Duplicate for

OA 1476/95

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Origin
OA 1155/95

O.A.Nos. 1135/95, 1472/95, 1473/95, 1474/95, 1475/95, 1476/95

Pronounced this the 22nd day of July 1997

CORAM:

HON'BLE SHRI B.S. HEGDE, MEMBER(J)

HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

(1) O.A.1135/95

Smt.Lasitha Arayakandy,
Asstt.Teacher
In the Education Department,
U.T. of Daman, Diu & Dadra
Nagar Haveli,
Daman - 396 220. .. Applicant

By Advocate Shri G.S.Walia

-versus-

(1) Administrator,
U.T. of Daman, Diu and
Dadra Nagar Haveli,
Daman - 396 220.

(2) Asstt.Secretary(Home)
U.T. of Daman, Diu and
Dadra Nagar Haveli,
Daman - 396 220.

(3) Development Commissioner,
Dept. of Personnel and
Administration,
U.T. of Daman, Diu and Dadra
Nagar Haveli,
Daman - 396 220.

By Counsel Shri V.S.Masurkar .. Respondents

(2) O.A.1472/95

Hirubhai Babubhai Patel .. Applicant in O.A.1472/95

(3) O.A.1473/95

Smt.Devyaniben Mohanlal Patel .. Applicant in O.A.1473/95

(4) O.A.1474/95

Smt.Naynaben Mangubhai Patel .. Applicant in O.A.1474/95

(5) O.A.1475/95

Smt.Nitaben(alias Nilaben)
Haribhai Patel .. Applicant in O.A.1475/95

(6) O.A.1476/95

Smt.Bharatiben Hirabhai Patel .. Applicant in O.A.1476/95

By Advocate Shri G.S.Walia

-versus-

...2/-

1. Administrator,
   U.T. of Daman, Diu and Dadra
   Nagar Haveli,
   Daman - 396 220.

2. Assistant Secretary(Home)
   U.T. of Daman & Diu,
   Daman - 396 220.

3. Development Commissioner
   Dept. of Personnel and
   Administration,
   U.T. of Daman, Diu and Dadra
   Nagar Haveli,
   Daman - 396 220.

4. Collector,
   Daman & Diu
   Collectorate,
   Daman - 396 210.

5. Assistant Director,
   Education,
   Nani Daman - 396 210

By Counsel Shri V.S.Masurkar .. Respondents in all the above OAs.

-: O R D E R :-

(Per M.R.Kolhatkar, Member(A))

As these six cases have identical facts with minor change of details and there is a common issue the same are being disposed of by common order. Facts in O.A. 1135/95 are taken as illustrative and where necessary supplementary orders are separately passed in regard to other cases.

2. The applicant was appointed by order dt. 15-3-94, at Ex.B, as Assistant Teacher on consolidated salary of Rs.1400/- p.m. on adhoc basis for a period upto April,1994. Apparently the appointment was continued from time to time. Applicant was called for interview for the post of Assistant Teacher by letter dt. 29-9-1994 at Ex.'C' scheduled for 14-10-1994. The letter states that if she wishes to take the benefit of OBC reservation she may produce a certificate issued by respective District

Magistrate of Daman & Diu in the prescribed format. The applicant states that there were 28 posts for Science and Arts, 2 posts for drawing teachers and 2 posts for Physical Training teachers and the name of the applicant was forwarded as a general candidate from the employment exchange. However, during the interview the selection committee asked her whether she belonged to OBC and on her reply that she is OBC from Kerala she was asked to give an affidavit to that effect. Affidavit was given on the same day stating that she belongs to Hindu(Thiyya)Community of District Cannanore Kerala notified as OBC in the State of Kerala. At Ex.'E' is the appointment letter dt. 29-11-1994 which states in para 2(i)"The appointment is purely on adhoc basis and will not confer any title to permanent employment subject to production of OBC certificate." The applicant was directed to report for duty in the Govt. High School, Nani Daman vide order dt. 2-12-94. The applicant states that she was found medically fit and also surrendered her Employment Exchange Identity Card vide letter dt. 22-4-95, Ex.'G'. The applicant by her letter dt. 12-9-95(not on record) had clarified her position with regard to her status as OBC from Kerala. However, by order dt. 14-9-95, Ex.'A', which is the impugned order reppondents purported to terminate her services for breach of condition No.2(i) viz. that she is not entitled to the concession admissible to the OBCs in the U.T. of Daman and Diu in terms of letter No.F.No.12011/11/94-BCC(C) dt. 8-4-1994 from the Govt. of India, Ministry of Welfare New Delhi. It is this purported termination of her services that the applicant had challenged in this O.A.

