

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

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O.A. NO. 643/2004

New Delhi, this the 01st day of September, 2006

HON'BLE MR. V.K. MAJOTRA, VICE CHAIRMAN (A)
HON'BLE MR. MUKESH KUMAR GUPTA, MEMBER (J)

Smt. Anita Gupta,
... APPLICANT
[By Advocate : Shri Manuj Aggarwal]

VERSUS

1. Ministry of Human Resource &
Development & Ors. ... RESPONDENTS
[By Advocate: Shri R.K. Singh with Ms. Deepa Rai]

1. To be referred to the Reporter or not. Yes / No
2. To be circulated to other Benches or not. Yes / No.


(Mukesh Kumar Gupta)
Member (J)

(31)

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HON'BLE MR. MUKESH KUMAR GUPTA, MEMBER (J)

Smt. Anita Gupta,
T.V. Producer of NCERT,
R/o B-1/26, Vasant Vihar,
New Delhi ... APPLICANT
[By Advocate : Shri Manuj Aggarwal]

VERSUS

1. Ministry of Human Resource & Development, Through Its Secretary (Education) Government of India, Shastri Bhavan, New Delhi
2. National Council of Education & Research & Training (NCERT), Through its Director, Sri Aurobindo Marg, New Delhi-110016
3. Central Institute of Education Technology (C.I.E.T), Chacha Nehru Bhawan, Sri Aurobindo Marg, New Delhi – 110 016
4. Smt. Uttam Puri, TV Producer Grade-I, CIET Chacha Nehru Bhawan, Sri Aurobindo Marg, New Delhi R/o Akashwani Apartments, Maur Vihar, New Delhi
5. Ms. Asha Devi, TV Producer Grade-I, CIET, Chacha Nehru Bhawan, Sri Aurobindo Marg, New Delhi – 110 016 ... RESPONDENTS

[By Advocate: Shri R.K. Singh with Ms. Deepa Rai]

O R D E R

By Mukesh Kumar Gupta:

In this second round of litigation, Smt. Anita Gupta seeks relief, which read as under:



"I) Issue directions to the Respondent No.1-3 to forthwith from year-wise select list for each respective years commencing from 1990 and the hold DPC for each year from 1990-till today in consonance with the law laid down by Hon'ble Supreme Court of India;

ii) issue directions thereby quashing the orders/finding of the D.P.C. held on 05.06.1998 and further quash the promotion given to Respondent No.4 against the post of T.V. Producer Grade-I in contravention of the rules and regulations governing the promotion of the employees and the criteria laid down therein;

iii) pass an order/direction holding that the DPC had no material and/or material was withheld from the DPC to give unreasonable benefit to Respondent No.4 who was not entitled for the promotion as per the rules and regulations;

iv) issue directions to the Respondents No.2-3 to reconstitute the review DPC and promote the Petitioner against the other vacant post of TV Producer Grade-I;

v) pass orders to summon the record of two DPCs held in the years 1991 & 1998 to high light that respondents have not made year-wise select list in accordance with DOPT norms existing in OMs dt. 10/4/89, 27.3.97, 2/7/97, 23/1/98, 25.5.98.

vi) pass orders to maintain promotion quota since 1990 and to declare seniority of TV, PRODUCER Gr I according to year-wise select list.

vii) Direct the Respondent NO.2 maintain the Quota System of 50:50 as required in rule.

viii) Direct the Respondent No.1 & 2 to determine the vacancies in accordance with their rule in Section 2.5, 3.1, 3.2, 6.4.1, 6.4.3 of DOPT

ix) Direct the Respondent No.1 & 2 to draw a seniority list in accordance with the rules for the years 1990 to 1998.

x) Respondents be directed to enforce in accordance with law as laid down in recruitment rules and DOPT rules in the context of the present matter.

xi) Respondents be directed to place the entire facts with respect to the service record including the Vacancies Register and Roster Register of all the officers before the tribunal for adjudication in the matter."

