

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 174/90 199
L.A. No.

DATE OF DECISION 4.12.91

P.P.Balasubramanian Applicant (s)

Mr. T.Ravikumar Advocate for the Applicant (s)

Versus

Union of India rep. by Respondent (s)
Secretary, Min. of Agriculture
and 3 others.

Mr. K.Prabhakaran, ACGSC Advocate for the Respondent (s)
(for R1 to 3)

CORAM: Mr. M.R.Rajendran Nair (for R4)

The Hon'ble Mr. N.V.Krishnan, Administrative Member

The Hon'ble Mr. N.Dharmadan, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement?
4. To be circulated to all Benches of the Tribunal?

JUDGEMENT

(N.V.Krishnan, AM)

This case was heard along with OA 418/91 in respect of one of the two issues raised herein. At a very late stage in this case, the applicant in OA 418/91 sought and was granted permission to implead himself as an additional respondent. Nevertheless, the applications are being disposed of separately because my learned Brother has some reservations about the conclusions reached by me in this case on one of the two issues raised herein.

2. The applicant is a Deputy Director (Development) in the Directorate of Cashewnut Development, a subordinate office of the Ministry of Agriculture, since 18.5.83. Dr. C.K.George, Director, Directorate of Cocoa, Arecanut and Spices Development, Calicut was also holding additional

charge of the post of Director, Directorate of Cashewnut Development, Cochin. The service of Dr. C.K. George was placed by Annexure-D order dated 27th September, 1984 at the disposal of the Department of Agriculture and Co-operation for appointment as Joint Commissioner (Horticulture fruit) in that Department. Therefore, the applicant, by the same order, was directed to "look after the current duties of the post of Director in the same Directorate, in addition to his own duties till regular arrangements are made." The regular arrangements to post ~~of~~ a full time Director in the Directorate of Cashewnut Development, Cochin are yet to be made and the applicant is, in the meanwhile, continuing to hold charge of the two posts, viz. his own post of Deputy Director and the additional charge of Director of Cashewnut Development. His first grievance is that, despite his holding charge of this additional post for such a long time, he has not been paid any additional remuneration or allowance. He, therefore, seeks a direction to the respondents to pay him such additional remuneration in terms of the provisions contained in FR 49.

3. His second grievance relates to his non-appointment as Director of Cashewnut Development. He seeks a direction to the respondents not to reserve this post for candidates belonging to Scheduled Tribe and appoint him. As against this, in OA 418/91, filed by Shri Sant Lal, Deputy Director (Marketing) in the Directorate of Cashewnut Development, the direction primarily sought is that the post of Director in the Directorate of Cashewnut Development, Cochin ought to be filled up only by direct recruitment and that too, after reserving it for Scheduled Caste/Scheduled Tribe in accordance with the Government of India, memorandum dated 25th April, 1989 exhibited as Annexure-3 in that application.

4. In regard to the claim for additional remuneration, the respondents have, in their reply, denied the applicant's claim for additional remuneration under FR 49 on the ground that he was not appointed to the post of Director, which alone would have entitled him to additional remuneration under FR 49. On the contrary, he "is only looking after the current duties of the post of Director and not the statutory functions" and hence, not eligible to the grant of any allowance. This stand was ~~not~~ reiterated by the learned counsel for the respondents during arguments.

5. I have carefully considered the rival contentions.

6. FR 49 regulates the pay of persons holding a post in a substantive or officiating capacity, who has been ordered to officiate, as a temporary measure, in one or more other independent posts. Sub clause (iv) states that "no additional pay shall be admissible to the Govt. servant who is appointed to hold current charge of the routine duties of another post or posts, irrespective of the duration of the additional charge". (emphasis added) The respondents are relying on this clause to deny the applicant the additional remuneration.

7. Having given my anxious consideration to the issue, I am satisfied that the prayer of the applicant in this regard has to be allowed, at least in part, on three grounds.

8. The first ground is based on the actual direction given to the applicant by the Annexure-D order dated 27th September, 1984. He was directed "to look after the current duties of the post of Director in the same Directorate, in addition to his own duties till regular arrangements are made". (emphasis added). The provisions of sub clause (iv) of FR 49 denying additional pay will be attracted only if the appointment is "to hold current charge of the routine duties of another post". (emphasis added). Obviously, the Annexure-D order did not require the applicant to perform only the routine duties of the Director. On the contrary, he was required to look after all the current duties of the Director. The expression "current duties" does not mean only routine duties. It encompasses both routine and non-routine duties, including important duties. In fact, the expression "current duties" has been interpreted to mean all duties other than statutory duties. This is clear from the Ministry of Home Affairs' Memo dated 24th January, 1963, reproduced as Govt. of India's Order No.3 under FR 49, reproduced below:-

"Looking after current duties distinct from combination of appointments.

✓ The Law Ministry has advised that an officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers, whether those powers are derived direct from an Act of Parliament, eg., Income Tax Act or Rules, Regulations and By laws made under various Articles of the Constitution, eg., Fundamental Rules, Classification, Control & Appeal Rules, Civil Service Regulations, Delegation of Financial Powers Rules, etc."

9. It is, therefore, clear that the Annexure-D order required the applicant to perform all duties - routine and non-routine - except statutory duties. FR 49 is silent as to how such a case should be dealt with.

10. The next ground is based on the duties performed by the applicant. The respondents have no case that the applicant, while holding current charge, was only discharging the routine duties of the post of Director. They have not indicated what these duties are and by whom the other important duties of the post of Director were being discharged. They have not repudiated the averments made in para 4 of the application that the applicant was performing the duties attached to the post of Director as mentioned therein.

11. On the contrary, the applicant has clearly stated ~~that~~ what duties he had discharged while looking after the current duties of the post of Director. In his representation dated 11.12.87 (Annexure 5) to the second respondent, requesting that he be promoted as Director, the applicant had, inter alia, narrated the types of duties which he was performing when entrusted with the current duties of the post of Director. In para 4 of the application also, the applicant has stated as follows in the context of his demand for additional remuneration under FR 49:-

"In Annexure-D it is specifically stated that the applicant "will look after the current duties of the post of Director" in addition to his own duties. In obedience to Annexure-D the applicant took up the current duties of the Director with effect from 8.10.1984. Since then the applicant has been acting as Director In-charge without any additional remuneration. The duties of the Director as specified by the Ministry of Agriculture are "to implement the various Cashew Development Programme in the country, to monitor and evaluate the progress of the schemes being implemented in the country and to study the problems of the marketing of Cashewnut and to make suggestion for improvement, formulation and scrutiny of the Government sponsored schemes, maintenance of liason between the Central and State Governments concerning development programmes, to be Member-Secretary of the Indian Cashewnut Development Council and to propose notes and agenda for annual meetings of the Council and to edit the quarterly journal "Cashew Causeways renamed as "The Cashew" at present of the Director. He is the Chief Technical and Administrative Officer of the Directorate of Cashewnut Development". These duties are being attended to by the applicant even now. In short, the applicant has been virtually doing the entire job of a fullfledged Director in the Directorate both in terms of Administrative and Financial matters since 8.10.1984. The respondents have not considered the claims of the applicant for additional remuneration as per FR 49."

Strangely enough, the reply of the respondents does not offer any comments on the type of work done by the applicant as stated by him in the Annexure-S representation and in para 4 of the application. As these averments have not been denied, they have to be taken as correct. The applicant has thus established that, for all practical purposes, he was performing all the duties of the Director except, perhaps, statutory functions. Therefore, the applicant is entitled to relief in this regard.

12. Lastly, current charge of another post is given only for a temporary period, say, about six months. It is meaningless to say that an officer was given current charge for 7 years. If that was possible, it is a sure

indication that the post is entirely surplus to the needs of the department and its abolition forthwith would have been justified. The respondents still feel the need of that post. In that circumstance, an inference has to be drawn for the purpose of additional remuneration under FR 49 that, after the expiry of, say, one year, the official was appointed to take full charge of the duties of the post, even though he may not have discharged statutory functions. That inference needs to be drawn in this case.

