

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

O.A.No. 105 /1998 A
MA-41/99 & MA 42/99
Shri V.P. Bansal

Date of Decision: 29-1-1998

APPLICANT

(By Advocate Shri B.P. Singh

versus

Union of India & Ors.

RESPONDENTS

(By Advocate Shri V.S.R. Krishna & Sh. P.P. Khurana

CORAM:

THE HON'BLE SHRI T.N. BHAT, MEMBER(J)

THE HON'BLE SHRI S.P. BISWAS, 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?


(S.P. Biswas)
Member(A)

Cases referred:

1. Asharfi Lal Vs. Koili (Smt.) (1995) 5 SCC 163.
2. K.K. Modi Vs. K.N. Modi & Ors. (1998(3) SCC 573.
3. National Institute of Mental Health & Neuro Sciences Vs. K. Kalyana Raman (Dr.) (1992) Supp.(2) 4 SCC 481.
4. M.P. Jaiswal & Ors. Vs. Dossibai (AIR 1971 SC 2355.
5. Ajit Prasad Gupta Vs. State of UP & Ors. 1998(1)SLJ 60.

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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No. 105/1998
MA No. 41/99 & MA 42/99

New Delhi, this 29th day of January, 1999

Hon'ble Shri T.N. Bhat, Member(J)
Hon'ble Shri S.P. Biswas, Member(A)

Dr. V.P. Bansal
s/o Shri S.C. Aggarwal
C-11/26, Tilak Marg
New Delhi .. Applicant
(By Shri B.P. Singh, Advocate)

versus

Union of India, through

1. Secretary
Ministry of Health & Family Welfare
Nirman Bhavan, New Delhi
2. Shri P.P. Chauhan
Former Secretary (Health)
14, Gurudwara Rakabganj Road, New Delhi
3. Dr. Narinder Bihari
D-3/9, Vasant Vihar, New Delhi
4. Dr. S.P. Aggarwal
Director General, Health Services
Nirman Bhavan, New Delhi
5. Dr. (Smt.) Ira Ray
Director
National Institute of Biological Sciences
Nirman Bhavan
New Delhi
6. Dr. A.K. Mukherji
H2, National Institute of Immunology
New Delhi-67
7. Secretary
Union Public Service Commission
Shahjahan Road, New Delhi
8. Secretary
Department of Personnel & Training
North Block, New Delhi .. Respondents

(By Shri V.S.R. Krishna, Advocate for official
respondents and Shri P.P. Khurana, Advocate for
Respondent No. 4)

ORDER
Hon'ble Shri S.P. Biswas

Applicant, an Additional Director General/
Health Services (ADGHS for short)/Ministry of

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Health & Family Welfare is challenging in this OA the Departmental Promotion Committee (DPC for short) proceedings dated 14.10.1996 for selection to the post of Director General, Health Services (DGHS for short) in the same Ministry under Government of India.

2. Shri B.P. Singh, learned counsel for the applicant argued at length to say that the recommendation of the said DPC is bad and vitiated because of impermissible, manipulated, interpolated and forged materials having been placed before it. It is because of this that the applicant, though much senior, elder and even more experienced than Dr. S.P. Aggarwal (Respondent No.4), could not be recommended for promotion to the post of DGHS/GOI. The counsel also alleges that the decision of this Hon'ble Tribunal dated 20.3.97 in OAs No.202/95, 566/92 and 952/96 are equally vitiated since it did not have the full picture as to how the recordings of the ACRs of the officers in the zone of consideration for the post of DGHS had actually taken place when the orders dated 20.3.1997 were delivered.