2. On an earlier occasion, she had initially filed Civil Writ Petition No.4374/1998 before Hon'ble Delhi High Court, which was transferred to this Tribunal & registered as TA No.5/2002, seeking quashing of proceedings of DPC held on 5th June, 1998 vide which Respondent No.4,



i.e. Smt. Uttam Puri, had been recommended and later promoted as TV Producer Grade-I, which was disposed of vide order dated 13.01.2003 with following directions:-

"6. In view of the above, we dispose of the present application with the following directions:

(a) It is directed that respondent No.2 would consider if a vacancy in the promotee quota had arisen in the year 1990 or in any case in the year 1995 or whichever year,

(b) If on the said date any vacancy arose, respondent No.2 would consider who are the persons eligible to be considered for promotion as per the Recruitment Rules,

(c) In case the applicant is the sole person eligible to be considered, her name shall be considered in accordance with the Recruitment Rules.

7. The above exercise should be completed within four months from the date of receipt of a copy of this order. In case there are other eligible persons on the relevant dates, they shall also be considered. We make it clear that nothing said herein shall be taken as an expression of opinion that the applicant must be necessarily promoted because she has only a right to be considered if she is eligible as the sole person to be considered in the relevant year."

3. The basic grievance had been that she was senior-most TV Producer Grade-II and that in year 1991 a vacancy in grade-I, promotee quota fell vacant, on which date she was the sole eligible person and ought to have been considered for promotion. Irrespective of said fact, on 30.07.1996, according to Respondents' letter, another vacancy also fell vacant in promotee quota, when Respondent No.4 was not eligible because she did not satisfy the condition of required qualification and applicant alone could have been considered. DPC meeting had not been held till 5.6.1998 and, therefore, year-wise panel should have been drawn. Since the said directions were not complied with, applicant instituted CP No.276/2003, which was dismissed vide order dated 29.09.2003. The said order also disposed of MA No.2066/2003 in TA 5/2002. Prior to the said date, applicant had submitted representation dated 22.01.2003, which was rejected on 12.05.2003, and, therefore,



Writ Petition (Civil) No.3898 of 2003 was filed, which was withdrawn with liberty to move application before this Tribunal. Similarly, RA 211/2003 filed in TA 5/2002 was also withdrawn with liberty to file a contempt application or fresh application, as deemed appropriate. The above Contempt Petition was sequel to such orders.

4. It is basically order dated 12.05.2005, rejecting her claim, which is the subject matter of present OA. The facts stated are that she joined NCERT on 29.10.1980 as T.V. Producer Gr.III. In addition to basic qualification required for said post, she also holds a Certificate of having attended the training course. She was sent by Respondents to Boston University, School of Public Communication BOSTON, U.S.A. for advanced recognized training in "T.V. Production and Programming" in the year 1984, which was successfully completed. Later, she was promoted to next higher grade of T.V. Producer Grade-II w.e.f. 21.08.1985. Under the rules in vogue, she became eligible for further promotion to the post of T.V. Producer Grade-I in August 1990 on completion of 5 years of regular service. She had an excellent and meritorious service record. In June, 1989 Shri Dharam Parkash, T.V. Producer Gr-I vacated his post. In September 1990, another two vacancies under 50% promotional quotas were available. She had made representation for consideration of her candidature for promotion to said post, which was ignored. Instead, the vacancy was diverted and one promotional post was advertised for direct recruitment. However, it was not filled. In the year 1990 applicant was the only eligible person having satisfied all eligibility requirements under the extant Recruitment Rules for the post of TV Producer Gr-I. Subsequently, in February 1991, another T.V. Producer Gr-II i.e. Respondent No.5 herein was promoted on ad hoc basis as T.V. Producer Gr-I. In December 1991 Ms.Madhubala Julka vacated her post of T.V. Producer Grade-I. In 1995 Shri Padam





Singh, T.V. Producer Gr-I was promoted as Film Producer and therefore yet another vacancy became available. Respondents again advertised about filling up of one post under promotee quota through direct recruitment, but it was not filled up.

