

CENTRAL ADMINISTRATIVE TRIBUNAL: PRINCIPAL BENCH.

O.A. NO. 772/91

&

O.A. NO. 2547/94

New Delhi this 25th day of October, 1995.

Hon'ble Shri N.V. Krishnan, Acting Chairman.

Hon'ble Dr. A. Vedavalli, Member (J).

O.A. 772/91.

A.K. Paliwal,
S/o late Shri K.C. Paliwal,
R/o A-312, Pragati Vihar Hostel,
Lodhi Colony,
New Delhi-3.

...Applicant.

By Advocate Mrs. Meera Chhiber.

Versus

1. Secretary,
Ministry of Food Processing Industries,
Panchsheel Bhawan,
Khalgaon Marg,
New Delhi-1.

2. Secretary,
Department of Personnel & Training,
North Block,
New Delhi-1.

3. Shri R.K. Bansal,
S/o Late Shri Mishri Lal Bansal,
Joint Director,
(Consultancy Service),
Ministry of Food Processing Industries,
Panchsheel Bhawan,
Khalgaon Marg,
New Delhi.

...Respondents.

By Addl. Solicitor General Shri K.T.S. Tulsi with
Shri Madhav Panikar, Standing Counsel, for Respondents
1 and 2.

By Advocate Shri K.C. Mittal, for Respondent No. 3.

O.A. 2547/94.

R.K. Bansal,
S/o late Shri Misri Lal,
R/o House No. 15, Vivekanandapuri,
Delhi.

...Applicant.

By Advocate Shri K.C. Mittal.

Versus

1. Union of India, through
the Secretary,
Ministry of Food Processing Industries,
Panchsheel Bhawan,
New Delhi.

2. Mrs. Promilla Issar,
Joint Secretary (Admn.),
Ministry of Food Processing,
Industries,
Panchsheel Bhavan,
New Delhi.
3. Mr. C.K. Basu,
Joint Secretary,
Ministry of Food Processing
Industries,
Panchsheel Bhavan,
New Delhi.
4. Shri A.K. Paliwal,
Deputy Director (F&VP),
Ministry of Food Processing
Industries,
Panchsheel Bhavan,
New Delhi. ... Respondents.

By Addl. Solicitor General Shri K.T.S. Tulsi, with
Shri Madhav Panikar, Advocate, for Respondents
1 to 3.

By Advocate Mrs Meera Chhiber, for Respondent No.4.

ORDER

Hon'ble Shri N.V. Krishnan.

O.A. 772/91 has been filed by A.K. Paliwal,
Deputy Director, Fruit and Vegetables Preservation
(F&VP), in the Ministry of Food Processing Industries
against the order of the first Respondent (i.e.
the Ministry) dated 25.1.1991, appointing R.K.
Bansal, Joint Director (Consultancy Service) in
the Ministry (Respondent No.3) to hold current
charge of the duties of the post of Director (F&VP)
in addition to his own duties.

2. The second O.A. 2547/94 is filed by R.K. Bansal,
Joint Director, against the subsequent ad hoc appointment
of the 4th Respondent A.K. Paliwal, as Director

(F&VP) with a direction to the applicant to hand over charge to the new appointee. Thus, the two O.As are inter connected and hence are being disposed of by this common order.

3. This litigation has a history. Shorn of unnecessary details, the material facts, which are not in dispute and which give rise to these two O.As, are as follows:

3.1 In the Department of Food and Agriculture-as it used to be then- there is a Food and Nutrition Board. That Board has since come under the control of the Ministry of Food Processing Industries. There is a Directorate (F&VP) in which, until 1972, work relating to the compulsory quality and preshipment inspection of fruit products and the enforcement of the Fruit Products Orders, 1955 was being done. In addition, the Directorate also dealt with consultancy services. The existing recruitment rules provided for promotion to the post of Director from only the grade of Deputy Directors. A new self contained cell was created in 1972 to look after consultancy services. One post each of Joint Director, Deputy Director and Assistant Director was created for this new cell for the consultancy services. R.K. Bansal was appointed by direct recruitment in December, 1980 as Joint Director (Consultancy Services).

3.2. As there was no further avenue of promotion for him, R.K. Bansal had represented that the Recruitment Rules be amended to provide that the Joint Director would also be eligible for promotion

to the post of Director (F&VP). That was rejected by Government on 6.1.1986. He, therefore, filed O.A. 13/86 for a direction to Government to amend the recruitment rules. That O.A. was dismissed on 9.4.1987 holding that the rejection of his representation by Government was neither arbitrary nor unfair and that he had no right to have the recruitment rules amended. The appeal filed by R.K. Bansal in the Supreme Court against this order is pending (CA 1172/87).

3.3 In the meanwhile, the post of Director (F&VP) fell vacant on 31.12.1990. Recruitment to this post is governed by the Food and Nutrition Board (Non Secretariat Gazetted Post) Recruitment Rules, 1967 - Rules for short - which provide for promotion as the first method from the only grades of Senior Marketing Officer (Fruit Products) and Deputy Director (F&VP) with five years regular service in the respective grade. None from these two grades had this length of service to be considered for promotion.

3.4 R.K. Bansal, though not eligible for promotion under the Rules was appointed by the notification dated 25.1.1991 to hold current charge of the post, in addition to his duties as Joint Director.

3.5 A.K. Paliwal, Deputy Director has challenged the aforesaid notification in O.A. 772/91, under disposal. He has impleaded the Union of India (Ministry) and R.K. Bansal as respondents. Both parties have filed replies resisting the challenge.