3. While alleging fraud, the applicant has cited from BLACK's LAW DICTIONARY the ingredients that would constitute "Fraud". It has been mentioned that "elements of a cause of action for "fraud" include false representation of a present or past fact made by defendant, action in reliance there upon by plaintiff, and damage resulting to

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plaintiff from such misrepresentations". (see
Citizens Standard Life Ins. Co. v. Gilley, Tex.
Civ. App. 521 S.W. 2d 354, 356). The applicant
seeks to establish the allegations of "forgery".
inter alia, on the following grounds:-

(a) In the background of date-wise events as
described in MA 828/98 in OA 105/98, the ACR
dossiers of eligible officers including that
of the applicant were sent to UPSC sometime
before 23.7.96 and were never returned back by
the UPSC to the Ministry till 14.10.96 and
therefore, the corrections as suggested in OM
dated 26.8.96 could not have been carried out
in the original ACR dossiers of respective
officers and if at all it was carried out, it
was so done only in the duplicate copies of
the ACR dossiers retained by the Ministry.
The applicant would also allege that OM dated
26.8.96 was not placed before the DPC held on
14.10.96 and he seeks to establish this
particular plea on the basis that the
judgement dated 20.3.97 itself mentioned that
"respondents have taken remedial action as
seen from the endorsement of the concerned
official dated 26.9.96 i.e. before the
holding of the DPC". It only indicates, as
per the applicant, that the remedial actions
as mentioned in the judgement dated 20.3.97
had been taken only on the photocopies or

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duplicate copies of the ACR dossiers since the originals remained with the UPSC between 23.7.96 (or before) and 14.10.96.

(b) The applicant has cited the letter of Dr. Narender Behari dated 22.7.96 which indicates that reporting and reviewing of ACRs of 1988-89, 1988-89, 1989-90, 1990-91 and 1991-92 had been done on a single day, i.e. on the same date in 1992; the ACRs of the said periods bear the rubber stamp of Dr. Narinder Bihari indicating his pay scale of Rs.7300-7600 which obviously was acquired on 11.11.91. Secretary (Health) had ignored these ACRs in a communication dated 26.8.96 though the applicant had separately raised specific challenge to those ACRs. That apart, the letter of former DGHS (Dr. Vishvakarma) dated 11.9.90 indicates that he had not reported or reviewed the ACRs for the year 1989-90 of any SAG officer till 11.9.90 and therefore the date i.e. 10.6.90 reviewing the ACR of R-4 is evidently interpolated one.

(c) As regards ACR of R-4 for 1995-96, remarks recorded by the former Health Secretary Shri M.S.Dayal in his capacity as reviewing authority have been "papered over" as these were recorded long after Shri Dayal had retired from Government service on 31.1.96. In respect of R-4, the "papering over" and other irregularities/interpolations indulged

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in by the official respondents have been mentioned in detail at page 15 of the OA. The materials which should have been placed before the DPC held on 14.10.96 but not placed have also been brought out by the applicant at page 16 of the OA in paras (i) to (iv). In short, necessary/relevant materials were not placed before the aforesaid DPC.

(d) Besides rampant interpolation and forgery in writing of the ACRs, the applicant has alleged that ACRs in case of Dr. Narinder Bihari, Dr. Ira Ray and Dr. S.P. Aggarwal and the applicant have been written contrary to the rules. Procedure of "papering over" adopted by the Ministry to remedy writing of ACRs contrary to the rules is not permissible. The ACR which consists of three portions has to be taken as one document and an ACR in which one portion is "papered over" cannot be taken into consideration for purpose of any selection. The applicant would also submit that "papering over" method has no legal basis and is irrational. There are cases where the official respondents have wrongly placed reliance only on the remarks of the reviewing officer. "Papering over" of the remarks of the reporting officer or of the reviewing authority vitiates the whole ACR. The correct step would have been to cancel the vitiated ACRs and record a certificate pertaining to the relevant year. The DPC held on 14.10.96

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is vitiated on the ground that the procedure of "papering over" has been resorted to in a malafide manner only to ensure that the overall grading of R-4 remains "outstanding" and to bring down the grading of the applicant herein. Manipulation in writing of ACRs is evident in that the ACRs of various periods have been written on a particular "date" and also reviewed on a single day which is not permissible in law. To put it briefly, neither the irregularities as admitted by the respondents in OM dated 26.8.96 as regards writing/reviewing of the ACR were brought to the knowledge of the DPC nor was the communication dated 26.8.96 issued at the level of Secretary (Health) was placed before the DPC. In the absence of such relevant materials the proceedings dated 14.10.96 could not be considered as legally valid.