13. Though the applicant has sought such a relief in para 8(ii) of the application, I notice that he did not persist with this demand when it was rejected by the Annexure-U letter dated 24.11.86 from respondent-1 to him in his capacity as the Director, Cashew Development. The applicant slept over this matter for quite some time until he made a representation in this behalf again by the Annexure-T letter dated 7.11.89. He drew the attention of the authority to the Annexure-V circular of the Deptt. of Personnel and requested that he be placed in full charge to become eligible for the additional remuneration. It is only now that he contends in this application that he claims additional remuneration on the basis of the Annexure-D order & the work done by him.

14. I am of the view that these shortcomings are not fatal to his prayer. The denial of the additional allowances is in the nature of a continuing grievance. Hence, the benefit thereof cannot be denied. Therefore, I am of the view that the benefit of this allowance should be given to him from a date three years prior to the date (2.3.90) on which he filed this application, i.e., from 2.3.1987.

15. My learned Brother does not agree with this approach. He is of the view that as the applicant has already made a representation dated 7.11.89 (Annexure-T) to the Department which is still pending, the proper course is not to examine the claim but to direct the Department to dispose of the representation in accordance with law, uninfluenced by what has been stated in the counter affidavit.

16. I am unable to accept this suggestion for two reasons.

Firstly, the representation dated 7.11.89 (Ann. T) was pending for more than 4 months as on 16.3.90 when this application was admitted. Therefore, the applicant is deemed to have exhausted the alternative remedy open to him under section 20 of the Administrative Tribunals Act. The spirit of this provision is that in such a circumstance, the relief claimed should be considered

on merits. In my view, a direction to the respondents as suggested by my learned Brother will be appropriate only in certain circumstances. For example, both parties may agree that the pending representation can be directed to be disposed of within a time limit or the respondents may themselves seek permission to dispose of the representation. No such request has been made.

Further, the Department has already indicated in its reply, in no uncertain terms, its reasons for not acceding to the request made by the applicant. It is naive to expect the Department to deal with the representation differently, even if it is directed to ignore its reply to the application.

17. Hence, I have felt it necessary to consider this matter on merits and issue suitable directions.

18. I now proceed to the other issue relating to the filling up of the post of Director in the Directorate of Cashewnut Development which is common to both this

and OA 418/91.
application/. This applicant, Shri P.P. Balasubramanian, claims that, being the most eligible person, the respondents may be directed to appoint him as Director in the Directorate of Cashewnut Development with effect from 18.5.88, from which date he became eligible to be promoted to that post in accordance with the Recruitment Rules which, admittedly, requires 5 years service as

Deputy Director, for promotion as Director. He has also

alleged that, in the light of the OM No.36012/6/88-Estt. (SCT) dated 25th April, 1989 (Annexure-W) specifying the circumstances and conditions subject to which alone posts reserved for SC/ST may be de-reserved, the department has approached the Union Public Service Commission by the Annexure-X letter dated 14th March, 1990 to select a suitable schedule tribe candidate for appointment to the post reserved. Therefore, the applicant has prayed for a direction that the post should not be reserved for a SC candidate because of the fact that the post of Director is the only one post in the cadre and there can be no reservation of that post as this will amount to 100 per cent reservation, which is against the provisions of law.

19. Though the respondents had contended in their reply that the applicant is not entitled to any relief, when the case came up for final hearing, the learned counsel for the respondents stated that certain further developments have taken place and the applicant should have no grievance on this account.

20. He stated that the Union Public Service Commission has now advised the Department that as action for making direct recruitment has failed, the Ministry must now try the first method of recruitment again, i.e., by transfer on deputation/promotion. A copy of the letter No.1895/90- HA

Q+

dated 14.9.90 of the UPSC, addressed to the Secretary to Govt. of India, Ministry of Agriculture, was produced for our perusal by the learned counsel for the Department. He submitted that, in the light of this advice, steps have been initiated to fill up this post by transfer on deputation/promotion. The learned counsel for the applicant agreed that if steps are taken accordingly he will have no grievance.

21. However, in OA 418/91 the applicant therein (i.e., the fourth respondent in this case) states that he is aggrieved by this decision and he has impugned in that application the formal order passed on the basis of that decision. That applicant claims that the post is reserved for a Scheduled Tribe and that the instructions of Govt. require that three consecutive attempts should be made to fill up the post by direct recruitment after reserving it for a S.T. Only two attempts have been made. He, therefore, seeks to quash the impugned notice thereon and a direction to make one more attempt at direct recruitment of a S.T.

22. That application has been dismissed by a separate order passed by us today and the step taken to fill up the post by transfer on deputation/promotion has been held to be valid.

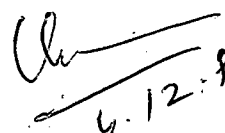
23. For the foregoing reasons, I dispose of this

application with the following directions:-

(i) I direct the respondents 1 to 3 to grant to the applicant, within a period of three months from the date of receipt of this order, additional remuneration in accordance with FR 49 (i) for holding the charge of the post of Director with effect from 2.3.1987 as if a formal order appointing him to hold full charge of the post from that date has been issued in his favour.

(ii) The Department shall proceed with recruitment to the post of Director on the basis of the primary method of transfer on deputation/promotion.

24. There will be no order as to costs.


4.12.81
(N.V. Krishnan)
Administrative Member

N. Dharmadan, M(J)

I have gone through the judgment written
by my learned brother but I regret my inability
to agree with the reasoning and conclusions therein.

25. This application was filed on first March
1990 with the following reliefs:

"..i) to direct the respondents to appoint
the applicant as Director, Dte. of Cashewnut
Development Cochin with effect from 18-5-88
on which date the applicant became fully
qualified to be appointed as Director;

ii) to direct the respondents to pay additional
remuneration to the applicant in terms of the
provisions contained in FR 49 for holding
the additional charge of Director in the Dte.
of Cashewnut Development, Cochin from 8-10-84
on which date the applicant took up the current
duties of the Director, and"

Later the applicant filed MP 354/90 for incorporating
additional relief viz. Relief No. 1(a) which reads
as follows:

"..to direct the respondents not to reserve
the post of Director, Directorate of Cashewnut
Development, Cochin for candidates belonging
to Scheduled Tribe..."

After hearing the parties, when we were about to
pronounce the judgment on 25-3-91 it was submitted
at the bar that the Govt. has issued a circular dated
17-1-91 proposing to fill up the post of Director by
transfer on deputation/promotion and the same has
been challenged in OA 418/91. The Govt. circular

is in Annexure-4 in OA 418/91. Accordingly we passed ⁵an order⁵ directing the Registry to list OA 418/91 for final hearing along with the present Original Application. We have heard both the cases together (i.e. OA 174/90 and 418/91).

26. The applicant in this case is at present, working as Deputy Director(Development) in the Directorate of Cashew Development, Cochin. He is mainly aggrieved against his non-appointment as Director, Directorate Cashew Development, Cochin. He submitted that the Ministry of Agriculture in its circular No. 15-1-83-CA.III dated 15-9-84 called for applications to the post of Director after reserving the post for ST candidate. An interview was conducted in 1987. But the applicant was not considered, even for posting on deputation even though he satisfied all the requirements for being considered. It was due to the fact that the post is reserved for ST candidate. The U.P.S.C. expressed their inability to advise any person because no suitable person belonging to ST community was available. Thereafter the Govt. by notification No. 15-1-83-CA.III dated 4-11-88 informed the Secretary, U.P.S.C. that it has been decided to readvertise the post for the same purpose. The U.P.S.C. could not advise any person for filling up the post

for the second time also. Hence, the applicant submits that he is eligible to be considered and posted as Director of Directorate of Cashew Development Cochin. The applicant also filed a representation (Annexure-N) detailing his eligibility to be considered and posted as Director. He has claimed additional remuneration for looking after current duties of the post of Director as directed by the Annexure-D order dated 27-9-84. According to the applicant he has been virtually doing the job of a fullfledged Director in the Directorate both in administrative and financial matters since 8-10-84 and hence he claimed additional remuneration under FR-49. In fact this was considered and disposed of by Annexure-U order dated 24-11-86 which reads as follows:

"...I am directed to refer to your letter No.4(II)/68-A.U dated 1.10.86 on the subject mentioned above and to say that the request of Shri P.P. Balasubramanian, Director-in-Charge, for grant of additional pay for holding the current charge of the post of Director has been carefully considered by the competent authority in this department. It is regretted that his request cannot be acceded to as per Rules on the subject.."