3.6 The next important development is when the Ministry issued an office order dated 14.12.1994 appointing A.K. Paliwal, Deputy Director (F&VP), as Director (F&VP) on an ad hoc basis and R.K. Bansal was requested to hand over charge of this post to Shri A.K. Paliwal immediately. Apprehending such an order, R.K. Bansal filed O.A. No. 2547/94 which has been amended subsequently to challenge the aforesaid order dated 14.12.1994. The respondents are the Union of India (Ministry), two Joint Secretaries, one of whom (Mrs Promilla Issar) has been impleaded /by name, and A.K. Paliwal. An interim order was issued on 6.1.1995 which was subsequently modified by the Ministry on 7.3.1995 directing / to maintain the status quo of R.K. Bansal as Director F&VP and restraining A.K. Paliwal from exercising any function in pursuance of the order issued in his favour.

4. We shall, therefore, take up the two O.As in the order in which they have been filed.

O.A. 772 of 1991.

5. Inasmuch as A.K. Paliwal has now been appointed on ad hoc basis as Director (F&VP) by the order dated 14.12.1994, this O.A. should normally have become infructuous. However, it is pressed by the applicant A.K. Paliwal because if he succeeds in this O.A., R.K. Bansal would have no locus standi to challenge his ad hoc appointment in O.A. 2547/94.

u

6. The grievance arises out of the following notification dated 25.1.1991 (Annexure A-1) appointing R.K. Bansal:

"NOTIFICATION.

No.9-13/90-PD-II. The president is pleased to appoint Shri R.K. Bansal, Joint Director (Consultancy) in the Ministry of Food Processing Industries to hold the current charge of the duties of the post of Director (F&VP), in addition to his own duties as Joint Director (Consultancy) in the Ministry of Food Processing Industries, until further orders.

The President is also pleased to appoint Shri R.K. Bansal, as the Licensing Officer under the Fruit Products Order, 1955 until further orders".

7. The main grounds raised are as follows:

- (i) Admittedly, R.K. Bansal was not eligible to be appointed as Director under the Rules. Hence, current charge could not have been given to him.
- (ii) The applicant was available for holding current charge, even if he did not have the length of regular service for regular promotion, as Director (F&VP).
- (iii) Therefore, he should have been given current charge as Director (F&VP) in preference to R.K. Bansal, who was not holding any post in the regular line of promotion.
- (iv) This is a colourable exercise of power. Though described as current charge, it is a full fledged ad hoc appointment, as statutory powers have also been

conferred. Only the senior most official in the feeder category (i.e. the applicant) can be given the ad hoc appointment.

8. In their reply, the Ministry has resisted the claim on the following plea taken in para 4.5:

"It is denied that the claim of the applicant was ignored. Although the applicant is holding a post which is a feeder post for the post of Director (F&VP). He does not fulfil the essential requirement of 5 years continuous service in that post which would be essential for him to be considered for appointment to the post of Direct F&VP. It is admitted that Respondent No. 3 does not fall in the feeder cadre for the post of Director, F&VP. The routine charge of the post of Director, F&VP was given to Respondent No. 3 to take care of day to day duties of the post in order to ensure the continuity of governmental work and since the Recruitment Rules for the post of Director, F&VP are under amendment". (emphasis added)

9. In reply to para 5 (A) and (B), it is reiterated that "Respondent No. 3 has merely been given the current charge of duties of the post until the Recruitment Rules are amended and regular appointment can be made". (Emphasis added)

10. In his reply R.K. Bansal (Respondent No. 3) has set out the circumstances in which the Annexure-1 notification was issued. He states that in the pleadings before the Supreme Court (i.e. in the appeal against the judgement of the Tribunal in O.A. 13/86) his counsel had pointed out that as Joint Director (Consultancy) he was under the administrative control of Director(F&VP) and the consultancy service dealt with by him was also

a concern of the Director (F&VP). As the post of Joint Director (Consultancy) was created at a later date, it was not included in the Rules as a feeder post for promotion. In fact, on 1.5.1987 the Supreme Court recorded a submission made by his counsel in the following order:

"UPON hearing counsel the Court made the following

ORDER

Shri R.K. Garg, learned counsel for the petitioner says that the petitioner may be treated as now holding the post equivalent to the post of a Dy. Director (F&VP) and that his case for promotion to the cadre of Director may be considered on that basis subject to the seniority of any Dy. Director who has worked for a longer period in the cadre of Dy. Directors.

No interim orders today".

On 7.8.1987 the Supreme Court also ordered that any appointment to the post of Director would be subject to the outcome of the S.L.P. filed by R.K. Bansal. It is further stated in the reply as follows:

"The Hon'ble Supreme Court, having realised that the petitioner's promotional avenues were bleak gave verbal directions to the Government of India to find out a mode for providing promotional opportunities to the petitioner instead of stagnating at the post of Joint Director (Consultancy). The Addl. Solicitor General gave an assurance to the Hon'ble Supreme Court of India that the promotional avenues for the petitioner would be created and the Addl. Solicitor General also communicated the same to the Government of India vide his letter to the Government after the Court proceedings dated 12th October, 1987".

The Annexure A-1 was issued pending the consideration of the amendment to the Rules. Hence, the applicant cannot challenge this order.

10. We have heard Mrs. Meera Chhiber, the learned counsel for the applicant, the learned Addl. Solicitor General Shri K.T.S. Tulsi and Shri Madhav Panikar, Standing Counsel for the Ministry (Respondents 1 and 2) and Shri K.C. Mittal, the learned counsel for Respondent No. 3, R.K. Bansal.

