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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH
BOMBAY

OA No.668/91

Date of decision: 19th June, 92.

Sh.Jagdish Rameshwar Sharma Applicant
versus

The General Manager
Telecom, Maharashtra Respondents
Circle, Bombay & others

CORAM: THE HON'BLE MR.T.S.OBEROI, MEMBER(J)
THE HON'BLE MR.USHA SAVARA, MEMBER(A)

For the Applicant Sh.M.A.Mahalle,
Counsel.

For the Respondents Sh.V.S.Masurkar,
Counsel.

1.Whether reporters of local papers may be
allowed to see the judgement? Yes.

2.Whether referred to the reporter or not? Yes.

JUDGEMENT

(DELIVERED BY HON'BLE MR.T.S.OBEROI, MEMBER)

In this OA filed under Section 19 of the Administrative
Tribunals Act, 1985, the applicant seeks the following
reliefs:-

- " (1) Respondents may be directed to confirm
the applicant with effect from 1969 in
the cadre of Office Assistant and give
him the further consequential promotions,
arrears including the increment that would
fall due alongwith the interest at market
rate.
- (2) Since the Respondents are deliberately
with the bias mind and rejected the claim
of the applicant, the heavy cost may kindly
be granted to the applicant."
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2. Earlier, while deciding OA 233/88, filed by this applicant, another Bench of this Tribunal passed the following order:-

" Having regard to the facts and circumstances of this case the applicant is entitled to succeed. We are of the view that the applicant's claim for confirmation as Office Assistant w.e.f.1969 had not been duly considered by the competent authorities due to the failure of the respondents 1 to 3. Hence, we dispose of this application with the directions to the respondents 1 to 3 to convene a review DPC as on 1971 and place the case of the applicant also along with other eligible officials and in case the applicant is found suitable for confirmation with effect from 1969 by the review DPC, he shall be entitled to promotion and all other consequential benefits including the salary and arrears."

3 . The applicant's prayer thus is that the directions in the judgement in OA 233/88 have not been properly implemented and hence this OA.

4. In the counter filed on behalf of the respondents, applicant's case has been opposed. Their contention is that the applicant's case as in 1971 was duly considered by a review DPC convened on 30.7.91, but did not find him suitable for confirmation with effect from 1969, due to his unsatisfactory record.

5. We have heard the learned counsel for the parties.

6. The learned counsel for the applicant pleaded that in spite of clear directions given in the judgement in OA No.233/88, the respondents have

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circumvented the same and not implemented the directions in true spirit. By referring to AIR 1988 SC 686 (K.I.Shephard and others Vs.Union of India & Others), the learned counsel for the applicant further emphasised that, as held in this citation(relevant para 16), there is always a tendency on the part of the Government officials to stick to the decisions already taken, and, therefore, pleaded that this Tribunal should straightway order confirmation of the applicant with effect from 3.1.69,i.e., the date his junior was confirmed. He relied upon 1991(1) S.L.J.(CAT) 257(V.W.Pradhan Vs. State of Marashtra and another), decided on 26.11.90, by New Bombay Bench of the Tribunal.in this regard.

7. By coming to the factual side, the learned counsel for the applicant pleaded that the applicant had passed the confirmation test in May, 1970, and, therefore, by virtue of the provisions in the Schedule to Appendix 9, containing the rules for recruitment to the post of Time Scale Clerks and Sorters in the Indian Posts and Telegraphs Department, the learned counsel for the applicant emphasised that column 8 of the said schedule provides,for confirmation, a period of probation of four years or passing of the confirmation examination, whichever is earlier, but the respondents, in this case,have conveniently ignored that the applicant had passed the confirmation test in May, 1970 . The learned counsel for the applicant further pleaded that even a bare perusal of the proceedings of the review DPC held on 30.7.91 would indicate that the

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remarks column therein shows that the applicant's performance has been rated as "Average", "Satisfactory" and "Average" again, during the periods 1.11.68 to 30.3.69, 1.4.69 to 30.9.69 and 3.10.69 to 31.3.70, respectively, which by no means shows that the same was so dismal or adverse, so as to bar applicant's confirmation on the basis thereof, particularly when the rules referred to above, only provide for confirmation from the date of passing of such test. The learned counsel for the applicant further pointed out that even the next item, i.e., item No.4 in the said proceedings of review DPC, shows that a warning was administered to the applicant, for the period relating to 1.4.70 to 5.11.70 which, as mentioned in the judgement in OA 233/88, ~~does not~~ does not stand in the way of such confirmation. The learned counsel for the applicant further pleaded that as mentioned in para 7 of the judgement *ibid*, even the adverse remarks were communicated to the applicant after the crucial period, as would be seen from original memorandum contained in the paper-book of OA 233/88 at page 12 exhibit P-3/1, which could not have been taken into account, ^{not} for confirming the applicant from the date of his passing the confirmation test, as held in *Brijmohan Chopra Vs. State of Punjab* (1987(2) SLR 54 S C). Lastly, the learned counsel for the applicant pleaded that though three of the officials namely, Mohd. Ziauddin, Sh. Abdul Munnaif and Sh. E.P. Borse had passed their respective confirmation tests ^{i.e.} later than the applicant, in November 1970, they had been confirmed from 3.1.69, 4.5.69 and 4.5.69 respectively,

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and this discrimination has been exercised in the case of the applicant, by not confirming him from the date he passed the confirmation test.

8. The learned counsel for the respondents, besides the points urged in the counter, pleaded that in the earlier OA, broadly on the same issues having been decided, the present application shall be barred by the principles of res judicata. The learned counsel for the applicant, however, met this objection by pleading that the ^{present} OA has since been admitted, and no such objection was raised by the learned counsel for the respondents, in this regard, at that time. He further pleaded that no other efficacious remedy is available to the applicant to seek recourse to his grievance, which was granted by the said judgement, and, therefore, in the interest of justice, technicalities should not be allowed to come in the way of providing relief to the applicant.