27. When the case came up for final hearing, it was contended by the additional 4th respondent that this O.A. has to be dismissed in the light of the Original Application 418/91 filed by the additional 4th respondent challenging same proceedings.

The respondents 1 to 3 submitted that as per the existing orders of the Government of India, the post which is reserved for SC cannot be filled up with ^a general candidates. Accordingly the UPSC could not find out any suitable ST candidate for the post and desired that fresh requisition may be sent after reviewing the reservation position. Since the posts falling on point reserved for ST/SC candidates cannot be deserved as per existing orders of Government of India, the UPSC has again been requested in March 1990 to recommend a suitable ST candidate for appointment to the post of Director. It is further submitted that since the post is to be filled up on direct recruitment basis and reserved for ST candidate, the applicant is not entitled for the appointment to the post of Director. It is clear from the records that the respondents and the UPSC went ahead with the recruitment process on the basis that the post of Director is a reserved one for Scheduled Tribe candidate.

The applicant was unable to show from the records that the said post has been dereserved to enable the respondents to proceed with the selection proceedings for the recruitment to the post of Director on the basis of the primary method ^{viz. 4} 'transfer on deputation/promotion'.

It is clear from Annexure-X dated 14-3-90, a letter sent by the Govt. to Secretary, UPSC that the post of Director is reserved for SC/ST candidates only. No order deserving the post has been produced by the parties.

But the 4th respondent contended that the issue of

the Circular dated 12-1-91 indicates dereservation. So he presumes a dereservation and proceeds on that basis. A post which has already been reserved for SC/ST candidate can be notified for selection from general candidates only after dereservation of the post by the competent authority in accordance with law. The stand of the respondents 1 to 3 is that no such action has been done in this case. I accept the contention of the respondents 1 to 3. Apart from this the applicant has not taken any steps, after the issue of the circular dated 17-1-91 either to amend the pleading so as to enable this Tribunal to grant relief to him in the light of the circular or filed any reply in the connected OA 418/91 indicating ^{his} stand. Under this circumstance having regard to the facts and circumstances of this case, I am of the view that this application is only to be rejected so ^{far} _{as} the relief No.1 and No.1(a). I do so. Regarding relief No.2, as indicated above, the applicants request for additional remuneration was considered and rejected by the Govt. by Annexure-U order dated 24-11-86. This order has not been challenged by him in this application even in spite of seeking directions to amend the application at a later stage. But subsequently he submitted a fresh representation on 7-11-89 (Annexure-T) claiming additional remuneration

which can only be directed to be disposed of by the Govt. on the facts of the case, particularly when the respondents have not objected to the consideration and disposal of the representation Annexure-T based on the provisions of Sec.20 of the Administrative Tribunals Act. Under these circumstances I am not forclosing the right of the applicant to pursue his rights, if any, forgetting additional remuneration in accordance with law in the light of Annexure-V OM No.4/2/989-Estt. Pay.III d dated 11.8.89. I direct that the Govt. may consider the claim of the applicant in Annexure-T representation uninfluenced by the views taken in the reply statement filed in this case on behalf of the Govt, while disposing of the representation submitted in this behalf.

28. The Original Application is disposed of with the above observations. There will be no order as to costs.

N. Dharmadan
4.12.91.

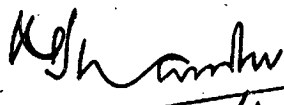
(N. Dharmadan)
Member(Judicial)

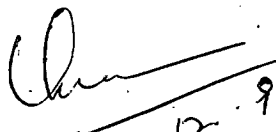
ORDER OF THE BENCH

29 In view of the difference of opinion between us, the Registry is directed to place the case before the Hon'ble Chairman, Central Administrative Tribunal under Section 26 of the Administrative Tribunals' Act of 1985 for further action thereunder to decide finally the following points of difference:-

(i) Whether, on the facts and in the circumstances of the case, the prayer of the applicant seeking appointment as a Director should be disposed of by issuing necessary directions to the Department or whether his application in so far as this prayer is concerned should be dismissed.

(ii) Whether, on the facts and circumstances of the case, the Department should be directed to pay the applicant additional allowances under FR 49(i) from 2.3.87 or whether, his prayer for such additional remuneration as contained in Annexure-^dT representation should be directed to be disposed of by Government.


4.12.91
(N Dharmadan)
Judicial Member


4.12.91
(NV Krishnan)
Administrative Member
4.12.91

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

ERNAKULAM BENCH

O. A. No. 174/90 199

DATE OF DECISION 17.2.1993

P.P.Balasubramanian Applicant (s)

Mr.T.Ravikumar Advocate for the Applicant (s)

Versus

Union of India rep. by
Secretary, Ministry of Agriculture and 3 others Respondent (s)

Mr.K.Prabhakaran, ACGSC Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. A.V.HARIDASAN, JUDICIAL MEMBER

~~The Hon'ble Mr.~~

1. Whether Reporters of local papers may be allowed to see the Judgement? *js*
2. To be referred to the Reporter or not? *~*
3. Whether their Lordships wish to see the fair copy of the Judgement? *~*
4. To be circulated to all Benches of the Tribunal? *~*

JUDGEMENT

This case has come up before me on a reference to the Hon'ble Chairman of the Central Administrative Tribunal in view of the divergence in views between the Hon'ble Members who heard the case earlier.

2. The applicant a Deputy Director (Development) in the Directorate of Cashewnut Development, a subordinate office of the Ministry of Agriculture was directed to "look after the current duties of the post of Director in the same Directorate in addition to his own duties till regular arrangements are made" vide Annexure-D order dated 27th September, 1984 of the Ministry of Agriculture, while the services of Dr.C.K.George who was at that time holding the additional post of Director, Cashewnut Development, Cochin was placed at the disposal of the Department of Agriculture and Cooperation for appointment

...2

as Joint Commissioner(Horticulture fruit). As regular appointment to the post of full-time Director in the Directorate of Cashewnut Development, Cochin was not made, the applicant continued to hold the charge of the post of Deputy Director as well as that of Director. The applicant's request for additional pay for holding the current charge of the post of Director was rejected by the order dated 24th November, 1986 at Annexure-U. Inviting attention of the Government to the circular of the Department of Personnel O.M No. 4/2/89-Estt.(Pay-II) dated 11th August, 1989(Annexure V(2)) , the applicant submitted another representation to the first respondent on 7.11.89 (Annexure-T) requesting that orders may be passed placing him full additional charges of Director with effect from 18.5.85 and to pay the additional remuneration. This representation has not so far been considered and disposed of. In the mean while , the Government of India addressed the Union Public Service Commission for advising a suitable candidate to be appointed as Director reserving the post for Scheduled Tribes through direct recruitment. As one attempt by the U.P.S.C. to find out a suitable candidate from the Scheduled Tribe failed, the vacancy was again advertised. The applicant is aggrieved by the action taken by the respondents in reserving the only post of Director to be filled by direct recruitment for a Scheduled Tribe candidate while, according to him, he is entitled to be considered for promotion especially when promotion is the first mode of filling up of the vacancy of Director, according to the Recruitment Rules. Therefore, the applicant filed this application claiming the following reliefs:-

- i) to direct the respondents to appoint the applicant as Director, Directorate of Cashewnut Development Cochin with effect from 18.5.1988 on which date the applicant became fully qualified to be appointed as Director;
- ii) to direct the respondents to pay additional remuneration to the applicant in terms of the provisions contained in FR 49 for holding the additional charge of Director

in the Directorate of Cashewnut Development, Cochin from 8.10.1984 on which date the applicant took up the current duties of the Director; and

- iii) to grant such other reliefs as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

The respondents resist the claim of the applicant for additional remuneration on the ground that as the applicant is only looking after the current duties of the post of Director, he is not entitled to be paid additional remuneration under FR 49. As regards the applicant's claim for promotion as Director and his challenge against the steps taken for filling up of the vacancy by recruitment of a Scheduled Tribe candidate, the respondents contend that two attempts made in the year 1983 and 84 for filling up the vacancy by transfer on deputation/promotion failed for want of eligible candidates, that it was in that context the U.P.S.C was requested to nominate a candidate from the Scheduled Tribe for direct recruitment, that as the vacancy in the post of Director falls on Point No.17 of the communal roster for direct recruitment which is a reserve point, the action taken for recruitment of a Scheduled Tribe candidate is perfectly in order and that the applicant can have no legitimate grievance in that regard. However, it has been stated in the reply that the attempts made by the U.P.S.C for finding out a suitable candidate from the Scheduled Tribes having failed, the Government will be initiating action for filling up the post by the primary method of recruitment, namely 'transfer on deputation/promotion'.