11. The basic question is whether a person, who admittedly was not in the feeder cadre for promotion to the post of Director (F&VP), could be given current charge of the duties of that post, even when the officers in the feeder category (Dy. Directors) had not yet become ripe for consideration for promotion.

12. The learned counsel for the parties generally reiterated the pleadings made. The learned Addl. Solicitor General denied that any assurance was given by the Union of India in the Supreme Court, as averred in R.K. Bansal's reply. However, this has not been refuted in this O.A. by the Ministry. This issue will be considered in the next O.A. filed by R.K. Bansal.

13. The only new point made was by Shri K.C. Mittal for Respondent No. 3. He sought to justify the appointment of Respondent No. 3 in terms of FR 49. He particularly relied on Clause (iii), which refers to holding charge of post not in the same office/promotion. On the contrary, Mrs Meera Chhiber for the applicant contended that FR 49 has no application. It only deals with fixation of pay in the circumstances mentioned therein.

14. We are of the view that F.R. 49 does not throw any light as to what are the powers of Government to entrust current charge of the duties of a post. No other service rule has been brought to our notice. We are of the view that these are sovereign powers of Government. In exercise of these powers, the Ministry has ample powers to entrust the current charge to any person in whom they have the confidence that he would be able to discharge those duties. The only restraint to be observed is that these is fair play and the action is not arbitrary. The applicant would have had a legitimate ground to question this decision, if he had been eligible for promotion and he was yet superseded. That is not the case. He was not ripe for promotion.

15. There is another point which requires a brief notice. It is contended that in view of the judgement of this Tribunal in O.A. 13/86, the applicant could not have been given the current charge. It is claimed that it has been held that the consultancy services is a self contained and separate unit. We have perused that judgement (Annexure A-3). What has been held is that the function of the Deputy Director (F&VP) is in the nature of a policing function, while the function of consultancy services was a consultancy function. They are different from each other and one cannot compare with the other and, therefore, equality of opportunity for promotion cannot be claimed on this ground. It was also held that R.K. Bansal had no right to insist that the Rule be amended and that rejection of his request was not arbitrary. There was, however, no finding that the Director (F&VP) had nothing to do with consultancy services and that, therefore, the Joint Director (Consultancy) is ineligible to

be considered for promotion and, therefore, the Rules cannot be amended to make the post of Joint Director as a feeder category.

16. We also do not find any merit in the claim that this is a colourable exercise of powers and what, in fact, is really an ad hoc appointment (because of the entrustment of statutory functions) is made to appear as an entrustment of current duties. Firstly, the Annexure-I order is unambiguous about the nature of the appointment. It vests only the 'current charge of the duties of the post of Director (F&VP) in Respondent No. 3. No doubt powers of Licensing Officer under the Food Products Order, 1955 have also been conferred. That was done because, otherwise, there would be a vacuum. The entrustment of this function does not change the character of the appointment. But for such specific conferral of power, R.K. Bansal could not have exercised the Licencing Power while merely holding current charge. We do not feel called upon to consider whether such conferral is legal or not. That is an issue which can be raised only by those affected by the conferral of the Licencing Power eg. parties whose claims in respect of licenses have been rejected, etc.

17. The learned counsel for the applicant submitted that until the statutory rules were amended, the rules which then existed alone remained in force. Thereunder, the 3rd respondent was ineligible to be given current charge. In any case, the applicant became eligible in January, 1993 to be considered for regular promotion as Director (F&VP). Hence, the further continuance thereafter of the third respondent in current charge is illegal.

18. We have carefully considered this argument. No doubt, the Rules as they stand alone will govern promotion until they are properly amended. Yet, the applicant would have had a claim against the third respondent only if, being eligible for promotion as Director(F&VP), he was bypassed and the ineligible third respondent was preferred. That is not the situation. Both the applicant and the third respondent were ineligible for promotion for different reasons. However, the third respondent had worked on a higher post for a much longer period.

19. It is true that the applicant became eligible in Jan, 1993 for promotion. In other words, one ground for preferring the third respondent disappeared then. He could very well have moved the Tribunal to issue an interim direction, either then or even on an earlier date, to the effect that the tenure of the current charge of the third respondent should end as soon as the applicant became eligible for promotion in accordance with the Rules, even if the Rules had not been amended till then to render the Respondent No. 3 eligible. That was not done. Hence, the third respondent continued till an order was passed on 14.12.1994 appointing the applicant on ad hoc basis as Director (F&VP) which gave rise to the second O.A.

20. The other objection of the applicant is that the current charge given to Respondent No. 3 violates the standing instructions of the Department of Personnel. We have to dismiss this objection for the reasons already stated in para 18 supra.

21. We now consider a few authorities relied upon by the parties. The learned counsel for the Ministry submitted that giving current charge to an officer who substantively holds a lower post merely to discharge the duties of higher post cannot be treated as a promotion. Therefore, the applicant could have no grievance at all. (1991(Supp)(2) SCC 733 - Ram Kant Sripad Sinahi Advalpalkar Vs. Union of India). On the contrary, the learned counsel for the applicant submitted that the characteristic of a current charge is that statutory powers cannot be exercised by the incumbent. As the Ministry has specifically conferred statutory powers on the respondent, it is not a mere current charge simpliciter as described in the Annexure-I order. It is a full fledged ad hoc promotion and has been given contrary to the recruitment rules. We are of the view that the impugned order is, undoubtedly, an order giving only current charge of the duties of the post of Director (F&VP) to the third respondent. The mere fact that he has been made the Licensing Officer also under the Food Products does not alter the position. A person who has been given current charge of the duties of the post, and nothing more, cannot exercise statutory powers on the only ground that he holds current charge. But nothing prevents the authorities from specifically conferring statutory powers on even such an officer, in the exigencies of service.