4. Controverting the respondents' plea of res judicata, applicant has cited the judgement of the Hon'ble Supreme Court in the case of *Asharfi Lal Vs. Koili (Smt.)* (1995) 5 SCC 163 to indicate that judgement/decision which has been obtained by fraud or collusion does not operate as res judicata and is not binding on the parties to the said proceedings. Learned counsel submits that there is no dispute that if a decision is put forth to canvass a plea of res judicata, the opposite party (i.e., the applicant herein) has got a right to say that the decision relied on for the purpose of res

judicata is a decision obtained under fraud and since the same has been established as per details in paras 2 and 3(a) to 3(d), the decision either of the Tribunal dated 20.3.97 or of the DPC dated 14.10.96 could not be used for the purpose of invoking the doctrine of res judicata. The ground of fraud for vacating a judgement therefore must be extraneous to everything which has been adjudicated on by the court and not any fraud which has already been dealt with by the court. Respondents' reliance on the plea of res judicata is misconceived, the learned counsel for the applicant contended.

5. Respondents have contested the claims of the applicant and would rely heavily on the plea of res judicata. Shri V.S.R. Krishna, learned counsel for official respondents and Shri P.P. Khurana, learned counsel for R-4 took us through the pleadings only to highlight the issues which continue to be reagitated by the applicant through different Original/Miscellaneous Applications. It has been submitted that all the original records were placed before the DPC for the purpose of selection to the post of DGHS held on 14.10.96. The Tribunal while passing its order on 20.3.97 also considered Secretary (Health)'s speaking order dated 26.8.96. Neither the decision of this Tribunal dated 20.3.97 nor the proceedings of the DPC dated 14.10.96 have been obtained by means of misrepresentation of facts or by any acts of forgery. Learned counsel brought to our knowledge

the illegalities on the part of the applicant in suppressing the material facts which by itself could be good enough to disentitle the applicant to the reliefs claimed for. Shri Khurana argued vehemently to say that the present application is a conspicuous example of abuse of process of court and contrary to the justice/public policy for a party to reagitate the same issues which had already been decided earlier by this Tribunal. To add strength to his submissions in this respect, Shri Khurana drew our attention to the judgement of Hon'ble Supreme Court in the case of K.K. Modi V. K.N. Modi & Ors. (1998) 3 SCC 573. Since the matter is already pending before the Hon'ble High Court in CWP No.4617/97, the applicant has no right to agitate the same before this Tribunal. In any case, the aforementioned order of respondents as regards appointment of R-4 as DGHS has been issued subject to the outcome of the OA.

6. In the background of the rival contentions of learned counsel for both parties, we are required to decide the following issues:

- (i) Whether the DPC proceedings held on 14.10.96 have been drawn by wilful suppression of material facts or forgeries indulged in by the respondents in placing the ACRs in an illegal manner?
- (ii) Whether the decision of the Tribunal dated 20.3.97 has been obtained by resorting to fraudulent means on behalf of the respondents?

(iii) Whether the present OA could be hit by the principles of res judicata based on the submissions of the respondents? and

(iv) Whether the applicant could be held responsible for suppression of relevant materials or giving false declaration?

7. We have gone through the pleadings, perused official files, all the CR dossiers and the DPC proceedings/records thoroughly. Perusal of official documents reveals that on 3.10.96, the UPSC wrote to the Ministry of Health saying "The original CR dossiers of the eligible officers, which have since been returned to the Ministry of Health & Family Welfare, vide this office letter of even number dated 24th Sept. 1996, may please be returned to this office urgently". Following the above reference, Ministry of Health sent the ACR dossiers of four eligible officers, in original, vide their communication on 3rd October as reconfirmed by letter dated 7.10.96. This communication was in connection with the respondents' proposal of continuing with the DPC scheduled on 14.10.96 at 11.30 AM. Applicant's claim that the ACR dossiers of eligible officers were with the UPSC from 23.7.96 till 14.10.96 is apparently without any foundation. To be precise, those CRs were handed over back to the Ministry by UPSC on 24.9.96. It is also seen that necessary corrections were made in the original copies with appropriate remarks on the review part of the ACRs. A close perusal of original ACRs of all the eligible officers indicate the following:-

(a) There are even remarks, particularly of the former Health Secretary (Shri Dayal) in the original CRs where he has even declined to review the ACRs because of having retired in the meanwhile. We also find that the ACRs of all the four eligible officers, right from 1988-89 till 1995-96 were sent enblock in original.