3. Considering the rival contentions, the learned Administrative Member of the Division Bench opined that the applicant's claim for additional remuneration for holding the charge of the post of Director should be allowed from a date three years prior to the filing of this application, i.e, 2.3.1987 and that the respondents 1 to 3 have to be directed to grant the applicant additional remuneration from 2.3.1987 onwards in accordance with FR 49(i) within a period of three months

from the date of receipt of the order. As regards the applicant's claim for promotion, the learned Administrative Member held that since the Ministry has decided to fill up the post of Director by transfer on deputation/promotion, it would be sufficient if the Department is directed to proceed with the recruitment to the post of Director on the basis of the primary method of transfer on deputation. The learned Judicial Member however took a different view. According to him, regarding his claim for additional remuneration, it would be sufficient if a direction is given to the Government to consider and dispose of the representation made by the applicant dated 7.11.1989 at Annexure-T. Regarding the prayers No.1 and 1(a), he held that since the applicant has not sought any relief in the light of the circular dated 17.1.1991 and has not filed any reply statement to the O.A 418/91 filed by the 4th respondent challenging the circular and the action for filling up of the vacancy by the primary method mentioned in the Recruitment Rules, the prayers No.1 and 1(a) of the applicant have only to be rejected. In view of the cleavage in views, the Division Bench raised the following points to be placed before the Hon'ble Chairman for taking action under Section 26 of the Administrative Tribunals Act:-

" (1) Whether, on the facts and in the circumstances of the case, the prayer of the applicant seeking appointment as a Director should be disposed of by issuing necessary directions to the Department or whether his application in so far as this prayer is concerned, should be dismissed.

(ii) Whether, on the facts and circumstances of the case, the Department should be directed to pay the applicant additional allowances under FR 49(i) from 2.3.87 or whether, his prayer for such additional remuneration as contained in Annexure-T representation should be directed to be disposed of by Government."

The Hon'ble Chairman has assigned the task of answering the points to me.

4. I have carefully gone through the pleadings and documents and the divergent opinions of my learned Brothers. I have also heard the arguments of the learned counsel for both the parties. I shall consider the 1st point first. The applicant has prayed for a direction to the respondents to appoint him as Director with effect from 18.5.1988 on which date he became fully qualified for appointment as Director and also not to reserve the post of Director to a candidate belonging to Scheduled Tribe. The grounds on which the applicant prays for this relief are that the primary method for filling up the post of Director as per the Recruitment Rules is by transfer on deputation/promotion and that he has become qualified to be appointed as Director by promotion with effect from 18.5.1988 and also that reservation of the only post of Director to a Scheduled Tribe candidate will amount to 100% reservation, which is unconstitutional. During the course of the arguments before the Division Bench, the learned Senior Central Government Standing Counsel submitted that the Government have issued a circular dated 17.1.1991 proposing to fill up the post of Director by transfer on deputation/promotion and that this circular has been challenged by the 4th respondent in this case in O.A. 418/91. Therefore, O.A 418/91 was posted for final hearing along with this application. By a separate judgment O.A 418/91 was dismissed. As the post of Director is the only post in the cadre, applying the dictum laid down by the Supreme Court in Chakradhar vs. State of Bihar (AIR 1988 SC 959), it was held by the Bench that the only vacancy of Director cannot be reserved for a Scheduled Tribe candidate and that the challenge against the circular dated 17th January 1991 notifying the vacancy to be filled by transfer on deputation/promotion will not stand. Taking note of this development and as the learned counsel for the applicant agreed that if steps are taken in accordance with the notification dated 17.1.91, he would have no further grievance on that score, the learned Administrative Member opined that in regard to the reliefs No.1 and 1(a) prayed for in the

application , it would be sufficient if the Department is directed to proceed with the recruitment to the post of Director on the basis of the primary method of 'transfer of deputation/promotion'. But the learned Judicial Member felt that as the post of Director is a post reserved to be filled by a Scheduled Tribe candidate on direct recruitment, without an order of dereservation by the competent authority in accordance with law , no action can be taken for filling up the vacancy throwing it open to the general candidates. Further, as the applicant did not take any steps after the issue of the circular dated 17.1.91 either to amend the pleadings so as to enable the Tribunal to grant the relief to him in the light of the circular or to file any reply statement in O.A 418/91, he was of the opinion that the application in regard to reliefs No.1 and 1(a) has only to be rejected. When the applicant has prayed for a direction that he may be appointed as Director and for a further direction not to reserve the post of Director to a candidate belonging to Scheduled Tribe and when on the basis of the circular issued by the Government on 17.1.91 to effect recruitment to the post of Director by the primary method of recruitment i.e, by transfer on deputation/promotion from among all eligible candidates without the post being reserved and when on behalf of the applicant, it is submitted that he would have no further grievance if the recruitment process is undertaken in accordance with the above said circular , the proper course in the interest of justice, is to dispose of the application in respect of prayer No.1 and 1 (a) by giving a direction to the Department, to proceed with the recruitment to the post of Director on the basis of the primary method of transfer on deputation/promotion, as proposed in the circular dated 17.1.91(Annexure-A4 in O.A 418/91) especially when O.A 418/91 filed by the 4th respondent in this case challenging the above circular has been dismissed by the Bench. With great respect to the learned Judicial Member , I am of the view that the fact that the applicant did not amend the original application

after the issue of the circular dated 17.1.91 or that he did not file any reply statement in O.A 418/91 would not come in the way of disposing of the prayers No.1 and 1(a) as aforesaid . Therefore, on the 1st point referred, I hold that in the facts and circumstances of the case, the prayer of the applicant seeking appointment as Director should be disposed of by directing the Department to proceed with the recruitment to the post of Director on the basis of the primary method of transfer on deputation/promotion.

5. Now I shall consider the point No.2 ,i.e,"whether, on the facts and circumstances of the case, the Department should be directed to pay the applicant additional allowances under FR 49(i) from 2.3.87 or whether, his prayer for such additional remuneration as contained in Annexure-T representation should be directed to be disposed of by Government". The fact that the applicant was directed to look after the current duties of the post of Director with effect from 27th September,1984 and that this arrangement still continues, is not in dispute. The applicant has clearly stated in the application that he has been virtually doing the entire job of a fullfledged Director in the Directorate both in the administrative and financial matters , in addition to his own duties as Deputy Director right from 8.10.1984. In paragraph 4 of the application, the applicant has stated as follows:-

"The duties of the Director as specified by the Ministry of Agriculture are "to implement the various Cashew Development programme in the country, to monitor and evaluate the progress of the schemes being implemented in the country and to study the problems of the marketing of Cashewnut and to make suggestion for improvement, formulation and scrutiny of the Government sponsored schemes, maintenance of liason between the Central and State Governments concerning development programmes, to be Member-Secretary of the Indian Cashewnut Development Council and to propose notes and agenda for annual meetings of the Council and to edit the quarterly journal " Cashew Causeries" renamed as "The Cashew" at present of the Director. He is the Chief

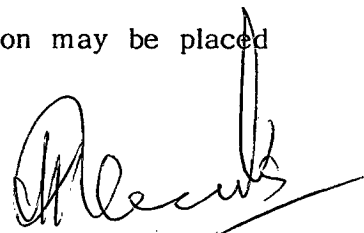
Technical and Administrative Officer of the Directorate of Cashewnut Development". These duties are being attended to by the applicant even now. In short the applicant has been virtually doing the entire job of a fullfledged Director in the Directorate both in terms of Administrative and Financial matters since 8.10.1984. The respondents have not considered the claims of the applicant for additional remuneration as per FR 49."