22. Reliance is also placed on AIR 1991 SC 76 Sheshrao Jangluji Bagbe Vs. Bhaiyya. In that case, a senior geologist who did not have 10 years practical experience

after minimum qualifications - which is the requirement of recruitment rules - was promoted to the post of Deputy Director. After such promotion, the rules were amended stating the requirement of 10 years practical experience was not necessary. This experience was retained only for direct appointment. Nevertheless, the court held the promotion to be valid. The promotion made earlier was not held liable to be set aside, because it was held that the later amendment should be deemed to apply retrospectively. That judgement was given on the special facts of that case and cannot be relied upon by the applicant to claim that he should have been appointed, even though he did not have the necessary length of service.

23. In the circumstance, we are of the view that the impugned order cannot be questioned on any ground and accordingly this application is dismissed.

O.A. 2547/94

24. R.K. Bansal has challenged the Annexure 'A' order dated 14.12.1994 which reads as follows:

"The President is pleased to appoint Shri A.K. Paliwal, Deputy Director (F&VP), Headquarter, in the Ministry of Food Processing Industries, New Delhi, to the post of Director (F&VP), on ad hoc basis with immediate effect for a period of six months or till such time that a regular appointment is made against the post, whichever is earlier.

2. The appointment has been made purely on ad hoc basis and does not confer any right upon the Officer for regularisation of the same and to claim seniority, etc. on that basis. The Government reserves the right to terminate the ad hoc appointment at any time without assigning any reason or giving notice etc. to the officer concerned, and consequent upon such termination he will revert to the post

of Deputy Director (F&VP), hitherto held by him. The said ad hoc appointment of Shri A.K. Paliwal to the post of Director (F&VP) is further subject to the result of C.A.-1172/87 in SLP No. 4831/87 and O.A. No. 71/94 pending in the Hon'ble Supreme Court of India and Central Administrative Tribunal, Delhi respectively .

Sd/-

(Rajendra Bist)
Under Secretary to the Govt. of India

Distribution:

1. Person concerned (Sh. A.K. Paliwal), with the request that the charge of the post of Director (F&VP) may be taken from Sh. R.K. Bansal, Jt. Director(C), who is holding current charge of the duties of the post of Director (F&VP), immediately and charge report be sent to F&VP-Admn. Section.
2. Shri R.K. Bansal, Jt. Director (Consultancy), with the request that charge of the post of Director (F&VP) may be handover to Shri A.K. Paliwal, immediately and report be sent to the F&VP-Admin. Section immediately".

25. The important grounds raised are as follows:

- (i) The applicant has been appointed to the post of Director (F&VP) until the finalisation of the amendments to the Rules and appointment of a Director on a regular basis after such amendment. Such amendments have been initiated after giving an assurance in the Supreme Court.
- (ii) In regard to such amendment, the Ministry has not considered the proposal to treat the applicant as a Deputy Director, for the purpose of promotion to the rank of Director. This has been approved by the Department of Personnel. Yet it is not sent to UPSC.

- (iii) The impugned order would result in his reversion and would be in the nature of penalty.
- (iv) This is due to the bias of the second respondent.
- (v) The fourth respondent is not the seniormost Deputy Director and, therefore, his appointment is bad.
- (vi) It is contended that the appointment of the applicant to the post of Director was a regular appointment and it was not a simple case of taking over of charge of current duties.

26. The applicant has sought a direction to the respondents to amend the recruitment rules and consider the applicant for regular appointment on the basis of such amendment and to quash the impugned order by which the fourth respondent has been given ad hoc charge. He also seeks to restrain Respondent No. 1 to 3 from making any selection or appointment to the post of Director (F&VP) without considering the applicant for the said post.

27. A reply has been filed on behalf of the respondents 1 to 3 opposing the O.A. Respondent No. 4 has also filed his reply. Nevertheless, preliminary objections have been raised. These have to be considered first.

28. Two of the preliminary objections viz., that this O.A. is not maintainable and that the applicant should have approached the Supreme Court have been dismissed by our interim order dated 7.3.1995.

29. The other preliminary ground is that this O.A. is barred by res-judicata. The learned Addl. Solicitor General contended that this was so in view of the judgement of this Tribunal in O.A. 13/86. As mentioned therein, that O.A. was filed by the applicant for a direction to the respondents to amend the recruitment rules so as to also include the post held by him, i.e. Joint Director, in the feeder category for promotion to the post of Director. In that judgement, it was held that the applicant had no such right and that the decision to reject his representation was neither arbitrary nor discriminatory. In our interim order dated 7.3.1995 we had observed that this objection cannot be decided merely on the consideration that there was a decision of this Tribunal in O.A. 13/86. Subsequent to that judgement, certain developments have taken place culminating in the appointment by the notification dated 25.1.1991 to hold current charge. We had left open the issue whether these developments have any bearing on the issue of res-judicata. We shall,

therefore, revert to this objection after first considering that issue.

30. It thus appears that the most important question to be decided is, whether the applicant was given an appointment only to hold current charge of the duties of the post of, a Director until further orders as disclosed by the notification dated 25.1.1991 (Annexure A-1) or, whether that appointment was to continue until the recruitment rules were amended and regular appointment made to the post of Director (F&VP), after such amendment, as contended by the applicant.