9. We have given our careful consideration to the rival contentions, as briefly summed up above. We have also perused the material on record, together with the citations referred to, during the course of arguments.

10. The review DPC as of 1971, held on 30.7.91, rejected the claim of the applicant, on the following grounds:-

" (i) Bad entry in CR of 1.4.70 to 5.11.70 and it was communicated.

(ii) As a normal practice, if the special report on latest performance of that period was called for, it would have

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definitely effect the mis-conduct of the official for which he was warned by his officer in the first quarter of 1971-72. Further it is noticed that inspite of communicating of the various adverse entries, the said official did not improve his conduct. Hence, Review DPC concluded that the case of Sh.J.R.Sharma, for confirmation is NOT APPROVED as on 1971.

(iii) Henceforth the official cannot be confirmed w.e.f.1969, since he is not eligible according to Departmental rules."

11. As regards item at (i) above, the judgement in OA 233/88, while dealing with this aspect in para 7 thereof, held that, "it is true that the applicant was given warning in 1971 but this cannot be treated as adverse entry. Generally warning is ~~given~~ given to a Government official for improving his work and conduct and it cannot be treated as a bar for considering his case for further promotion and confirmation in service." It is evident from the proceedings of the review DPC that for period from 1.4.70 to 5.11.70, the applicant was only warned, which as held in the above part of the judgement, was considered to be not a bar for considering applicant's confirmation.

12. As regards the remarks at (ii) above, it is a well known proposition of law that only the position concerning the relevant period, should have been taken into consideration by the review DPC, as held in 1985(1) SLJ 49(Allh.) (Hari Om Prakash Agrawal Vs. Union of India and 1986(2) SLJ 122(CAT) (Dr. Sushila Mishra Vs. Union of India and, nothing not

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relating to the period in question could be imported by the DPC, for considering applicant's confirmation. Further, as evident from respondents' memorandum dated 28.12.73 received by the applicant on 29.12.73 (exhibit P-3/1, page 12 of the paper-book of OA 233/88), the communication regarding adverse remarks relating to the period from 1.4.72 to 30.11.72, which, as held in the judgement in OA 233/88, could alone be considered as adverse remarks, communicated to the applicant, for purposes of evaluation of his performance, in the matter of his confirmation, was conveyed to him much later, so as not to enable him to submit his representation against the same, before the same could be considered by the DPC held on 1.2.73. There is also no explanation by the respondents, on record, as to why applicant's case for confirmation could not be considered in the DPC held on 26.10.71, though he had qualified in the test for confirmation in May 1970. There is also no material on record, indicating as to why the DPC meeting could not be held in 1970 or again in 1972, particularly when there were vacancies of Office Assistant, against which the applicant, by virtue of his having passed the confirmation test, was entitled to be considered for the same.

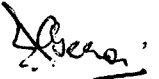
13. As regards item (iii) of the grounds of rejection of applicant's case for the review DPC held on 30.7.91, as per schedule to the Appendix 9 containing rules for recruitment to the posts of Time Scale Clerks and Sorter in the Indian Posts and Telegraph Department, the only requirement is passing of the confirmation examination,

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or probation for a period of four years, whichever is earlier, whereas the applicant passed the confirmation examination much earlier i.e. in May, 1970, till which period, as earlier discussed, nothing can be treated as adverse against him, as the applicant's performance during the relevant period has been rated as "Average" and "Satisfactory", and warning is not considered as a bar for confirmation. No other material or rules have been placed by the respondents on record, imposing any other conditions for confirming an incumbent, after his passing the requisite examination.

14. As a result of the above discussion, we are of the view that there is no justification for denying confirmation to the applicant from 3.1.69, i.e., from the date his junior, Mohd. Ziauddin, was confirmed. We accordingly, allow the OA by quashing the D.P.C. proceedings and the letter dated 28.8.91 issued by the Telecom District Engineer, Nanded, and direct the respondents to order applicant's confirmation accordingly, w.e.f. 3.1.69. He shall also be entitled to promotion and all other consequential benefits including salary and arrears. We, however, make no order as to costs.


(USHA SAVARA)
MEMBER(A)

 19.6.91
(T.S. OBEROI)
MEMBER(J)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH.

C.P.No.26/93 in

O.A. No.668/91

Dt. 9.7.1993.

Shri J.R.Sharma.

.... Applicant.

V/s.

Department of Telecom.

.... Respondent/s.

Coram: Hon'ble Shri Justice M.S.Deshpande, Vice-Chairman,
Hon'ble Shri M.Y.Priolkar, Member(A).

Appearances:-


Applicant by Shri G.S.Walia.
Respondents by Shri P.G.Godhamgaonkar.

Oral Judgment:-

[Per Shri M.S.Deshpande, Vice-Chairman] Dt. 9.7.1993.

Heard Shri G.S.Walia for the applicant and Shri P.G. Godhamgaonkar for the Respondents. The affidavit filed by the Respondents shows that all that was to be done on the basis of the order of the Tribunal has been done.

According to Shri Walia though the applicant was promoted w.e.f. 4.5.1992 when his junior Mohd.Ziauddin was promoted, the applicant came to be reverted in September, 1992 (i.e. 1.9.1992) by an order dt. 5.5.1993. The matter of reversion cannot, however, be one which would come within the purview of the Contempt Application because the applicant would have his remedy separately in respect of the alleged reversion. We are satisfied that no contempt has been committed. The Rule is discharged. There will be no order as to costs.


(M.Y.PRIOLKAR)
MEMBER (A)


(M.S.DESHPANDE)
VICE-CHAIRMAN

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