5. In terms of Rules notified on 14.02.1979, 50% posts for T.V. Producer Gr-I are to be filled by promotion. Upto the year 1983, five posts were sanctioned. Despite applicant being senior-most TV Producer Gr-II and eligible as per Recruitment Rules, she was ignored for promotion to Gr-I. A DPC was held on 05.06.1998 to fill up two posts of TV Producer Grade-I, which arose in the year 1995, but DPC made selection for year 1998 by enlarging zone of consideration in violation of DOP&T Rules and Recruitment Rules in vogue inasmuch as no technical person was included in the said Selection Committee. DPC committed yet another mistake by not considering 8 years' ACR from 1986 to 1994 for the vacancy which fell vacant in the year 1995, which prejudicially affected her fundamental rights. Shri Manuj Aggarwal, learned counsel for applicant strongly urged following contentions:-

- (a) This Tribunal while passing order in TA No.5/2002 on 13.01.2002 did not give its finding on the prayer made by her challenging findings of DPC held on 05.06.1998;
- (b) While rejecting applicant's request vide impugned communication dated 12.05.2003, respondents failed to comply direction of this Tribunal vide order dated 13.1.2003 and rejected such request in a mechanical manner without adverting to rules and regulations;
- (c) Applicant became eligible in August 1990 for the post of TV Producer Grade-I on completion of 5 years of service, & Respondents were required to consider ACRs for the years

1986-1994, i.e. ACRs for 8 years, in terms of Recruitment Rules and in accordance with OM dated 25.05.1998, which was in force on the date of DPC when the DPC met on 05.06.1998. Respondents vide impugned DPC enlarged zone of consideration to her disadvantage and to illegally favour Respondent No.4.

(d) DOP&T OM dated 10.04.1989 as well as law laid down in **Union of India vs. N.R. Banerjee & Ors**, 1997 SCALE (SC) 235: 1997 (9) SCC 287, clearly enjoins that when DPC is not held for a number of years, year-wise panel should be prepared. Admittedly, DPC had not been held during year 1995 – 1997 and no year-wise panel was prepared.

(e) Respondents failed to follow the law laid down in **Vinod Kumar Sangal vs. Union of India & Ors**. (1995) 4 SCC 246. Respondents also failed to correctly implement rules regarding promotion in terms of DOP&T OM dated 27.03.1997 whereby the word “selection-Cum-Seniority” has been substituted by “Selection by Merit”.

(f) Respondents failed to take into consideration the fact that applicant has unblemished & good service record and had never been communicated any adverse remarks. DPC had no material before it to arrive at a different conclusion except to promote her because of outstanding work and achievements.

6. Respondents resisted the claim laid raising preliminary objections to the effect that applicant's earlier claim in Civil Writ Petition No.374/1998 (TA 5/2002) was based on same facts & had already been disposed of and, therefore, same issue cannot be raised afresh by the

present OA. In other words, present OA is barred by res judicata. Earlier applicant had challenged promotion of Respondent No.4 and now through this OA applicant has challenged promotion of Respondent No.5 too. This issue has already been concluded and settled both in TA No.5/2002, as well as in OA No.682/2003 [**Karan Singh vs. NCERT**] dismissed on 28.11.2003. On merit, it was stated that OA is based on premises that there were two posts of TV Producer in 1998, which is not correct. Vacancy in grade of TV Producer Gr-I first arose in the year 1991 when Shri Dharam Prakash, who proceeded on deputation w.e.f. 16.06.1989 to IIT, Delhi, later on resigned on 31.12.1991. Respondents had convened DPC in March, 1991 to fill up said vacancy and it considered cases of Smt. Asha Devi (respondent 5 herein) as well as of the applicant. On consideration of service record etc., DPC recommended Smt. Asha Devi for promotion, which fact was in her knowledge. Neither she made representation against it nor challenged her promotion and, therefore, said settled service position cannot be unsettled at this distant point of time. The other vacancy arose when Smt. Madhu Bala Jhulka resigned in 1991, which was a reserved post and question of offering it to a general category candidate did not arise at all. Next time vacancy arose in the year 1995, which was reserved for ST, after Shri Padam Singh, an SC candidate who was occupying the post against ST quota since 1986 was selected and promoted as Film Producer on 04.09.1995. This vacancy was advertised for direct recruit twice to fill up the vacancy in 1996, but since no suitable candidate was available from SC category, the post remained unfilled. The said vacancy, being a back-log vacancy since 1986 for ST, was reserved for said category until 02.07.1997. On introduction of post based roster w.e.f. 02.07.1997, said post fell into general category within promotion quota and hence a DPC was convened to fill up said vacancy. The DPC



was held on 05.06.1998, which had recommended Respondent No.4. Accordingly, said Respondent No.4 had been promoted.