31. In so far as the mere current charge is concerned, it can be terminated by the appointing authority and that by itself, cannot give rise to any cause of action. That is the settled law. (1991 (Supp) (2) SCC 733 - Ram Kant Sripad Sinahi Advalpalkar Vs. Union of India) and (1993(2) SLR 557 State of Haryana Vs. S.M. Sharma). This is due to the fact that a person holding current charge does not acquire any vested right.

(C)

...Contd...,

32. At present, we are to consider whether the submissions made by the applicant are corroborated by surrounding circumstances obtaining in this case and if so whether that makes any difference.

33. Obviously, the Annexure A-1 notification dated 25.1.1991 makes it clear that the appointment to hold current charge is "until further orders". The applicant states that when SLP was granted to file an appeal against the judgement of the Tribunal in O.A. 13/86, his counsel stated that for the purpose of promotion the applicant could be treated as a Deputy Director, subject to the seniority of Dy. Directors who have worked as such for a longer period than him as Joint Director. He then averred as follows:

"4.8. That during the course of hearing, the Additional Solicitor General appearing on behalf of the respondent No. 1, on subsequent date, gave an assurance that the post of the applicant would either be upgraded to the level of the Director or the applicant would be considered as equivalent to the Deputy Director (F&VP). Based on this assurance, the respondent No.1 initiated action and sent proposal to amend the Recruitment Rules for the post of Director (F&VP) by treating the post of Joint Director (Consultancy) as equivalent to the post of Deputy Director (F&VP) or to upgrade the post of Joint Director (Consultancy) to the post of Director (F&VP)."

Hence, it is contended that, until rules are amended and until the applicant is also considered for promotion for the post of Director (F&VP), the current charge held by him cannot be terminated.

34. Rebutting this allegation, the learned Addl. Solicitor General Shri K.T.S. Tulsii, categorically denied that the respondents had given any such assurance to the Hon'ble Supreme Court. He also pointed out that the applicant has not produced a copy of any order or proceedings of the Court to corroborate that such an assurance was given.

35. We were, therefore, satisfied that, no such assurance was given. For, if the grievance of the applicant was against the action of the respondents contrary to such assurance, he should have sought a remedy only from the Supreme Court. But we were equally satisfied that there must have been some special circumstance which persuaded the Ministry to consider amendments to the Rules, even though this Tribunal had dismissed the applicant's O.A. 13/86 holding that he had no right to claim that the particular amendment sought by him be made. Indeed, in the short reply filed on 5.1.1995, by the Ministry, it was briefly mentioned that, on 3.10.1988, the Addl. Government Advocate in the Supreme Court requested the Department to state whether it would be feasible to upgrade the pay scale of Joint Director (Consultancy) and also consider the amendment of the Rules accordingly. But that is the only reference to this matter in the Ministry's pleadings.

36. On our directions, the Ministry produced the records for our perusal viz., File No. A-12018/1/83-E1/CMT of the Ministry regarding "Amendment to the recruitment rules to the post of Director (F&VP) - DPC for promotion to the post of Director (F&VP)." It confirms the statement of the Addl. Solicitor General that no such assurance, as claimed in the O.A., was given to Hon'ble Supreme Court. The Hon'ble Supreme

Court passed an order on 7.8.1987 directing that any promotion to the post of Director will be subject to the outcome of the appeal. It is seen that, on 13.10.87, the Addl. Government Advocate informed the Ministry the Hon'ble that /Supreme Court has directed the Solicitor General "to ascertain from the Government whether any promotional avenues can be created for the petitioner with prospective effect". The note of the Director (Processing) dated 10.3.1988 indicates that on 2.11.1987 the Hon'ble Supreme Court was informed "that the department would have, in principle, no objection to examine the possibility of creating promotional avenues for the post of Joint Director (Consultancy)". The Addl. Government Advocate again wrote on 2.12.1987 that the Court has directed the Union of India to consider whether the petitioner should be placed in the feeder category so that he becomes eligible for promotion to the post of Director (F&VP) and that this was to be placed before the court.

It is, thus, clear that the question of making amendments in the recruitment rules was taken up by the Ministry in the above circumstances.

37. File No. 9-13/90-F&VP(A) relating to 'Delegation of powers under Food Products Order, 1955' shows that the question of appointing a Director came up because it fell vacant from 1.1.1991 due to the retirement of Shri O.P. Ghera. The claims of the Deputy Directors, including the Respondent No. 4 were considered, as also the claim of the applicant, who had made certain representations consequent upon the aforesaid developments relating to amendment of the rules. The file indicates that there were discussions at the highest level and it was decided that pending the sorting out of the

seniority problems of the Deputy Directors and also the amendment of recruitment rules of Director (F&VP), the work of Director (F&VP) may be looked after by the applicant, in addition to his own duties as Joint Director and that he could be given the powers under the Food Products Order also. As in every such case, the Annexure A-1 order was issued stating that the appointment to hold current charge would be "until further orders". However, it is clear from the file that the arrangement was to continue "pending" the amendment of the Rules. It is this position that stands reflected in the reply of the Ministry to para 4.5 and to sub-para A&B of para 5 of the application of A.K. Paliwal in O.A. 772/91 to which reference has been made in para 8 & 9(Supra). Thus, this/^{is} not a case of giving current charge simpliciter.