(b) Which part of assessments of an officer cannot be allowed to stand because of remedial actions suggested by Secretary (Health) in OM dated 26.8.96 are also indicated in the original CRs. This has been done at the appropriate level.

(c) Again, for which year the reviewing officer could not be allowed to do the review has been clearly mentioned in the original CRs, including in the case of applicant's CR as well.

(d) "Papering over" uniformly done on 19.7.97 has been actually preceded by an appropriate formal advice dated 22.4.96 issued by Establishment Officer of DoP/T on this issue.

(e) While making remedial endorsements in some cases, say for the year 1995-96, the authority for such action, i.e. OM dated 26.8.96 has been quoted and the OM has also been made part of CR files.

8. The issue before the DPC was one of "Selection" and not merely promotion based on seniority. We find that the controversy of seniority between applicant and R-4 stands finally resolved when the seniority position as ADGHS, circulated on 16.7.96, was duly acknowledged by applicant's office as recorded in the peon book. Applicant has not challenged this successfully. It is also evident from the perusal of records that the selection committee did categorise R-4 vis-a-vis other 3 eligible officers as "OUTSTANDING" on a comparative analysis of the ACRs spread over as many as 11 to 12 years with particular reference to 5 years preceding the date of selection. We also find that

atleast in two files containing CR dossiers of Dr. Aggarwal and Dr. (Mrs.) Ray. Secretary's communication in OM dated 26.8.96 was available. Applicant's plea that the DPC did not have the communication dated 26.8.96 available before it is also not correct. Evidently, the applicant has come out with baseless allegations as regards providing DPC with impermissible materials or manipulated/interpolated ACRs. Nor was there any suppression of relevant documents/papers. DPC proceedings on 14.10.96 were held on availability of necessary records as stipulated under Rules.

9. Situations of incomplete ACRs like lack of reporting or review officers remarks etc.. as mentioned by the applicant herein, are to be handled in terms of instructions of DoPT in O.M. No. 22011/5/86-Estt.(D), dated 20.06.89. Relevant portions of the guidelines that would govern selection proceedings as in the present case are extracted below:-

"(c) Where one or more CRs have not been written for any reason during the relevant period, the DPC should consider the CRs of the years preceding the period in question and if in any case even these are not available the DPC should take the CRs of the lower grade into account to complete the number of CRs required to be considered as per(b) above. If this is also not possible, all the available CRs should be taken into account.

(d) Where an officer is officiating in the next higher grade and has earned CRs in that grade, his CRs in that grade may be considered by the DPC in order to assess his work, conduct and performance, but no extra weightage may be given merely on the ground that he has been officiating in the higher grade.

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(e) The DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs but should make its own assessment on the basis of the entries in the CRs, because it has been noticed that sometimes the overall grading in a CR may be inconsistent with the grading under various parameters or attributes.

As per guidelines for DPCs, "DPCs enjoy full discretion to devise their own methods and procedures for objective assessment of the suitability of candidates who are to be considered by them." It is not for the Court or the Tribunal to investigate why all the earlier reports from 1988-89 onwards have not been duly completed, although it is seen that the applicant had represented on this. The applicant could have sought appropriate legal remedies available to him to have these ACRs completed by the concerned officer at the relevant point of time. We find that the applicant had raised this issue, though belatedly, in OA 2372/94 but failed to obtain any relief since the said OA was dismissed. As far as the DPC dated 14.10.96 is concerned, it had to proceed on the basis of materials available before it. Absence of negligible part of reports is noticed in the ACRs of all the four eligible candidates. Necessary endorsements at the appropriate level on the "Review" part of the reports have been made on all four eligible officers. We do not find any motivated interpolations as alleged. Based on this, it cannot be said that the proceedings dated 14.10.96 have been vitiated. Even if there had been delay in writing review reports, it does not invalidate the remarks. Applicant's basic claim as in para