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3. There are some technical contentions viz. that letter of appointment, stated to be appointment on adhoc basis, was in fact in respect of substantive vacancy to which applicant was selected after proper selection and that the respondents were not competent to terminate her services without giving any prior notice. Leaving these technical contentions aside the first substantive contention of the counsel for the applicant is that the applicant belongs to OBC community of Kerala and as such she is entitled to OBC concessions in a U.T. Counsel for applicant has invited our attention to the central list of OBC communities in Kerala which is annexed as Ex.I to the rejoinder dt. 7-8-1996 in which Thiyya community is at Sr.No.14. He further points out that in the case of SC/ST community there are State lists of SC and State lists of ST but there are no central lists of SCs and STs. It is only in the case of OBCs that there is a central list. According to the applicant a candidate of OBC community belonging to central list is entitled to the concession as an OBC candidate in a U.T. and for this purpose he relies on the judgment of the Principal Bench of the Tribunal in Shri Bhika Ram vs. Delhi Administration & Ors., 1996(1)ATJ 1. In that O.A. the question posed before the Tribunal was whether an SC candidate who had migrated from UP to Delhi is entitled for reservation in the post under Delhi Administration which is a Union Territory. The Tribunal in para-15 observed as below:

> "15. The position is thus clear that the rights and privileges to a Scheduled Caste of one state would not apply to those persons belonging to S/C and S/T category of another State who have migrated belong to a caste or Tribe which bears a similar nomenclature. However, the question which arises in this case

is whether the post which is held by the applicant is to be filled in on an All India basis or his recruitment is confined only to these domiciled and residents of Delhi. In the matter of recruitment rules the posts under the Central Government are filled in on all India basis, the benefits of reservation being extended to all the Scheduled Castes and Scheduled Tribe candidates irrespective of the State to which they belong and are notified. The learned counsel for the respondents No.5 and 6 have contended that the post under the Irrigation and Flood Control Department of Delhi Admn. are filled in only from the permanent residents of Delhi Union Territory and not on an All India basis. In support it has been pointed out that the post of J.E. is filled in through candidates sponsored by the employment exchanges of Delhi and since only permanent residents of Delhi can be enrolled in the employment exchanges in Delhi, the recruitment is confined only to residents of Delhi. It is further contended that the question of all India selection arises only when suitable candidates cannot be sponsored by the employment exchanges in Delhi which is not the case in respect of the applicant. We however do not see our way to agree to this somewhat ingenuous argument. In our view it is not how the post is filled in but the provision made for filling in which is relevant. The posts under the Union Govt. are open to all citizens of India. Delhi is a Union Territory and therefore all Departments and posts belong to the central government in the ultimate analysis. In other words, the posts of Irrigation and Flood, Control, Department in Delhi NCT are to be filled in as if they are under the Govt. of India and there can be no restriction in regard to the domicile or residence if the candidate is a citizen of India. It is a different matter that the concerned authorities would, considering the level of the post, confine their enquiries for candidates only to the local employment exchanges of Delhi. The point is that there is nobar on the Appointing Authority to circulate these posts through means such as Employment News

> or other Circulars to employment exchanges elsewhere in the country. The posts of similar status/level in Delhi and elsewhere are filled through recruitment of adjoining states or Union Territory of Delhi. We are therefore of the view that the ratio of the Supreme Court judgment in the aforecited case does not apply in the instant case since the circumstances of the case are different."

According to the counsel on the same analogy since Diu and Daman is U.T. therefore a candidate figuring in OBC list of Kerala is entitled to the OBC concession in Diu and Daman. In this connection he also relies on the judgment of Chandigarh Bench of the Tribunal in Kuldeep Singh vs. U.O.I. 1996(2)ATJ 421. The Tribunal in Kuldeep Singh's case relied on Bhika Ram's case vide para 12.