38. The learned counsel for the applicant has submitted that in view of the aforesaid reply given in O.A. 772/91 the applicant has a right to continue till the rules are amended and the applicant is also considered for promotion. He further contended that even though the Annexure A-1 order states that the appointment notified therein would subsist only "until further orders", such further order cannot be passed until the rules have been amended and regular appointment made on the basis of the amended rules.

39. At this stage, it is proper to dispose of the preliminary objection regarding res-judicata, which we had held over. From the above narration, it is clear that the cause of action in the present case is entirely different from that which arose in the earlier O.A.

13/86. It arises out of an entirely new development and hence, we now hold that this O.A. is not barred by the principle of res-judicata.(See Jaswant Singh Vs. Custodian of Evacuee Property, N.Delhi, AIR 1985 SC 1096)
40. Reverting back to the contention raised by the learned counsel for the applicant in para 38, he has cited the following authorities:

- (i) AIR 1967 SC 341, Basant Singh Vs. Janki Singh and Ors.
- (ii) AIR 1968(AP) SC 336, Official Receiver, Kurnool Vs. Vale Pedda Mounamma and Others.
- (iii) AIR 1968 SC 772, Seth Mohan Lal and Anr. Vs. Grain Chambers Ltd., Muzaffarnagar & Ors.
- (iv) AIR 1984 SC 1890, Jai Kishan Vs. Mst. Mumtaz Begum.
- (v) AIR 1987 SC 2179, Vinod Kumar Vs. Surjit Kaur.

We have seen these judgements. The decision in AIR 1967 SC 341(Supra) is the most appropriate authority which needs consideration. The Apex Court has observed in paragraph 5 of the judgement:

"Under the Indian Law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true".

41. On the contrary, the learned counsel for the respondents rely on the decision of the Apex Court in Dr. N.C. Singhal Vs. Union of India (AIR 1980 SC 1255) to contend that the reply given in the earlier O.A. does not confer any right on the applicant. It was pointed out that, in that case before the Supreme Court, the appellant referred to a counter affidavit filed

by the Govt. of India in an earlier case and sought to rely on that affidavit to derive support for his contention, in the same manner as the applicant has done in this O.A. Dismissing this contention, the Supreme Court observed as under:

"It does appear that such a stand was taken on behalf of the Union of India but simultaneously it may be noted that the Court has not accepted the stand. And it would be too late in the day to say that on such a stand of the Union of India, if it runs counter to the rule explicit in meaning any argument can be founded or any relief can be claimed unless estoppel is urged. And no such estoppel is claimed. In P.C. Sethi vs. Union of India (1975) 3 SCR 201 at p.210: (AIR 1975 SC 2164), the petitioners urged that the view put forward on their behalf had been admitted by the Government in its affidavit filed in connection with certain earlier proceedings of similar nature and other admissions in Parliament on behalf of the Government. Negativizing this contention this Court held that such admissions, if any, which are mere expression of opinion limited to the context and not specific assurances, are not binding on the Government to create any estoppel".

Hence, it is contended that the reply in O.A. 772 of 1991 should not be taken into account and, at any rate, that does not confer any right on the applicant.

42. We have carefully considered the rival contentions. No doubt, Basant Singh's case refers only to a plaint in a suit. But that ratio will apply to pleadings by parties and will cover the reply to an

application filed before this Tribunal by Government. We are also of the view that the judgement of the Supreme Court in Dr. Singhal's case is distinguishable. The counter affidavits of the Government of India referred to in this decision related to only opinions about an issue of law or about a particular event. Hence, it was held that these expressions of opinion do not bind Government. That is not the situation here. The reply affidavit of the Ministry relied upon by the applicant relates to a question of fact. Even so, the Ministry could have established by production of records that the facts stated in the reply are not correct. Instead, it is established as facts by a perusal of the original records. Hence, the Ministry cannot get away from the submission made by them in O.A. 772/91 and they are bound by them as mentioned above.

43. In the circumstances, we hold that the expression "until further orders" used in the Annexure A-1 notification cannot be read in isolation. It has to be read in conjunction with the reply given by the Ministry to the application filed by A.K. Paliwal in O.A. 772/91. So read, it is clear that the appointment to hold current charge will continue "until the recruitment rules are amended and regular appointment can be made".

44. Before proceeding further, we should consider the contentions of A.K. Paliwal, Respondent No.4. In his reply, he has mainly contended that the appointment of the applicant to hold current charge is bad and fraudulent. That is not relevant for consideration of this O.A. Other than this, his submissions are practically the same as that of the Ministry which we have considered above.

45. Mrs. Meera Chhiber, the learned counsel for Respondent No. 4, raised certain issues which are not germane to the final hearing. They relate to the dissatisfaction with the interim order. Therefore, these submissions do not require any consideration.

46. In other respects she has endorsed the stand taken on behalf of the Ministry. Her special contentions are dealt with now.

47. It is stated that the applicant has come with un-clean hands. He filed this O.A. knowing fully well that the Annexure A-1 order has already been issued, yet he suppressed this fact when he first filed the O.A. In our view, it is for the Ministry, who alone, should be aware as to when the applicant came to know of the Annexure A-1 order, to have taken this objection, if there was any substance. That has not been done.

48. A point is made that the Tribunal cannot direct Government to amend the Rules. This is taken in view of the very first prayer in para 8 of the O.A. seeking a direction to the Ministry to amend the Recruitment Rules as proposed. Reliance is placed on the decisions in 1992 ATC (20) SC 285, State of J&K Vs. A.R. Zakki & Ors. position. This no doubt is the correct/. We have only to add that the prayer has been made in view of the developments which took place after the applicant's appeal was admitted by the Supreme Court. We, therefore, proceed next to consider this very issue.