These averments have not been specifically denied in the reply statement. Therefore, it has to be held that the applicant have been performing all the duties of the Director excepting probably the statutory functions and not only the routine duties. The claim of the applicant for additional remuneration is resisted only on the ground that as he had not been appointed to the post of Director, but was only looking after the current duties of the post of Director under FR 49, the applicant is not entitled to additional remuneration. Any arrangement to look after the current and routine duties is usually made for a short spell of time. In this case ^{since} ~~for~~ over seven years preceeding the filing of this application, the applicant had ben discharging the duties of the post of Director, to say that for all these period , he had been discharging only the routine duties and therefore, he is not entitled to any additional remuneration is absolutely unjustified. The learned Administrative Member rightly held that in the facts and circumstances, it was legitimate to draw an inference that for the purpose of eligibility for additional remuneration under FR 49 after the expiry of a period of one year, the official was appointed to be in full additional charge of the post of Director. Since the applicant was by Annexure-U letter dated 24th November,1986 told that he would not be entitled to additional remuneration and as he had made a further claim only in his representation dated 7.11.1989 at Annexure-T, the learned Administrative Member found that it would meet the ends of justice if the respondents 1 to 3 are directed to grant the applicant additional remuneration in accordance with FR 49(i) for holding the charge of Director with effect from 2.3.1987 as if

a formal order appointing him to hold full charge of the post from that date has been issued in his favour. The learned Judicial Member felt that as the representation submitted by the applicant on 7.11.1989 claiming additional remuneration is still pending and as the respondents have not objected to the consideration and disposal of this representation, the proper course would be to direct the Department to dispose of the representation at Annexure-T especially in view of the provisions of Section 20 of the Administrative Tribunals Act. Therefore, the learned Judicial Member opined that instead of giving a direction to the respondents to pay additional remuneration to the applicant, they have to be directed to dispose of the representation at Annexure-T in accordance with law in the light of Annexure-V O.M No.4/2/989-Estt. Pay.III dated 11.8.89. The Original Application was filed on 6.3.90. According to Section 20 of the Administrative Tribunals Act, a Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules. If an appeal or representation had been filed by a Government servant and if no order or reply was received thereto till the expiry of a period of six months, for the purpose of Section 20 of the Act, it would be deemed that the Government servant has availed of all the remedies available to him under the relevant service rules. Since the Annexure-T representation was submitted by the applicant only on 7.11.89 a period of six months had not elapsed on the date of filing of this application. The bar contained in Section 20 for admission of an application without exhausting alternative remedy is not an absolute bar. The wording "A Tribunal shall not ordinarily admit an application" indicate that in exceptional cases even if a Government servant has not availed of all remedies available to him under the relevant service rules, an application can be admitted. Here the grievance of the applicant is that in spite of the fact that he has been looking after

the duties of a higher post for more than seven years, he is not being paid additional remuneration for the additional burden shouldered by him. Probably it ^{was} Considering this aspect that the application was admitted by the Bench which consisted of the same Hon'ble Members who heard the application finally. The respondents did not offer to consider the representation and dispose of the same. Further, the mind of the respondents to dismiss the claim of the applicant is clearly expressed in the reply statement. In such circumstances, I am of the view that no useful purpose will be served by directing the respondents to dispose of the representation and the just and proper course would be to take a decision on merits. Since the application has been admitted after hearing the counsel on either side, the provisions of Section 20 of the Administrative Tribunals Act does not operate as a bar in disposing of the issue on merits. Therefore, I am convinced that interest of justice demands directing the respondents 1 to 3 to grant the applicant within a period of three months from the date of receipt of a copy of the order additional remuneration in accordance with FR 49(i) for holding the charge of Director with effect from 2.3.87 as if a formal order appointing him to hold full charge of the post from that date has been issued in his favour. The points referred are answered as stated in the end of para-4 above and on this paragraph.

6. The records of the case along with my opinion may be placed before the Division Bench for disposal.



(A.V.HARIDASAN)
JUDICIAL MEMBER

Hon'ble Shri A.V.Haridasan, Judicial Member, agreed with the view taken by Hon'ble Administrative Member. He answered the first point as follows:-

"..... When the applicant has prayed for a direction that he may be appointed as Director and for a further direction not to reserve the post of Director to a candidate belonging to Scheduled Tribe and when on the basis of the circular issued by the Government on 17.1.91 to effect recruitment to the post of Director by the primary method of recruitment i.e, by transfer on deputation/promotion from among all eligible candidate without the post being reserved and when on behalf of the applicant, it is submitted that he would have no further grievance if the recruitment process is undertaken in accordance with the above circular, the proper course in the interest of justice, is to dispose of the application in respect of prayer No.1 and 1(a) by giving a direction"
(emphasis supplied)

2. The basis for this conclusion is that the post of Director, Directorate of Cashewnut Development, Cochin being the only post in the cadre the dictum laid down by the Supreme Court in Chakradhar's case, AIR 1988 SC 959 applies and that the single vacancy of Director cannot be reserved for a ST candidate. Since the circular dated 17.1.91 notifying the vacancy to be filled up by transfer on deputation/promotion was upheld in OA 418/91 filed by the 4th respondent challenging the same, the applicant has no further grievance. However, according to him "the proper course in the interest of justice is to dispose of the application in respect of prayer No.1 and 1(a) by giving a direction to the Department to proceed with the recruitment to the post of Director on the basis of the primary method of transfer on deputation/promotion as proposed in the circular dated 17.1.91 (Annexure-A4 in OA 418/91) especially when OA 418/91 filed by the 4th respondent in this case challenging the above circular has been dismissed by the Bench".

3. The circular letter dated 17th January 1991 issued by the Government of India for filling up the post of Director, Directorate of Cashewnut Development, Cochin by transfer on deputation/promotion basis from amongst officers under the Central/State Governments, Union Territories, Agricultural Universities, recognised research institutes, public sector undertakings and autonomous organisations was challenged by the 4th respondent on the sole ground that the decision taken by the Government ~~is~~ against Annexure-A3 instruction of the Government of India dated 25.4.1989 which provides that a vacancy required to be filled by SC/ST candidates on the basis of reservation according to roster cannot be dereserved unless three successive attempts have been made in three years. That case was heard along with this case, ~~but~~ dismissed as per our judgment dated 4.12.1991 giving the following reason:-

"9. We are satisfied that, on the basis of the rule laid down in Chakradhar's case, there can be no reservation when a vacancy is in respect of the only post in the cadre. Therefore, even though the Department made two successful attempts to recruit a ST to this post, it cannot be contended that a third attempt should also be made before trying out other methods which will amount to dereservation. As this is the only basis for the applicant's challenge to the Annexure-4 letter, we are of the view that this application deserves to be dismissed."

