO, was promoted as AD on 23.10.1998. However, the post of DD(Admn.) is required to be filled up only by promotion from amongst AD(Admn.) with three years (now raised to 5 years as a consequence of the recommendation of Fifth Pay Commission) of regular service in NVS. Thus, the first eligible candidate for the post of DD(Admn.) will be available only in October, 2003 when the incumbent holding the post of AD(Admn) will complete five years of regular service in NVS.

10. ^{above} The ~~A~~ contentions made by the respondents are full of contradictions and are totally wrong. According to Annexure R-2 filed along with affidavit filed by the respondents, the applicant was absorbed permanently in NVS with effect from 1.5.1991, vide order dated 22.7.1991. In other words order dated 22.7.1991 has been issued after the R/Rules came into existence w.e.f. 7.6.1991. Thus the post of AD(Admn.) was in existence when the order dated 22.7.1991 was issued. As per the R/Rules for the DD(Admn.), AD(Admn.) with 3 years regular service in the grade is eligible for promotion. Therefore, the applicant having been absorbed in NVS from 1.5.91, had completed 3 years regular service in the

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grade of AD. He became eligible for promotion to the post of DD on 1.5.94 and, therefore, he was rightly promoted as DD(Admn.) vide order dated 29.7.94 from that date. Respondents have failed to show us any document whereby the R/Rules, which are statutory Rules, have been amended/modified so as to provide 5 years service in the grade of AD(Admn.) as the eligibility criteria for promotion to the post of DD(Admn.). We also find from the seniority list of ADs that there are three separate categories of ADs, i.e. AD(General), AD(Admn.) and AD(Finance). It is for these reasons that the name of applicant has not been shown in the seniority list of AD(General).

11. As regards the contention of the learned counsel for the respondents that the OA is barred by principle of res judicata, he has relied upon the judgement of the Hon'ble Supreme Court dated 27.3.1961 in the case of Daryao & Ors. Vs. State of UP & Ors. (1962) SCR 574.

12. On the other hand, the learned counsel for the applicant has contended that this case is not barred by principle of res judicata but it is a case of per incuriam. In support of his contention, he has relied upon a catena of judgements of the Hon'ble Supreme Court including Ferro Alloys Corporation Ltd., Vs. UOI (1999) 4 SCC 149, Fawan Kumar Gupta V. Rochiram Nagdeo (1999) 4 SCC 243, Madhavi Amma Bhawani Amma Vs. Kunjikutty Pillai Meenakshi Pillai (2000) 6 SCC 601 and and P.G.Eshwarappa Vs. M. Rudrappa (1996) 6 SCC 96. In the case of P.G.Eshwarappa (supra), it has been held that "The principles of estoppel or res judicata do not apply where to give effect to them would be to counter some

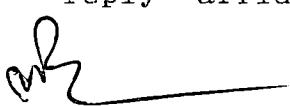
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statutory direction or prohibition. A statutory direction or prohibition cannot be overridden or defeated by a previous judgement between the parties." Therefore, we are of the considered opinion that the present OA is not hit by principle of resjudicata. On the other hand, it is a case of per incuriam.

13. During the course of the arguments, the learned counsel for the applicant has submitted that the applicant has no objection for his being posted at Regional Office, Shillong provided the post of DD(Admn.) is also shifted from the Hqrs. of NVS to Regional Office, Shillong.

14. We find that there are three different cadres of ADs, i.e. AD(General), AD(Admn.) and AD(Finance) and again three different cadres of DDs, i.e. DD(Admn.), DD(Academics) and DD(Finance). The post DD(Admn.) is hqrs. based. All these posts are governed by different methods of R/Rules. The post of DD(Admn.) has not been transferred to Regional Office, Shillong by issue of any valid order. Respondents have also not denied the fact that Respondent No.4 was a petitioner before the High Court of Punjab & Haryana, in which case the respondents had affirmed that there are three different cadres of DD and the post of DD(Admn.) is not vacant and as such a person from academic side is not eligible for the post of DD(Admn.). As per annexure R-9 filed along with the reply affidavit filed on 6.12.2001 by the respondents,



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applicant's name is not shown in the seniority list of ADs(General) but shown separately in the seniority list of ADs. As such the contention that the applicant has not been promoted from the post of AD(Admn.) to that of DD(Admn.) is not tenable and is liable to be rejected. In this view of the matter, the transfer of the applicant from Hqrs. of NVS to Regional Office, Shillong by the impugned order is totally arbitrary and unwarranted.

15. In the result, for the reasons recorded above, the present OA is allowed. We set aside the orders dated 5.11.2001, 3.1.2001 and 5.1.2001. Respondents are directed to allow the applicant to continue to function as DD(Admn.) in NVS, Delhi. The period of absence if any of the applicant till he resumes duty at Delhi shall be treated as leave of the kind due to him. The interim order dated 8.11.2001 is merged with this order. There shall be no order as to costs.

M.P. Singh
(M.P. Singh)
Member(A)

Lakshmi Swaminathan
(Smt. Lakshmi Swaminathan)
Vice-Chairman(J)

/gtv/