

Central Administrative Tribunal, Principal Bench, New Delhi

O.A.No.2786/2004

New Delhi, this the 19th day of November, 2004

Hon'ble Mr.Justice V.S. Aggarwal, Chairman  
Hon'ble Mr.S.K. Naik, Member(A)

Miss Neera Gupta,  
R/o 1166, Gali Samosan,  
Farash Khana,Delhi-6

....Applicant

(By Advocate: Shri R. Venkatramani,Sr.counsel with Shri S.M.Garg,counsel)

Versus

1. Union of India,  
Through the Secretary,  
Ministry of Law,Justice & Co. Affairs,  
Department of Legal Affairs,  
Shastri Bhawan,New Delhi

2. Income Tax Appellate Tribunal,  
Through its President,  
Lok Nayak Bhawan,Khan Market,  
New Delhi

3. Shri P.K. Malhotra,  
Judicial Member,  
Income Tax Appellate Tribunal,  
R/o K-31,Second Floor,  
South Extension Part II  
New Delhi-49  
Presently on deputation as  
Legal Adviser,Govt. of Guiana(Africa)

....Respondents

Order(Oral)

Justice V.S. Aggarwal, Chairman

Applicant is a practicing lawyer by profession. Respondent no.1 had advertised two posts of Judicial Member in the Income Tax

*V.S. Ag*

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Appellate Tribunal (for short 'ITAT'). The applicant had applied for the same. Interviews were held from 10<sup>th</sup> to 13<sup>th</sup> November, 2002 by a Committee under the Chairmanship of Hon'ble Mr.Justice S.S.M. Quadri. The applicant appeared in the interview. She was not selected.

2.Respondent no.3 Shri P.K. Malhotra had been selected and according to the applicant, he joined as a Judicial Member on 19.9.2003. By virtue of the present application, the applicant seeks for quashing and setting aside of appointment of respondent no.3 as Judicial Member on the ground that he was not properly selected and that on accepting foreign assignment, he has ceased to be a Member of the said Tribunal and further to declare that respondent no.3 could have gone on a foreign assignment in his capacity as a Member of the Indian Legal Service. Once he has gone as such, he cannot take the benefit of being a Member of the Tribunal. She also seeks that an order should be passed to appoint her as a Judicial Member, contending that so far as she is informed, her name is at serial no.1 in the panel.

3.We have heard the applicant's learned counsel.

4.It had been pleaded that performance of the applicant was excellent in the interview but still she has not been selected.

5.So far as this particular argument is concerned, it has to be stated to be rejected. Interviews had been held under the Chairmanship of Hon'ble Mr.Justice S.S.M. Quadri. It is for the committee constituted

*Ms Agg*

to consider the merits of the candidates. Unless there are other factors that are shown or proved, the scope for interference would not arise.

6. It has been pleaded further that to the best of her knowledge, respondent no.3 was not interviewed with others and it is not clear when he was called for the interview.

7. So far as this particular assertion is concerned, it is vague because it is not definitely being pleaded that in fact respondent no.3 had not come for the interview. If such a plea had been raised, it might have prompted us to look into the matter. In the present case, in fact in the representation filed by the applicant copy of which is Annexure P-5 dated 19.5.2004 addressed to the Minister, Law, Justice and Company Affairs, such a plea even has not been taken. Keeping in view the nature of vague pleas, it can hardly be taken to be an averment of fact. Even this plea must fail.

8. The main argument advanced was that respondent no.3, after joining as a Member of the ITAT had gone for a foreign assignment and, therefore, he has ceased to be a Member of the said Tribunal. Applicant being no.1 on the panel should be appointed. Reliance was being placed on the office memorandum of 14.5.87 which reads:

"The undersigned is directed to refer to this Department's OM No.39021/18/94-Estt.(B) dated 6.2.1985, 13.6.1985 and 20.11.1985 (Copies enclosed) and to say that according to the existing procedure, the reserve lists prepared with effect from 1.1.1985 were to be operated only to fill replacement vacancies. Earlier to this the reserve lists were being used both for replacement vacancies and fresh vacancies of identical nature. Some of the ministries

*Ms. Ag*

have reported difficulties in filling up of vacancies caused in a situation where the recommended candidate joined the post of a short period and then resigned or where the vacancy occurred on account of the death of the candidate. It was pointed out that the posts could not be kept vacant for a long time till the next recruitment took place.

2. The matter has been examined in consultation with UPSC and it has been decided that the reserve lists may be operated in cases where a vacancy is created by a candidate resigning the post or in the event of his death, within a period of six months from the date of his joining the post subject to the condition that such an operation of the lists should be limited in respect of statutory posts and those of scientific, technical, academic or medical nature or other similar nature where it may not be possible to keep the post vacant till the completion of fresh recruitment or to make local arrangements.

3. In other types of cases also where the post could be manned normally on officiating basis or by integral arrangements, request of the ministries/ departments for operation of reserve lists will be considered by the Commission but only when it is apparent that making of such arrangements would not be feasible and the posts also cannot be kept vacant till the candidates from next recruitment process are available.

4. These instructions would apply in respect of vacancies arising on or after 1.1.1986."

9. Perusal of the same clearly shows that it does not support the case of the applicant. This is for the reason that as per paragraph 2 of the same, even if we assume that there is a vacancy, it should be by a result of resignation or death of the concerned person. This should arise within six months of his joining and further that it is limited to statutory posts of scientific and technical nature. The applicant cannot therefore rely on the said office memorandum because neither respondent no.3 has resigned and admittedly he has gone on some foreign assignment.

*As Ag*

10. All the same, it was contended that respondent no.3 could not go on foreign assignment from the Indian Legal Service and once he has so gone, he must be deemed to have vacated the post.

11. Admittedly, respondent no.3 had been appointed as Judicial Member in the ITAT. He had taken charge of the post and it is not disputed that he worked for three months. It can only be stated that a vacancy has arisen if he has been removed from service in accordance with law. Otherwise it cannot be termed that there is a vacancy or a post that has fallen vacant. When he has not been removed, the vacancy has not arisen and the claim of the applicant that she should be appointed and considered in this regard, falls to the ground.

12. We are conscious of the fact that this Tribunal cannot entertain Public Interest Litigation but still we can only observe that the Secretary Law may look into the fact as to how respondent no.3 has gone on foreign assignment which according to the applicant has nothing to do with his duty as Member, ITAT and that it was concerned with Indian Legal Service which he had left.

13. No other argument has been advanced.

14. For these reasons, the O.A. being without merit must fail and is dismissed in limine.

Naik  
( S.K. Naik )  
Member(A)

/dkm/

V.S. Aggarwal  
( V.S. Aggarwal )  
Chairman