4. But it is to be noted that the applicant in this case was impleaded as the 4th respondent in OA 418/91. He relied on the decision of the Supreme Court in Chakradhar vs. State of Bihar, AIR 1988 SC 959, and contended that there can be no reservation with reference to the post in question either for recruitment at the initial stage or filling up the future vacancy in respect of that post. Reservation in such circumstances will be contrary to Article 16 of the Constitution of India. Applicant in that case on the other hand relied on the decision of the

Supreme Court in A.R.Choudhury vs. Union of India, AIR 1974 SC 532, and contended that even in respect of one post reservation would be made in certain circumstances. Chaudhury's case was distinguished on the ground that that case was referred to by the Supreme Court in the judgment in Chakradhar's case. The OM dated 30.11.81 issued by the Government dealing with reservation was not brought to our notice. Considering the limited question raised before us we came to the conclusion that the two unsuccessful attempts made by the Department to recruit a ST candidate to the post of Director, Directorate of Cashewnut Development, Cochin, would satisfy the requirements of the Government circular. A third attempt before trying out other methods will amount to dereservation. This was the only point raised and considered by us in that case when the applicant challenged Annexure-4 letter. The question whether an order of dereservation is necessary to validate the circular dated 17.1.91 or whether it is invalid on account of the failure of the department to take steps invoking the provisions of OM dated 22.1.77 were never considered by us while dismissing OA 418/91. The OM dated 22.1.77 is extracted below:-

"Sub :- De ~~reservation~~ and carrying forward of reserved vacancies.

Instances have come to the notice of this Department where prior approval of this Department for dereservation of reserved vacancies was not obtained before appointing general candidate against such vacancies carried forward and approval for dereservation is to be obtained in the third year of carry forward. It is clarified that a vacancy reserved for Scheduled Castes or Scheduled Tribes for which a candidate belonging to that community is not available even after taking all the prescribed steps has first to be dereserved before filling it by a general candidate. Prior approval of this Department is necessary for dereservation of a reserved vacancy included in the roster for permanent appointments and temporary appointments likely to become permanent or to continue indefinitely. Reserved vacancies included in the roster for purely temporary appointments which have no chance of either becoming permanent or continuing indefinitely can be dereserved by the Ministries themselves after ensuring that the prescribed steps have been taken to secure Scheduled Caste/Scheduled Tribe candidates and that such candidates are still not available.

2. After a reserved vacancy is dereserved in accordance with the procedure mentioned in para 1 above, the reservation is to be carried forward to subsequent three recruitment years. The 'carry forward' of reservation means that in the subsequent year, an equal number of vacancies will be reserved in addition to the normal reservations becoming due in that year according to the roster. Any recruitment of Scheduled Castes/Scheduled Tribes candidates in such year of carry forward is first to be counted against the reservation brought forward from the previous years and then against the normal reservations accruing during the year. The procedure for dereservation mentioned in para. 1 above should be followed every time when a vacancy which is treated as reserved, either on account of carried forward reservation or on account of a fresh reserved point in the roster, has to be filled by a general candidate due to non-availability of candidates belonging to Scheduled Caste or Scheduled Tribes, as the case may be. The reservation is due for getting lapsed only after it is carried forward for three recruitment years. Approval of this Department is not necessary for the lapsing of the reserved vacancy at the end of the third year of carry forward.

3. As will be seen from para.2 above, an approval of this Department for dereservation, is necessary in respect of all vacancies treated as reserved in a particular recruitment either on account of carried forward reservations or on account of fresh reserved points in the roster, for which suitable candidates belonging to Scheduled Castes/Scheduled Tribes could not become available. "

5. One Shri K.N.Sreenivasan filed OA 792/91 for getting promotion to the post of Senior [REDACTED] Foreman, on the ground that it is the only post in the cadre and no reservation applies in view of the decision in Chakradhar's case, AIR 1988 SC 959. This Tribunal considered the issue in the light of departmental instruction O.M. dated 30.11.1981 after advertizing to the order of reference in this case and held as follows:-

"6. Relying on the decision of the Supreme Court in Dr.Chakradhar Paswan vs. State of Bihar and others (AIR 1988 SC 959) the learned counsel for the applicant, Shri M.R.Rajendran Nair, argued that no reservation could be made under Article 16(4) if there is only one post in a cadre.

7. This contention is strongly opposed by the respondents 1 to 3 and the contesting respondent by stating that the vacancy of Sr. Foreman now arose on the retirement of Shri Ponnappan Pillai is a reserved post for scheduled caste candidates (second year carry forward vacancy). Therefore the applicant, though qualified, cannot be promoted and posted in that post. They further submitted that as per the existing Govt. orders, even if there is only one vacancy, the reservation policy has to be complied with; "the policy of the Government is that the reserved points for Scheduled Castes candidates are not to be filled by general candidates and such vacancies are to be filled by the respective

candidates". The learned counsel for the respondents also relied on Departmental instruction OM No.36011/39/81-Estt (SCT) dated 30.11.81 in support of the statement in the reply. the OM is extracted below:-

'Subject:- Single vacancy arising in a recruitment year against SC/ST point.

Where only one vacancy occurs in the initial recruitment year and the corresponding roster point happens to be for a Scheduled Caste or Scheduled Tribe, it should be treated as unreserved and filled accordingly and the reservation carried forward to subsequent three recruitment years as hitherto, in the subsequent year(s), even if there is only one vacancy, it should be treated as "Reserved" against the carried forward reservation from the initial recruitment year and a Scheduled Caste/Scheduled Tribe candidate, if available, should be appointed in that vacancy, although it may happen to be the only vacancy in that recruitment year(s). For instance, if a single vacancy arises in the initial recruitment year 1975, and it falls at a reserved point in the roster, it will be treated as 'unreserved' and filled, accordingly in that year but the reservation would be carried forward to subsequent recruitment year(s). In the first subsequent year, i.e., 1976, if, again, a single vacancy occurs, then it should be treated as reserved against the reservation carried forward from 1975, and a Scheduled Caste/Scheduled Tribe candidate, as the case may be, should be appointed against that vacancy, in spite of the fact that the vacancy happens to be the only vacancy in that recruitment year. In the event of a Scheduled Caste/Scheduled Tribe candidate not being available to fill the reserved vacancy in 1976, the reservation would be further carried forward to 1977 and 1978, when also a single vacancy, if any, arising in those years should be treated as "reserved" against the carried forward reservation, whereafter, the reservation will lapse."

8. The argument of the learned counsel Shri M.R.Rajendran Nair based on the dictum of Supreme Court in Dr.Chakradhar Paswan's case has to be tested in the light of the O.M. referred above. We have gone through the decision carefully. It is a case concerning the appointment of the appellant Paswan to the post of Dy.Director (Homeopathic) on 30th May 1979. State of Bihar on the basis of the law laid down by the decision in Balaji's case, AIR 1963 SC 649, sanctioned two Dy. Directors posts for each of the two systems of Unani and Homeopathic, when there was already a Director in the Directorate of Indigenous medicines for Ayurveda. So there were three posts, one Director of Indigenous Medicines, Deputy Director (Homeopathic) and Deputy Director (Unani). All are Class-I posts. According to the roster the first post of Director should be treated as unreserved, the second as reserved for SC and the third again as unreserved. As per order of the Health Minister the Deputy Director (Homeopathic) was set apart for SC and advertisement was issued. The appellant was selected and appointed. This was challenged. High Court declared the appointment as illegal, nevertheless he continued in that post. The argument was that the order reserving the post of Dy. Director (Homeopathic) for SC infringes the principle embodied in the Government circular introducing 50 point roster, according to which, if in a particular cadre, single post falls vacant, it should, in the case of first vacancy, be considered as general and on the second occasion when a single post again falls vacant, the same must be treated as reserved. The Supreme Court considering the scope of the circular held as follows:-

'16. It is quite clear after the decision in Devadasan's case that no reservation could be made under Art. 16(4) so as to create a monopoly. Otherwise, it would render the guarantee of equal opportunity contained in Arts. 16(1) and 16(2) wholly meaningless and illusory. These principles unmistakably lead us to the conclusion that if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post. A reservation which would come under Art. 16(4), pre-supposes the availability of at least more than one post in that cadre.'