49. We now consider the question whether the Government of India was bound to amend the rules. The question whether the applicant has any right in this regard has been decided against him in O.A. 13/86. That is under appeal in the Supreme Court. We have also held earlier that there is nothing to establish that the Ministry had given an assurance to the Hon'ble Supreme Court

that the rules would be amended. On the contrary, we have noticed that the Hon'ble Supreme Court only directed Government "to consider" whether it would be possible for Government to place the applicant in the feeder category. There was no further direction that, until the final decision of Government was reported to the court, no further action should be taken in regard to the appointment of Director (F&VP). On the contrary, permission was impliedly granted when the applicant's Miscellaneous Petition for stay of proceedings was disposed of by directing that any appointment made would be subject to the final decision in that appeal.

50. Shri Madhav Panikar, the learned counsel for the Ministry, has pointed out that three proposals to amend the rules were considered as mentioned in the Ministry's reply dated 14.2.1995. The proposal to upgrade the post of Joint Director (Consultancy) by making it equal to the post of Director (F&VP) was rejected by the Ministry of Finance on 5.8.1988. Another proposal for providing that the post of Joint Director (Consultancy) should be filled by promotion from Deputy Director (F&VP) and the post of Director (F&VP) should be filled by promotion from Joint Director (Consultancy), was rejected by the Department of Personnel and Training, on 13.8.91. In that reply, it was stated that the third proposal for downgrading the post of Joint Director (Consultancy) to that of Deputy Director (F&VP) so as to make the applicant eligible for the post of Director (F&VP) had not been finalised till then (i.e. 14.2.95) because of the conditions put-forth by the applicant about the

seniority and other administrative and legal problems involved if the proposal was given effect to. On a later date, the learned counsel for the Ministry submitted that a decision has been finally taken to drop this proposal and that in this connection an additional affidavit has also been filed in the Hon'ble Supreme Court.

51. The learned counsel for the applicant, however, submitted that even so, his appointment by the Annexure A-1 notification could not be terminated. He contended that this would amount to a reversion which is a punishment which cannot be awarded except in accordance with the provisions of Article 311(2) of the Constitution and that he cannot be replaced by an ad hoc employee. He also contended that having worked for such a long time, he was entitled to be considered for promotion.

52. We do not find any merit in these submissions of the learned counsel of the applicant. Now that Government is stated to have taken a decision that no amendment is pending for consideration and that no amendment is to be made, the current charge of the applicant now becomes only a current charge simpliciter. This can be terminated at will by the employer and it will not amount to punishment, particularly when the order does not cast any stigma on him and the applicant is not eligible for promotion or to hold the post.

53. We, therefore, propose to only consider the other plea that in view of his length of service, he has a right to be considered.

54. The learned counsel relies on the decision of the Supreme Court in JT 1992 (1) SC 373 K.S. Pvt. College Stop Gap Lectuerers Association Vs. State of Karnataka & Ors. He particularly relies on direction No. 3 which was issued as stated in para 6 of the judgement. That direction reads as under:

"Any teacher appointed temporarily shall be continued till the purpose for which he has been appointed exhausts or if it is in waiting of regular selection then till such regular selection is made".

55. We have seen that case. The allegation therein was against the exploitation of helpless teachers by the Private Managements of School. The teachers were deprived of their rights, though they continued to work for eight to ten years. Their services used to be terminated from time to time and they were not paid full salary. The Court not only deprecated this practice of the management but also adversely commented on the inability of the State Government to set right this evil practice. The above direction has to be understood in this context. It commanded that there shall no more be any artificial termination if work remains to be done. The most important point to note is that the appellants were teachers otherwise eligible for regular appointment. On the contrary, in the present case, the applicant is, admittedly, ineligible for consideration for appointment as a Director (F&VP).

56. Likewise, the reliance of the learned counsel on the judgement of the Supreme Court in State of Haryana & Ors. Vs. Pyara Singh & Ors., JT 1992(5) SC 179 is also of no avail. The court has specifically stated in para 46 that an unqualified person ought to be appointed only when qualified persons are not available for recruitment or selection. That is not the situation today. Deputy Directors eligible for promotion are available at present. It was further held that if, for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation, provided he is eligible and qualified according to rules. That stipulation deprives the applicant of the benefit of that judgement.

57. The only other relevant decision for consideration is Jacob Puthuparambil Vs. Kerala Water Authority (AIR 1990 SC 2228). That decision is distinguishable. Rule 9(a)(i) of the Rules empowers the appointing authority to appoint a person temporarily, otherwise than in accordance with the rules, if it is necessary in public interest and where an emergency had arisen to fill up post immediately. If any person is appointed under this clause, he will be liable to be replaced by a qualified person. However, clause (e) of Rule 9 provides for the regularisation of the service even such a person (i.e. appointed under Rule 9 (a)(i)) if he had completed continuous service of two years on 22.12.1973, notwithstanding anything contained in the rules. Thus, that is a case where the rules themselves specifically authorised the regularisation of the service of a person who, though not qualified, had worked for two years. That is not the situation in the present case.