4. Counsel for respondents however contends that there is an error on the part of the Principal Bench in holding that service under U.T. is service under central government. According to him the constitutional position is quite clear; vide Article 239 relating to Administration of Union Territories, it is provided that every Union Territory shall be administered by the President acting through an administrator. According to him, the Supreme Court in the case of Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra & Anr. vs. U.O.I., JT 1994(4)SC 423 observed in para 10 as below:

> "10. In the counter filed on behalf of the State of Maharashtra, it is contended that the question raised in this petition has been conclusively answered by a Constitution Bench of this Court in Marri Chandra Shekhar Rao v. Dean Sheth G.S.Medical College and others (JT 1990(2)SC 285) = 1990(3)SCC 130 and as such, the petition is liable to be

dismissed. Without prejudice to this preliminary contention, it is pointed out that the expression 'in relation to that State' read with the words 'for the purposes of this Constitution' in Articles 341 and 342 leave no manner of doubt that the specification made is 'in relation to that State' for which it is made i.e. the State of origin and not the State to which a person migrates. That is because the concept of backwardness in Articles 15 and 16 is a relative one varying from area to area and region to region and hence it is not permissible to generalise any Caste or any Tribe as a Scheduled Caste or Scheduled Tribe for the whole of the Country. Therefore, a person belonging to a Scheduled Caste or a Scheduled Tribe in relation to a State would require necessary protection and benefits in that State to bring about equality but the social environment of the State to which he migrates may not be the same as in the State of his origin and therefore he cannot claim the benefits and privileges available to Scheduled Castes and Scheduled Tribes in the State to which he migrates. Therefore, the contention of the petitioners that on migration the Caste or Tribe of the concerned person does not change and if such person is denied the concessions, benefits and privileges available to Scheduled Castes and Scheduled Tribes in the State to which he migrates, such a denial would be in violation of Article 14 of the Constitution, in that, the right to equality and equal treatment would be denied, cannot be sustained. For the very same reason, the challenge to the communications and circulars issued by the Government of India and the Govt. of Maharashtra is without merit. It is, therefore, contended by the deponent that there is no merit in this petition and the same shouldbe dismissed. "

5. But the same judgment was noticed in Bhika Ram's case and still the Tribunal held that "the posts under the Union Govt.are open to all citizens of India. Delhi is a Union Territory and therefore all Departments and posts belong to the Central Government in the ultimate analysis." According to the counsel for the Respondents this proposition however is not correct. Union Territory is a separate administration which has its own list of OBC/is different from the central list of Kerala or central list of Gujarat. For this purpose he relies on the case of Satya Dev Bushahri vs. Padam Dev and Ors., AIR 1954 SC 587. That was a case in which the question/was whether the contracts entered into with Part C States are, in law, contracts entered into with the Central Govt. It was argued on one side that this is so and the reliance was placed on article 239 which enacts that the States specified in Part C shall be administered by the President through a Chief Commissioner or Lieutenant-Governor to be appointed. A reference was also made to Article 77 which provides that all executive action of the Govt. of India shall be expressed to be taken in the name of the President. The argument is that the executive action of the Central Government is vested in the President and the President is also the executive head of Part C States. The Hon'ble Supreme Court repelled this contention by observing as below :

> "The fallacy of this reasoning is obvious. The President who is the executive head of the Part 'C' States is not functioning as the executive head of the Central Government, but as the head of the State under powers specifically vested in him under Art.239. The authority conferred under Art.239 to administer Part C States has not the effect of converting those States into the Central Government. Under

> Art.239, the President occupies in regard to Part C States a position analogous to that of a Governor in Part A States and of a Rajpramukh in Part B States. Though the Part C States are centrally administered under the provisions of Art.239, they do not cease to be States and become merged with the Central Government."

Satya Dev Bushahri's case referred to the constitutional provision as unamended. As observed in Durga Das Basu's Shorter Constitution of India, Eleventh Edition, January,1994, the Constitution(7th Amendment)Act,1956 replaced the States in Part C and Territories in Part D of the First Schedule by the 'Union Territories' and that the provision relating to the administration of the Union Territories do not materially differ from those relating to the administration of the Part C States as was provided in repealed Arts.239 and 240, and that they are to be administered by the Union through an Administrator. It is also observed that Union Territory is a separate entity relying on Satya Dev Bushahri's judgment.

6. We are inclined to accept the contention of the counsel for the respondents that in view of above position the Union Territory and in this particular case U.T. of Diu and Daman is a separate entity. The observations to the contrary in Bhika Ram's case that Delhi is a U.T. and therefore all departments and posts belong to the Central Govt. in the ultimate analysis with greatest respect do not appear to reflect the correct legal position especially in view of the fact that Satya Dev Bushahri's case was not cited before the Principal Bench.