9. The Court in the light of above referred circular held that if there is only one post in a cadre "there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of that post". This decision is confined to the interpretations of the circular dated 8th November, 1975 prescribing 50 point roster to implement the policy of reservation. The Supreme Court was neither called upon to consider nor did consider the scope and ambit of any other circular or the application of the principle pertaining to the reservation policy in respect of carry forward under the existing orders or the policy of the Government that the reservation policy has to be implemented even if there is only one post. The circular dealing with the carry forward vacancy and the filling up of the same dated 30.11.81 referred to above was not considered by the Supreme Court. Hence, under these circumstances the decision of the Supreme Court in Dr. Paswan's case is not an authority to be followed uniformly in all situations irrespective of the circulars and orders governing the reservation principles and policy of Government. It is a settled proposition of law that a decision is an authority for the point which is considered in that case. Recently this /A.Radhakrishnan vs. The General Manager, Southern Railway, OA 149/92, held:-

/Tribunal in

'17. It is well settled proposition of law that no case is an authority for the proposition not arising and considered in the case. "Subjectum secundum materium" is the principle. The Supreme Court in State or Orissa vs. Sudhansu Sekhar Misra, AIR 1968 SC 647, held

"A decision is only an authority for what it actually decides. What is the essence in a decision is its ratio and every observation found therein not what logically follows from various observations made in it."

The Supreme Court in State of U.P. v. Ram Chandra, AIR 1976 SC 2547, said

"It is the rule deducible from the application of law to the facts and circumstances of a case while constitutes its ratio decidendi and not some conclusions based upon facts which may appear to be similar. One additional or different fact make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. See also Regional Manager v. Pawan Kumar, AIR 1976 SC 1765." '

10. Recently identical question came up for consideration in more or less similar circumstance in P.P.Balasubramanian vs. Union of India, O.A. 174/90, in which the question of appointment to the post of Director of Cashewnut Development, which was falling on a point reserved for SC/ST candidate came up for consideration. One of us, N.Dharmadan, following the Government orders existing at the relevant time gave dissenting note to the effect that since the post is to be filled by direct recruitment, which was reserved for ST candidate on the basis of carry forward rule the applicant therein, who is a general candidate, is not entitled for that post. The Government was taking this stand and it was upheld. Nevertheless, because of difference of opinion on the application of the principles laid down by the Supreme Court in Dr. Paswan's case, the decision is not final. It was referred to the Hon'ble Chairman and it is pending. "

This decision is directly in conflict with the majority view in this case.

6. The application of the OM dated 30.11.81 and relevance of OM dated 22.1.77 dealing with dereservation of a post reserved for a reservation point as clearly stated in the reply filed by the respondents 1 & 2 that the post of Director falls on a point No.17 of the continuing roster for Direct Recruitment which is reserved for ST, was never argued nor considered while disposing of OA 418/91. If, in the light of the circular dated 17.1.91, the applicant has no further grievance as found by the 3rd Member and the Administrative Member particularly when the challenge of the 4th respondent against the circular dated 17.1.91 in OA 418/91 was dismissed, the proper course of this Tribunal is to close the application holding that the applicant has no surviving grievance to be considered and redressed by the Tribunal by issuing directions.

7. The Courts or Tribunal will not issue a direction to the respondents in a case unless it is satisfied that the party approaching such forum has a legal right to be redressed and that in the interest of justice such a direction is necessary. But it may in special circumstances issue directions to the respondents on consent of the parties. In the instant case both the Administrative Member and the 3rd Member decided to issue directions to

Department to proceed with the recruitment to the post of Director on the basis of preliminary method of transfer on deputation/promotion after finding that the applicant has no further grievance if steps are being taken in the light of the circular dated 17.1.91. There ~~was no~~ consent or agreement by the learned counsel for the respondents. Merely because of the dismissal of OA 418/91, which was filed challenging the circular dated 17.1.91 on the sole ground that it is ^{is} violative of instructions of Government of India dated 25.4.89 (Annexure-3 in OA 418/91), there is no approval that the circular is valid if it is otherwise invalid on account of the failure of the Government to pass orders for dereservation of the post in the light of OM dated 22.1.77.

8. Regarding the second point dealing with the additional remuneration claimed by the applicant under FR 49, ~~the~~ representation was rejected by the Government as per Annexure-U order dated 27.11.86. Since this order was not challenged by the applicant either in the original application or in the amended application he is estopped from claiming the second relief. This point has not been answered by the 3rd Member or the Administrative Member.

9. However, in view of the conflicting views taken in OA 792/91 and the majority opinion in this case and having regard to the facts and circumstances stated above I am of the view that the entire case with the questions framed in this case is to be placed before the Hon'ble Chairman for being referred to a larger Bench under Section 26 of the Administrative Tribunals Act, 1985 without stating any points as envisaged in the Section.


(N. DHARMADAN)
JUDICIAL MEMBER

N.V.Krishnan,
Vice Chairman (A).

I have carefully perused the judgement dated 5-3-93 of my learned brother holding that the case should be placed before the Hon'ble Chairman for being referred to a larger Bench for the reasons given in that judgement.

2. It is not necessary to recite the facts of the case as they have been stated in my learned brother's judgement. There are two issues involved. One is whether the vacant post of Director, Cashewnut Development is reserved for a scheduled tribe in the roster or whether, being the only post in the cadre, no such reservation can at all be made. The second is in regard to remuneration to the applicant, a Deputy Director, for shouldering the additional responsibility of Director, as claimed by him. My learned brother has given his views in regard to these issues in his judgement dated 5-3-93. It is with great regret that I find myself unable to agree with him for the detailed reasons given herein.

3. My views on the first issue are as follows:-

(i) My learned brother seems to have apparently concluded- vide the observations in paras 9 & 11 of the judgement in O.A.792/91, which has been made available to me for perusal- that the O.M. dated 30-11-91 deals with a situation where there is only one post in a cadre and it has fallen vacant. With great respect, I am unable to agree with this view. In my view, the O.M. dated 30-11-81 contains instructions about filling up a single vacancy in a cadre where the number of such posts is more than one and therefore, it is not at all relevant for the disposal of the instant O.A. This is evident and

u

can be inferred from that O.M., reproduced in para 5 of my learned brother's judgement. On the contrary, in the instant O.A., the post of Director, Cashewnut Development, is admittedly the only post in the cadre. This finding has been given by us in para 5 of our judgement in O.A.418/91, a copy of which has been kept on record for reference.

(ii) No doubt, the Supreme Court did not consider the aforesaid O.M. dated 30-11-81 in the judgement in Chakradhar's case (AIR 1988 SC 959). However, a similar O.M. was in existence even earlier, in the Ministry of Railways and its validity was upheld in A.R.Choudhary Vs. Union of India (AIR 1974 SC 532). That was also a case of a single vacancy in a cadre which has more than one post. The following extracts from the head note, from that judgement bear this out:

"--In 1964 the Railway Board prepared a new 'Model Roster' signifying the turns of reserved and unreserved vacancies. Under this Roster 12.5 per cent of the vacancies were reserved for scheduled castes and 5 per cent for the scheduled tribes. The Roster contained an explanation that if there are only two vacancies to be filled on a particular occasion, not more than one may be treated as reserved and if there be only one vacancy, it should be treated as unreserved. If on this account a reserved point is treated as unreserved, the reservation may be carried forward in the subsequent two recruitment years. In the financial year 1966-67 a vacancy of Headmistress arose in a High School run by the Railway Administration and it was treated as unreserved on this basis. Another vacancy arose in the financial year 1968-69. It was contended that the vacancy must be treated as unreserved.

Held, that the vacancy of the year 1968-69 had to be treated as reserved vacancy. Though each year of recruitment was to be treated separately and by itself, a reserved vacancy had to be carried forward over 2 years, if it was not filled in by the appointment of a reserved candidate. The open class reaped a benefit in 1966-67 when a reserved vacancy was treated as unreserved. If the carry forward rule had to be given any meaning, the vacancy had to be carried forward for the benefit of scheduled castes and scheduled tribes until the close of the financial year 1968-69. The carry forward Rule was not violative of Arts. 14 and 16. AIR 1964 SC 179. Followed."

u That judgement does not, in any way, affect the ratio

of the decision in Chakradhar's case, because in the latter case also, it was found that the post of Deputy Director (Homeopathic) was the only post in the cadre and hence, reservation could not be made.

(iii) In my view, there is no circular issued by any Department of the Govt. of India that where there is only one post in a cadre and it falls vacant, it can be reserved. The O.M. dated 30-11-81 is not such a circular. In fact, such a circular could not have been issued because such a reservation would have been violative of Article 16(1) of the Constitution, as held in Chakradhar's case.