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6(1) thus falls flat. Where selection has been made by the assessment of relative merits of rival candidates determined in the course of a duly constituted Selection Committee consisting men of high status and unquestionable impartiality. Court/Tribunal cannot substitute its decision. If any authority is needed for this purpose. it is available in **National Institute of Mental Health & Neuro Sciences Vs. K.Kalyana Raman (Dr.). 1992 Supp (2) 4 SCC 481.**

10. We find that the Tribunal in its order dated 20.3.97 had examined in details, as in paras 34 to 36. applicant's pleas with reference to manipulation in writing of the ACRs by the official respondents. We also find that for all the relevant ACRs, respondents have taken remedial actions as seen from the endorsement of the concerned official dated 26.9.96 i.e. well before the holding of the DPC. Details of OM dated 26.8.96 of Secretary (Health) was also available to the Tribunal when the order in OAs 952/96, 566/92 and 202/95 was delivered on 20.3.97. Applicant seeks to draw strength in filing of this OA only because of this Tribunal's remarks in the order saying "DPC proceedings are not before us. It is however open to the applicant to assail the orders passed in pursuance of the aforesaid proceedings if he is aggrieved by the same". This Tribunal, however, did not allow the applicant to file an OA without there being fresh valid reasons.

11. It is pertinent to mention that the applicant in support of his plea regarding the alleged manipulation of the ACRs of Dr. S.P. Aggarwal for the years 1988-92 filed Annexure-I for the first time alongwith his rejoinder dated 4.4.98. Annexure-I is supposed to be an unsigned letter of Dr. Narender Bihari addressed to the then Secretary (Health) as at page 354 of the paper book. The applicant claims that this Annexure contains some corrections and writings. Unsigned, undated letter (Annexure-I) carries no value and cannot help the applicant. We may also observe that all that an officer can do is to submit his self-resume in time and thereafter on which date the reporting/reviewing is done by the senior officers and what stamp is affixed is not subject of any concern for such an officer. Inferences thus drawn by the applicant are misplaced and not sustainable. Further, all these allegations of the applicant were considered earlier and rejected.

12. This brings us to third issue regarding respondents' plea on res judicata. While examining such a plea, we are required to follow some basic principles as regards res-judicata. One of the abuse of the process of the court is the series of relitigations. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the

process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amounts to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of the court's discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is jurisdiction which should be sparingly exercised and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding [see K.K. Modi (supra)].

13. In determining the application of the rule of res judicata the court is not concerned with the correctness or otherwise of the earlier judgement. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A missed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. In the present case the "cause of action" being the same and the "matter in issue" (as per S 11, Code of Civil Procedure) having been

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litigated between the same parties, the law laid down in the case of M.P.S.Jaiswal & Ors. v. Dossibai, AIR 1971 SC 2355 will be applicable.

14. Applying the above principles, we enumerate below, issue-wise, the details as to how the applicant has indulged in avoidable re-litigations:

Issue	When originally raised	When settled/ raised later on	When and how re-agitated
1. Combined seniority list in the SAG level/seniority for working in Chandigarh PGI	In para 5(iv) OA 202/95 filed on 25.1.95	In Para 28 of this Tribunal's common order in OAs 202/95, 566/92 & 952/96	In para 4.6 in OA 105/98 (present) filed on 7.1.98 on 20.3.97
2. Promotion to ADGHS.	In para 9 of OA 202/95 and in paras 5A to 5C in OA 566/92	Issue decided on 20.3.97 in OA 952/96	Again raised against vacancies arising in 91-92, 93-94 & 94-95 in para 4.7 of present OA
3. Promotion of R-4 in the rank Specialist Gr. I & II	In para 9 to 13 in addl. affi- davit dt. 2.7.96	Decided in para 38 of order dt. 20.3.97	Again raised in para 4.1 in the present OA saying R-4 was ineligible for appt. as DGHS in view of the fact that his appt. as Spec Gr. I (Neuro Surgery) was contrary to the rules as admitted by Secy. M/Health vide OM dt. 26.8.96
4. Manipulation of ACRs by R-4 right upto 96 & allegation that R-4 got his ACRs reported & reviewed for 2-3 years	In paras 14 to 28 raised in para 36 & 37 of aforesaid order	In para 4.23 in present OA	
5. Eligibility of R-4 for promotion to ADGHS	In para 18 to 22 in OA 202/95	Decided in para 35 of the above common order	Raised again in paras 4.3 & 4.5 in present OA