7. If, therefore, OBC list of Kerala does not help the applicant then we are required to take account of the contention of the respondents that so far as U.T. of Daman and Diu is concerned it has a separate list which is

notified under notification No.DC/10/201/92/2440 dt. 27-1-1994. This list comprises 18 castes as OBCs for the purpose of reservations for the civil posts and services under the Administration of Daman and Diu and one of the castes mentioned is Koli(Sr.No.11) which is relevant for the purpose of other applicants, but not for the purpose of applicant in O.A.1135/95.

8. The reply of the respondents refer to Govt. of India Ministry of Welfare letter No.F.No. 12011/11/94-BCC(C) dt. 8-4-1994 on the subject of "Issuing of other Backward Class Certificates to migrants from other States/UTs." That circular to the extent it is relevant lays down the instructions to avoid hardships to the migrants from one state to another and in particular it lays down that the prescribed authority of a State/ U.T.Administration may issue the OBC certificate to a person who has migrated from another State on the production of a genuine certificate issued to his father by the prescribed authority of the State of his father's origion except where the prescribed authority feels that a detailed enquiry is necessary through the State of origin before the issue of the certificate. The certificate will be issued irrespective of whether the OBC candidate in question is included in the list of OBC pertaining to the State/UT to which the person has migrated. In our view this does not help the case of any party because it merely provides that the applicant was to approach the local District Magistrate toobtain a certi-cate regarding her OBC status in Kerala but as the circular makes it clear the facility does not alter the OBC status of the person in relation to the one or the other State/U.T. Thus even if the applicant is able to

get the certificate to her status as OBC from Kerala from the DM of Daman that certificate would not alter the fact that the Thiyya community which is OBC in Kerala is not an OBC community in Daman and Diu and therefore that certificate would not confer any benefits on the applicant in relation to UT of Daman & Diu.

9. The contention of the respondents is that they terminated the services of the applicant because she was not able to produce a certificate of her belonging to the OBC community from the U.T. In our view the ground taken by the respondents is correct and therefore the order of termination cannot be challenged on the ground that the applicant was wrongly asked to produce the certificate to the extent it was required.

10. However, we are required to consider the other contentions of the applicant. The counsel for applicant submits that she was initially registered as a general category candidate in the Employment Exchange in Daman & Diu and that it was only because respondents asked her the question regarding her being OBC that she truthfully replied that she belonged to OBC community in Kerala and produced the affidavit to that effect. Respondents ought to have considered her as a general category candidate and the applicant could still be selected on merit as a general category candidate. In this connection counsel for the applicant has pointed out that the Employment Exchange in fact had communicated to the department vide their letter dated 7.9.94 Ex.'J' that at present no candidates are registered in the Employment Exchange under the OBC category. On this point the contention of the respondents is that there were 28 vacancies of Assistant Teachers, and some vacancies were reserved for OBC candidates. The candidate was asked by the

the Selection Committee about her caste to which the applicant stated that she belonged to OBC category and her name was recommended by the Selection Committee against the vacancies reserved for OBC candidates and the candidate was offered the post on ad hoc basis subject to the production of OBC certificate. The respondents have not come out very clearly as to the overall merit gradation of the applicants and whether she could have been selected as a general category candidate on merit, even assuming that she could not be considered against OBC category. Learned Counsel for the applicant relies on the judgment of the Supreme Court in the case of Kumari MADHURI PATIL & ANR. Vs. ADDL. COMMISSIONER, TRIBAL DEVELOPMENT & ORS. JT 1994(5) SC 488 which related to admission to the Medical Colleges of a Mahadeo Koli candidate and the Hon'ble Supreme Court in para 19 had observed

> "that although Madhuri could not continue as a Mahadeo Koli candidate, if she was eligible to obtain admission as a General candidate, she may continue her sutdies."

Learned counsel for the applicant submits that it was her impression that she had done well in the interview, that academically speaking she is a First Class Science graduate with B.Ed. Degree and there was no reason why the Selection Committee could not consider her case as a general candidate.