7. Applicant contested the stand of Respondents by filing detailed rejoinder affidavit, contending that they have not cared to apply and reconsider post based roster starting from earliest appointment. Respondent No.4 did not fall in the zone of consideration in the year 1995 for which year Respondent-NCERT deliberately failed to make year-wise select list in conformity with the law laid down by Hon'ble Supreme Court in **R.K. Sabharwal & Others v. State of Punjab & Others**, 1995 (2) SCC 745, and other subsequent judgments. When belated DPC was held in the year 1998, it was required to make year-wise select panel for employees who were within the zone of consideration in said year. Even Para 6.4.1 of OM dated 10.04.1989 requires drawing of year-wise panel. This aspect has been reiterated by Hon'ble Supreme Court in **Union of India & Ors. vs. N.R. Banerjee & Ors.** (supra), DPC convened on 05.06.1998 considered Respondent No.4, extending zone of consideration from the year 1995 to 1998, which is against all cannons of justice. If year-wise panel was prepared in the year 1995 & applicant would have faced no competition as nobody else was eligible in the feeder cadre for promotion during that period.

8. Applicant thereafter filed M.A. Nos. 237/2005 and No. 1214/2005 placing numerous documents on record & summoning the records. Reply was also filed by Respondents to said MAs & also filed additional affidavit and MAs.

9. We heard learned counsel for parties and perused the pleadings & material placed on record carefully.

10. As far as the objection regarding res judicata is concerned, we do not find any substance inasmuch as the issue raised vide TA No.5/2002

had not been conclusively adjudicated and determined vide order dated 13.01.2003 disposing of the aforesaid TA. In these circumstances we proceed on merits.

11. The short question, which needs consideration in present case, is two fold. Firstly, whether Respondents complied with the direction of this Tribunal dated 13.01.2003 while passing impugned communication dated 12.05.2003? Secondly, the vacancy which was filled up by promoting Respondent No.4 pertains to the year 1995 or 1998? In our considered view, these two questions are inter linked and accordingly the same would be dealt with hereinafter.

12. In reply Para-5, filed on 26.07.2004, Respondents had categorically asserted as follows:-

"In 1997, upon the introduction of the Post Based Roster, w.e.f. 02-07-97, this post, earlier within the DR quota, reserved for ST, fell into the General Category within the Promotion quota, and hence, accordingly a DPC was convened for filling this post. The applicant was again considered alongwith others, and Smt. Uttam Puri (respondent No.4) was promoted in 1998 upon the recommendations of the DPC." (emphasis supplied)

In earlier reply Para-4, it was also stated that said vacancy came into existence on promotion of one Shri Padam Singh as Film Producer on 04.09.1995. The said reply or even subsequent affidavits filed by Respondents are completely silent and did not disclose as to when Respondent No.4 became eligible for the said post. Applicant's specific stand had been that Respondent No.4 was not eligible for promotion in the year 1995 to the post of T.V. Producer Grade-I. It is an admitted fact that post based roster came into operation by virtue of the law laid down by Hon'ble Supreme Court in **R.K. Sabarwal vs. State of Punjab** (supra) which judgment had been rendered on 10.02.1995. We may note that this is a Constitution Bench judgment and in Para-11, it was observed that :



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"We, therefore, find considerable force in the second point raised by the learned counsel for the petitioners. We, however, direct that the interpretation given by us to the working of the roster and our findings on this point shall be operative prospectively." (emphasis supplied)

13. In the said judgment, it was also observed that the roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled in, numerical test of adequacy is satisfied and thereafter the roster does not survive. The expressions 'posts' and 'vacancies', often used in the executive instructions providing for reservations, are rather problematical. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

14. The interpretation advanced and the law laid down in aforementioned judgment, in our considered view, has to be operative from 10.02.1995 when said judgment had been rendered, and merely because the executive instruction was issued belatedly and took around two and a half years, like in the present case, it cannot be a cause or reason to contend and interpret that operation of said judgment is either deferred or postponed till executive instruction is issued by nodal agency.