15. In this uncontroverted 21st visit to this Tribunal (See Annexure R-II), the applicant has only rerun the earlier issues, but only in rotation. The applicant had even preferred a review application against the judgement of this Tribunal dated 20.3.97 which too was dismissed by this Tribunal vide its order dated 11.8.97 observing, *inter alia*, "the petitioner has attempted to reagitate and reargue all the issues which have been considered and disposed of by our order in the aforesaid OAs." Apparently, the warning given by this Tribunal failed on deaf ears of the applicant. In any case the applicant has not opposed the respondents plea of res judicata *per se*. He has only opposed res judicata to the extent that the decisions have been obtained by means of fraud, which does not stand established as per discussions in the foregoing paras.

16. Since the applicant has failed to come out with any good ground, much less convincing ones, to establish forgery by respondents in writing of ACRs or deciding 14th Oct. DPC proceedings on the basis of impermissible materials, the law of res judicata will be applicable on all fours in the facts and circumstances of the present case.

17. The illegality perpetuated by the applicant in seeking the same reliefs simultaneously from two different legal forums is evident from the following:-

Reliefs sought in the OA present OA filed on 7.1.98

Same reliefs claimed in Writ Petition No. 4617/97 filed in the Hon'ble High Court

Para 8(a) - Issue writ order or direction calling for records and quash the DPC held on 14.10.96 for the post of DGHS and direct review DPC

Para 28(d) in the WP as exactly as in para 8 (a)

Para 8(b) - Declare Dr. S.R. Aggarwal ineligible for consideration to the post DGHS.

Para 28(c) in the WP is identical with para 8 (b)

Para 8(c) - Direct that an enquiry held by an independent authority into the circumstances attendant to the manipulation of promotions contrary to the Rules and also the manipulation of service record in favour of Dr. S.P. Agarwal.

Para 28(c) in the WP is identical with para 8 (c)

18. In the face of such an unquestionable reality the applicant dares to declare in para 7 of the present OA that "he has not previously filed any application, writ petition or suit regarding the matter in respect of which this application has been made before any Court". Applicant has concealed the aforesaid material facts and is, therefore, guilty of making false declaration. It is well accepted canon of justice that he who seeks protection of court must come with clean hands. Suppression of material facts disentitle the applicant to any relief even if such a claim was justified otherwise. The present application falls in this category.

19. Such an attitude to abuse the legal process and unmerited attempt to cause wastage of Tribunal's precious time could hardly be encouraged. While dealing with a similar matter in a recent case of **Ajit Prasad Gupta V. State of UP & Ors.** 1998(1)SLJ 60, the Hon'ble Supreme Court has held that "We take a serious view of the matter and condemn this practice of filing petition after petition. No litigant has a right to unlimited drought on court's time and public money in order to get the affair settled in the manner he wishes. Finality of judicial proceedings must be accepted at some stage. We cannot allow the process of the court to be abused in the manner it has been done by the petitioner in this case. Exactly the identical situation prevails in the present OA.

20. The applicant has added respondents No.2.3 & 6 in the array of parties. Respondent No.2 retired even before this O.A. was filed. The applicant has not indicated the reliefs he is seeking from Respondents No.2 & 6 respectively.

21. For lack of unassailable evidences that could invalidate 14th October DPC proceedings and on grounds of res judicata as well as false declaration, as per details in paras 9 to 19, we hold that this O.A. is devoid of any merits. It is accordingly dismissed.