58. There is only one another aspect to which reference has to be made before we conclude. The applicant has alleged malafide against the second respondent. There is an averment that a complaint was engineered by the fourth respondent and the second respondent took advantage of this to process the case for the appointment of the fourth respondent and the termination of the current charge of the applicant. That complaint is contained in the second respondent's memo dated 11.2.94 to the applicant. We do not see any merit in this allegation because, a perusal of the original records show that as early as in 1992, this respondent had clearly taken the stand on the file that the claim made by the applicant is unjust and that amendment of the rules to make him eligible for consideration would be doing an injustice to others who are in the department. Hence, the charge of malafide has no basis.

59. The parties had referred to a large number of other authorities. For the sake of record, we have mentioned them in the footnote. We have not felt it necessary to consider the authorities mentioned in the footnote below because they are irrelevant or they are unnecessary.

By Applicant's Counsel.

1. AIR 1968 SC 418; The Municipality of Taloda Vs. The Charity Commissioner, Bombay & Ors.
2. AIR 1986 SC 872, Express Newspapers Pvt. Ltd. Vs. Union of India.
3. AIR 1988 SC 1033, Raghunath Prasad Singh Vs. Secy, Home(Police) Department, Government of Bihar & Ors.
4. AIR 1990 SC 1402, Km. Neelima Misra, Vs. Dr. Harinder Kaur Paintal & Ors.

60. We now summarise our conclusions in regard to O.A. 2547/94 as follows:

(a) The current charge given to the applicant in terms of the Annexure A notification is no doubt to continue "until further orders".

(b) That notification was issued because, firstly, no Deputy Director was ripe for consideration and secondly, amendments to the Recruitment rules, the object of which was to make the Joint Director (Consultancy) also eligible for promotion as Director (F&VP), were pending consideration. The current charge was to last until regular appointment was made after such amendments to the rules.

*

5. JT 1990(2) SC 135, Vinay Kumar Verma & Ors. Vs. The State of Bihar & Ors.
6. AIR 1991 SC 534, The State of Sikkim & Ors. Vs. Sonam Lama & Ors.
7. AIR 1994 SC 1889, The Food Corporation of India, Vs. New India Assurance Co. Ltd.
8. (1994) 28 ATC 518, Puranjit Singh Vs. Union Territory of Chandigarh & Ors.

By Counsel of Respondent No.1.

1. 1968(2) SLR 369, M. Maridev (M. Marayappa) Excise Inspector Versus The State of Mysore.
2. 1994(28) ATC 306, Bhagat Singh Vs. UOI & Ors.

By Counsel for Respondent No.4.

1. AIR 1983 SC 1015, Welcome Hotel & Ors. Vs. State of A.P.
2. AIR 1989 SC 29, Umesh Chandra Gupta & Ors. Vs. Oil and Natural Gas Commission & Ors.
3. 1990(2) SLJ (SC)95, The District Collector and Vizianagaram & Anr. Vs. M. Tripura Sundari Devi.
4. 1992(3) SCALE 121, The Ramjas Foundation & Ors. Vs. The Union of India & Ors.
5. JT 1993 (6) SC 331, S.P. Chengalvaraya Naidu Vs. Jagannath.
6. 1994(28) ATC 667, A.S. Radhamani (Smt.) & Ors. Vs. Chief Commissioner of Income Tax & Ors.
7. 1994(27) ATC 20, Dr. Mahabal Ram Vs. UOI & Ors.

(c) Government have not assured the Hon'ble Supreme Court that such amendments shall be made to the Rules. They only undertook to consider such amendments.

(d) The fourth respondent, a Deputy Director has become ripe to be considered for promotion under the Rules.

(e) Government have stated that all the possible amendments to the Rules to enable the applicant also to become eligible for promotion have been considered and given up. There is now no proposal to amend the Rules.

(f) In the circumstance, it is now open to Government to terminate appointment of the applicant to hold current charge.

(g) The termination of the Annexure A order was premature and, therefore, bad in law and hence has to be quashed.

61. It is only to be added that after the cases were reserved for orders, Government filed an unnumbered Miscellaneous Application (Filing No.6179) on 7.8.95 to take on record an order dated 4.8.1995 with an additional affidavit, by which the 4th respondent was reverted as Deputy Director (F&VP) in terms of their office order dated 14.12.1994 i.e. impugned Annexure A order. They also cancelled by the same order another Office Order dated 20.6.95. The applicant also filed M.A. 2021/95 enclosing the copies of the orders dated 4.8.1995 of Government, referred to above, and copy of the order dated 28.6.1995 referred to therein. The later order dated 28.6.1995 was only an order relating to

U

assigning of functions to the 4th respondent in pursuance of our interim order and has no other bearing. In both the M.As, the prayers are that these documents be taken on record. We have heard the parties. No other prayers have been made. The documents, therefore, are taken on record. We only wish to add that the order dated 4.8.1995 now passed by Government will have no effect on the conclusion reached by us as mentioned in sub-para (g) of para 60.

62. In the circumstances, the impugned Annexure A order which impliedly terminates the current charge of the applicant given to him by the Annexure A-1 notification, by directing him to hand over charge to Respondent No.4, being premature, is bad in law and is quashed. We make it clear that it is open to the Ministry to terminate the current charge given to the applicant by the Annexure A-1 notification dated 25.1.1991 with prospective effect after recording that Government has decided not to amend the rules to make him eligible for consideration for promotion. The interim order is vacated. No costs. O.A. 2547/94 is disposed of as above at the admission stage.

63. Copies of this order should be placed in both cases.

A. Vedavalli
25/10/95
(Dr. A. Vedavalli)
Member (J)

N.V. Krishnan
25/10/95
(N.V. Krishnan)
Acting Chairman