Under Article 141 of the Constitution of India, the law laid down by the



apex Court is binding on all courts. Article 144 enjoins courts to aid in the enforcement of such law. If we examine date of vacancy in the above context, as admitted by Respondents, the vacancy which fell vacant on 04.09.1995 was of general category within the promotion quota. As such, there remains no doubt in our mind that it has to be filled treating it as a vacancy of the year 1995.

15. A specific contention has been raised by applicant in rejoinder filed to MA No.1214/2005 that Respondent No.4 became eligible for the post in question in May 1996 and applicant was denied promotion to said post for extraneous considerations & deliberately, which remained uncontroverted despite additional affidavit filed on 21.03.2006. A further contention was also raised that she had submitted representation dated 10.01.2005 to Sathyam Committee against denial of promotion and said committee vide communication dated 09.06.2005 informed her that substance was found in her representation. Respondents in their reply affidavit dated 25.08.2005 stated that based on recommendations of said committee a proposal to review her case is under process. During the course of hearing, we were not informed anything on this aspect. Respondents also detailed applicant's performance, as graded in various ACRs, namely for years 1985, 1986, 1987, 1988-89, 1989-90, 1990-91 wherein she was graded as "V.G.". In ACRs for years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98 she was graded as 'Good', 'V.G.', 'Good', 'Good', and 'Good' respectively. No details were provided in respect of ACRs for years 1991-92 and 1992-93.

16. Shri Manuj Aggarwal, learned counsel for applicant also relied upon a Division Bench judgment of this Tribunal dated 31.01.2001 in OA No.1033/2000 – **Sh. T.R. Nehra & Anr v. Union of India & Ors.**, wherein it has been held that because of delay in holding DPC, officials cannot be made to suffer and following the ratio laid down in **N.R.**



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Banerjee (supra), preparation of yearly panel was held to be a mandatory requirement.

17 On taking a cumulative view of the entire matter, we are of the considered view that vacancy of T.V. Producer Grade-I, which had fallen vacant on promotion of Shri Padam Singh on 04.09.1995 had to be taken as a vacancy fallen on the said date meant for general candidate under promotee quota and was required to be filled as a vacancy of 1995-96. Merely because there was delay in convening & holding DPC, which was held on 05.06.1998, respondent No.4 could not have been considered and promoted, as she was not eligible till May 1996. In other words, there had been no "fair consideration" of applicant's candidature, which is a mandatory requirement as held by Hon'ble Supreme Court in 2000 (8) SCC 395 **Badri Nath vs. Tamil Nadu** wherein it had been observed thus:

"58. From the above Judgments, the following principles can be summarized:

(1) *Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.*

xxxxxxxxxx" (emphasis supplied)

18. As aforesaid respondent No.4 was not within the zone of consideration being not eligible in said year, will not make her eligible to be considered merely because of delay in holding such DPC. One has a right of consideration provided he/she comes within the zone of consideration. By delaying holding of DPC, Respondents have virtually enlarged the zone of consideration, which obviously has benefited Respondent No.4, which is impermissible in law. Directions issued by this Tribunal on 31.01.2001 have not been examined and complied with in its correct perspective by Respondents as reflected vide



communication dated 12.05.2003, which only deals with vacancy of year 1990 whereby Respondent No.5 had been promoted. Respondents failed to examine factual aspects and implication of vacancy, which had fallen vacant in September 1995. On bestowing our thoughtful consideration to all aspects, we have no hesitation to conclude that Respondents' action fell short of fairness and the procedure adopted by them being illegal & arbitrary cannot be sustained in law. Accordingly DPC proceedings dated 05.06.1998 cannot be sustained in law and are held to be illegal, arbitrary and unjust. Consequently, Respondent No.4's promotion to said post also cannot be sustained and is accordingly quashed and set aside. Respondents are directed to consider applicant against the vacancy which had fallen vacant on 04.09.1995 and treating said vacancy for year 1995-96, convene a review DPC, consider applicant and any other person, if eligible in terms of Recruitment Rules. If applicant is found fit, they should regulate her promotion accordingly, with all consequential benefits. This exercise should be completed within a period of two months from the date of receipt of a copy of this order.

19. OA is accordingly allowed. In the facts and circumstances of the case, there shall be no order as to costs.



(Mukesh Kumar Gupta)
Member (J)



(V.K. Majotra)
Vice Chairman (A)