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22. Because of foregoing details and in follow up of the law enunciated by the apex court in A.P.Gupta's case (supra), this Tribunal considers it to be fit case where the applicant should pay cost of Rs.5000 (Rupees five thousand only) for resorting to frivolous litigations causing drain on Tribunal's precious time as well as for making a false declaration against which the applicant could not come out with a satisfactory explanation in course of oral arguments. The amount shall be paid to Secretary, Legal Aid Association, Central Administrative Tribunal, Principal Bench, New Delhi, within eight weeks from the date of receipt of a certified copy of this order.



(S.P. Biswas).
Member(A)

Attv/



(T.N. Bhat)
Member(J)

I have gone through the draft of the judgement proposed by my learned Brother. I respectfully disagree with some of the findings recorded by him though I agree that this O.A. deserves to be dismissed both on merits as well as on the ground that the applicant has in ~~not~~ writ petition filed before the Hon'ble High Court sought the same relief as he is seeking in this O.A. but has not made a mention of this fact in the relevant para no. 7 of the O.A.

On the question regarding application of the principle of res judicata, on the facts of the instant case, I hold a view different from the view of my learned brother. The common judgement dated 20.03.1997 passed in OAs 566 of 1992, 202 of 1995 and 952 of 1996 would not bar the instant O.A., for the simple reason that those OAs did not relate to the DPC proceedings held on 14.10.1996 and the consequent promotion of respondent no. 4 herein to the post of Director General. A bare perusal of the aforesaid common judgement would reveal that even though the applicant had at the time of hearing of the previous OAs made an attempt to challenge the promotion of respondent no. 4 to the higher post of DGHS as also the DPC proceedings culminating in the recommendation of the said respondent's name for the post, the Tribunal refused to adjudicate on that question, stating in clear terms in para 39 of the judgement that it was not necessary to give any direction to the DPC held for promotion to the post of DGHS, for the simple reason that those DPC proceedings were not before the Bench of the Tribunal. This was so obviously because the question of promotion of respondent no. ~~4~~ to the post was not at all a subject matter in issue

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in any of those OAs. In O.A. 566 of 1992 the applicant had sought the relief that he should also be considered for appointment to the post of Additional DGHS, as he was eligible for the same. By the O.A. 202 of 1995 the applicant assailed the combined eligibility list of officers belonging to the Supertime Grade who could be considered for promotion/selection to the post of ADGHS. When some officers including the applicant were promoted to the post ADGHS by the order dated 19.4.1995, the applicant, aggrieved by the seniority assigned to him, filed O. A. 952 of 1996. Thus, in none of these three OAs was the question of appointment/selection to the post of DGHS at issue. Precisely for this reason the Bench of the Tribunal (of which I was also a Member) by the aforesaid judgement dated 20.03.1997 granted liberty to the applicant to assail the order passed by the official respondents in those OAs in pursuance to the DPC proceedings of 14.10.1996. In my considered view, therefore, this question cannot be said to have been directly and substantially in issue in any of the earlier OAs so as to attract the application of the principle of res judicata or even constructive res judicata. When the subject matter of two suits/proceedings as also the capacities in which they are brought are altogether different and the cause of action on which the suits are barred are not the same the bar of res judicata cannot come into operation.

As regards payment of costs in this O.A. I would respectfully express my dissent on this question also. As already mentioned, the applicant was specifically granted the liberty to file a fresh OA assailing the appointment of respondent no. 4 in pursuance to the recommendations of the DPC held on 14.10.1996, although he had attempted to raise this question also at the time of hearing of the

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earlier OAs. It may be that in the instant O.A. he relies upon a set of facts identical to those sought to be pressed into aid at the time of hearing in the earlier OAs. But the fact remains that the applicant has urged some additional grounds also in the instant O.A. I do not find this case to be one where the applicant has tried to abuse the legal process resulting in unnecessary wastage of the Tribunal's time. In this regard, I may state that the Secretary, Health had in the O.M. dated 26.8.96, while disposing of the representation of the applicant, conceded that some of the ACRs of the concerned officers had not been recorded in accordance with the rules and regulations and certain entries in the ACRs had also been made by officers not competent to do so. However, the Secretary had suggested some remedial measures. The applicant has in the instant OA taken the plea that the remedial measures were either not at all carried out or if carried out this was not done in a proper manner. It is true, as already stated, that the applicant has in addition to the above sought to raise the same pleas as raised at the time of the earlier OAs which pleas had not been accepted by the Tribunal while disposing of those OAs. But it is equally true that having been granted the liberty to file a fresh OA challenging the DPC proceedings held on 14.10.1996 all those please raised earlier continued to be available to him. However, as demonstrated by my esteemed brother on the bench those pleas have been found to be without force. But this fact by itself would not give rise to the assumption that the pleas were vexatious or frivolous. I may repeat that according to respondents' own showing, as conceded by the then Health Secretary in this O.M. dated 26.8.1996, some irregularities had crept in so far as recording of the ACRs of the different officers, more