(iv) I disagree with my learned brother's interpretation of our earlier judgement in O.A.418/91 given in the following extracts from para 4 of his judgement:

"Considering the limited question raised before us we came to the conclusion that the two unsuccessful attempts made by the Department to recruit a ST candidate to the post of Director, Directorate of Cashewnut Development, Cochin, would satisfy the requirements of the Government circular. A third attempt before trying out other methods will amount to dereservation. This was the only point raised and considered by us in that case when the applicant challenged annexure-4 letter. The question whether an order of dereservation is necessary to validate the circular dated 17-1-91 or whether it is invalid on account of the failure of the department to take steps invoking the provisions of O.M. dated 22-1-77 were never considered by us while dismissing OA 418/91."

My understanding of that judgement is that it goes to the very root of the dispute by declaring that the post in question is the only post in the cadre and when it fell vacant reservation cannot be done, as it violates Article 16(1) of the Constitution, as held by the Appex Court in Chakradhar's case.

Therefore, while it is true that the two questions mentioned by my learned brother were not considered by us, the reason therefor is that they did not even

arise for consideration.

(v) The pleadings of the applicant in O.A.792/91 do not show that it was contended by him that the cadre of Senior Foreman consisted of only one post. Apparently, this was only an argument advanced at the time of hearing vide para 6 of the judgement therein. There is, however, no finding of the Bench whether the cadre consisted of only one post of Senior Foreman or more than one post. It, however, appears from the observations in paras 9 & 11 of the judgement that the case was decided on the footing that the post of Senior Foreman is the only post in the cadre. In my view, if this was so, it could not have been reserved and the O.M. dated 30-11-81, not being applicable in such circumstances, could not have been invoked to justify reservation. In the circumstance, I am unable to agree with the judgement in OA 792/91 and I am of the view that the instant O.A cannot be decided on the basis of that judgement.


(vi) Therefore, neither the O.M. dated 30-11-81 nor the judgement in OA 792/91 affects the validity of the majority view in this OA. It is thus clear that this issue has to be decided only on the basis of that majority view. Therefore, we again differ as to how this O.A. is to be disposed of after the third Member has given his opinion.

4. In regard to second issue viz., the payment of additional remuneration- my learned brother's views are at page 8 of his judgement. He has observed that as the applicant's representation was rejected on 21-11-86 the applicant is estopped from claiming this relief and that this question has not been answered either by me or by the third Member.

U

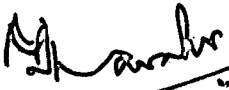
5. My only observation is that while my learned brother had, no doubt, referred to the dismissal of the representation in his judgement dated 4-12-91, he did not hold that the applicant's prayer should be dismissed on the ground of estoppel. Therefore, the question of answering this argument, by me or the Hon'ble third Member, never arose. Instead, he felt that the respondents should be directed to dispose of the applicant's representation. The majority view was expressed only in this context and it was held that no useful purpose would be served by such a direction and hence, the majority considered the question on merits and decided it in the applicant's favour.


6. For the foregoing reasons, I regret it has not been possible for me to agree with the judgement dated 5-3-93 of my learned brother and I am also unable to agree with the decision in OA 792/91, assuming that it concerns the filling up of a post, which is the only post in the cadre, when it fell vacant. I also, therefore, find it necessary- though for totally different reasons- to refer this O.A. to the Hon'ble Chairman to enable him to constitute a larger Bench to decide the disputed issues.


8.4.93
(N.V. KRISHNAN)
Vice Chairman(A)

Order of the Bench

For the reasons given in our respective judgements, the Registry is directed to place this O.A before the Hon'ble Chairman, Central Administrative Tribunal to enable him to refer it to a larger Bench to render a final decision in this case.


(N. Dharmadan) 29.4.93.
Member (J).


(N.V. Krishnan)
Vice Chairman(A)

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 174/90

Thursday, this the 16th day of June, 1994

HON'BLE SHRI N. DHARMADAN (J)
HON'BLE SHRI J.P. SHARMA (J)
HON'BLE SHRI S.KASIPANDIAN (A)

P.P. Balasubramanian,
20/12, VOBhavana, Off Hospital Road,
Tripunithura.

.. Applicant

By Advocate Shri T.Ravikumar.

V/s

1. Union of India, rep. by
Secretary, Min. of Agriculture,
Dept. of Agriculture & Cooperation,
Krishi Bhavan, New Delhi 110 001.
2. The Joint Secretary (P) and
Horticulture Commissioner,
Min. of Agriculture, Deptt. of
Agriculture & Cooperation,
Krishi Bhavan, New Delhi-1.
3. The Secretary, Union Public Service
Commission, Dholpur House,
Shahjahan Road, New Delhi.
4. Sant Lal, Deputy Director
(Marketing), Director of Cashewnut
Development, Cochin-11.

.. Respondents

By Advocate Shri T.P.M.Ibrahim Khan, ACGSC (R.1 to 3)
By Advocate Shri M.R.Rajendran Nair (R. 4).

ORDER

N. DHARMADAN (J)

This case has come up before the Full Bench on the basis of a reference order by the Hon'ble Chairman in view of the disagreement of Hon'ble Shri N.V.Krishnan, Vice-Chairman with the judgment of this Tribunal in OA 792/91. Hence, the entire case is before us for decision.

2. A Deputy Director (Development) in the Directorate of Cashewnut Development is the applicant. As per an order, Annexure-D, he was directed to look after the current duties of the post of Director in the same Directorate till regular arrangements are made. His request for additional remuneration under F.R.49 was rejected by Annexure-U order. Two years later, he filed Annexure-T representation. It is pending. In the mean time the post of Director at point No.17 of the communal roster was notified twice for filling-up the same with suitable S.T. candidate. Under these circumstances, this O.A. was filed with the following two prayers:-

- " i) to direct the respondents to appoint the applicant as Director, Dte. of Cashewnut Development Cochin with effect from 18.5.88 on which date the applicant became fully qualified to be appointed as Director;
- ii) to direct the respondents to pay additional remuneration to the applicant in terms of the provisions contained in FR 49 for holding the additional charge of Director in the Dte. of Cashewnut Development, Cochin from 8.10.84 on which date the applicant took up the current duties of the Director, and"

The learned counsel for the applicant, Shri T.Ravikumar submitted before us that after the disposal of the O.A.418/91, applicant was promoted as Director on 20.7.93. In the light of this appointment, the O.A. has become infructuous. He also submitted that the issue regarding the claim of the applicant for getting additional remuneration under FR 49 is not pressed for a decision by this Tribunal and he seeks permission to withdraw the case.

3. In the light of the above submission, we are of the view that the issues arising for consideration in this case on the basis of the order of reference need not be considered and decided by us.

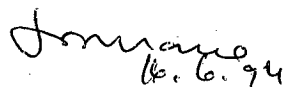
4. The prayer of the applicant to withdraw the case is not opposed by the learned counsel for the respondents. But the learned counsel for the additional 4th respondent submitted that the grievance of his client to agitate the matter separately against the appointment of the applicant, as Director, pending the original application be preserved for he could not get proper instructions from his client in this behalf.

5. In the result, having regard to the above submission, we allow the prayer of the applicant to withdraw the case reserving the right, if any, of the 4th respondent to challenge the appointment of the applicant, particularly when the learned counsel for the 4th respondent was not in a position to make his submission about the validity of the appointment of the applicant after the order passed by this Tribunal referring the case to the Hon'ble Chairman.

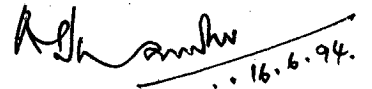
6. In the result, we dismiss the O.A. as withdrawn reserving the right of the 4th respondent as referred to above. There will be no order as to costs.



(S.KASIPANDIAN)
MEMBER (A)


16.6.94.

(J.P. SHARMA)
MEMBER (J)


16.6.94.

(N. DHARMADAN)
MEMBER (J)

v/-