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particularly respondent no. 4, was concerned. However, the Health secretary had pointed out some "extenuating circumstances" which should be taken into consideration while considering the case of Dr. S.P. Aggarwal, respondent no. 4. The main circumstance pointed out in this regard was that the said respondent was promoted by the competent authorities and confirmed on different levels of posts after due consideration of his merit, though admittedly he was not having the requisite qualifying service for appointment to the post of Surgeon Specialist Gr. I in the year 1983 but even so his name was forwarded to the Union Public Service Commission and he was eventually appointed/promoted to the higher post in the same year. The Health Secretary expressed the view that it would not be "administratively expedient" to re-open the case and thereby undoing decisions taken more than a decade ago which was "likely to lead to prolonged litigation resulting in the top job of Chief Technical Advisor to Ministry of Health & Family Welfare remaining vacant or being operated on ad hoc basis". It was further pointed in the OM that this would not be in public interest as the DGHS has to shoulder "extremely onerous responsibilities". This view found favour with the Bench hearing the earlier OAs.

Thus, in my humble view there is no reason to hold that the applicant has by filing the instant OA made an attempt to abuse the process of the court or has indulged in frivolous litigation. I would accordingly refrain from awarding any costs, much less heavy costs, in this case.

By me
29.1.99.
(T.N. Bhat)
Member (J)

(25) *U.B*

ORDER OF THE BENCH

Since there is no difference of opinion between the Members constituting this Bench on the result of the O.A., we dismiss this O.A.

We may, however, mention that the applicant has filed two M.As after the final hearing of this O.A. had been concluded and the judgement was reserved. Although we have our own doubts on the question as to whether such Miscellaneous applications would at all be entertained, yet we heard Shri Jayant Das the Senior Counsel appearing for the applicant on these M.As.

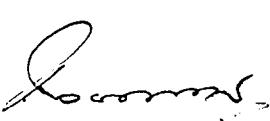
As regards M.A. 41 of 1999 the same has become infructuous as the applicant in that M.A. prayed for pronouncement of the judgement by us on an early date. So far as M.A. 42 of 1999 is concerned, we find that the applicant has once again made an attempt to persuade us to take a view which is not supported by the facts. In this M.A. the applicant had sought to make out that the affidavit filed on behalf of the respondents in the O.A. is false. He accordingly seeks initiation of proceedings under Section 340 Cr.P.C. against Shri H.N.Yadav, Under Secretary to the Government of India, Ministry of Health and Family Welfare for having allegedly sworn and filed a false affidavit. We have gone through the affidavit and the contents of the M.A. and we do not find any good grounds disclosed in the M.A. for initiating such proceedings against the Under Secretary. As already stated hereinabove in the main judgement, we have perused the original records furnished by the respondents and are of the view that the respondents had taken the remedial action as regards the ACRs as suggested in the Secretary's O.M.

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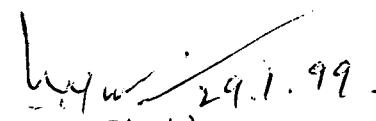
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dated 26.8.1996. We have further found that the necessary endorsements at the appropriate level had been made in the reports of all the four eligible officers and that there was no basis for raising the plea that some impermissible material was provided to the D.P.C. or some relevant documents/papers were suppressed. In this view of the matter we find no merit in MA 42 of 1999. The same is also, therefore, rejected.

In the result the O.A. is dismissed.


(S.P. Biswas)
Member (A)

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29.1.99.
(T.N. Bhat)
Member (J)