11. On this point we have directed the respondents by our order dt. 29-10-96 to produce the related record including selection prodeedings of the Selection Committee. From the records so produced it comes out that the departmental selection committee met on 14.10.94 under the Chairman of Collector Daman. So far as question of filling up the post of Assistant Teachers are concerned the total break up is as below:

1. Assistant Teachers	..	56 Posts
2. Drawing Teachers	..	02 Posts
3. Physical Edn.Teachers	..	02 Posts

Since 50% of the posts are to be filled in by promotion from Primary School Teachers only 50% seats were required to be filled up by direct selection. As there was no feeder cadre for drawing and physical education the DPC considered selection for 32 posts including 28 posts of Asstt. Teachers. It is observed that one post was reserved for SC, one post was reserved for ST, 7 posts were reserved for OBC and 19 posts were for general candidates. The selection committee after assessing the performance of the candidates selected 19 candidates in order of merit and the name of the applicant is not in the list of 19 candidates. The selection committee selected 8 candidates including the applicants in these OAs as below:

1.Patel Bhartiben Hirabhai	Applicant in O.A. 1476/95
2.Patel Devayaniben Mohanlal	Applicant in O.A. 1473/95
3.Patel Hirubhai Babubhai	Applicant in O.A. 1472/95
4.Patel NaynabenMangubhai	Applicant in O.A. 1474/95
5.Lasitha Ryakandi(Smt.)	Applicant in O.A. 1135/95
6.Smt.Nitaben Haribhai Patel	Applicant in O.A. 1475/95

12. The main point to note about this select list is that although the selection committee states that both the general category and OBCs are selected in order of merit it also states that it selected them considering the resevations. The marks obtained by each of the candidates have not been mentioned against either the general candidates or OBC candidates. It is therefore difficult to know

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as to whether any of the OBC candidates could have qualified on their own merit irrespective of reservation. It is well settled that reservation percentage is required to be calculated after leaving out of account the reserved category candidates who have been selected on merit. This can be given effect to only if marks of each of candidates are available independently. However, we are not able to ascertain the position in this regard because of the failure of the committee to indicate the marks against each of the candidates. It is therefore our reasonable inference from the procedure followed by the above committee that the selection committee specifically asked the candidates about their OBC status and required to file affidavit in this regard with a view to enable it to make categorisation independently of marks as between general candidates and the OBC candidates. This is also supported by the letter relied upon by the counsel for the respondents from the Assistant Employment Officer which states as below:

> "In continuation to this office letter No. EE/DMN/VAC/X-2/(114/94)/513 dated 30-6-1994. I am directed to forward herewith a list of the candidates for the post of Assistant Teacher (General) in duplicate who have been newly registered in this Employment Exchange. Please note that presently no candidates are registered in this employment exchange under the OBC category and it is learnt that no certificates have still been issued to this effect by the Mamlatdar. However, you may inform the candidates that a certificate from the appropriate office i.e., the Mamlatdar should be submitted by them for being considered under the OBC category.
>
> After you have made your selection one list may be returned to this office after completion to necessary action."

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13. Under the circumstances the Tribunal is required to hold the Committee did not follow the well settled principles of Selection, that individual candidates are not allotted marks according to merit that the candidates from the OBC category were pre-selected and were not included in the general category according to marks obtained by them. The selection therefore to that extent is required to be held to have been vitiated and requires to be quashed. Since the question as to whether the applicant could have been considered on merit irrespective of OBC status remains open, the order of termination is also requires to be quashed. We accordingly quash and set aside the order dated 14-9-95 in the case of applicant in O.A. No.1135/95 and corresponding orders in the other O.As. and we also quash the proceedings of the Departmental Selection Committee dated 14-10-1994. Respondents are directed to hold a Review D.P.C. in respect of the same candidates which review D.P.C. should follow the well settled principles of selection including allotment of marks according to merit so that applicants to the extent they are not OBC of Daman & Diu could be considered for the post of Assistant Teacher on merit. We note that the Selection Committee consisted of the following:

(1) Collector, Daman

(2) Dy. Conservator of Forests, Daman & Diu

(3) Executive Engineer, PWD, Daman

(4) Medical Officer, P.H.C. Daman (A representative of the Deptt.)

(5) Medical Officer, Govt. Hospital Marwar, Daman (An officer of SC/ST Community)

(6) Assistant Director of Education, Daman (An officer of Minority Community)

It appears that this Committee considered the cases of

Class-III non Ministerial, non-gazetted in terms of corresponding recruitment rules of 1974. The Recruitment Rules dt. 25-7-1963 were noticed by us in the record produced by the respondents but we are not able to see any formal orders indicating the composition of departmental selection committee. Prima-facie we are of the view, that the composition of departmental selection committee which is meant to select Asstt.Teachers ought to have educational experts in its composition. Since Gujarati is stated to be the medium of education in U.T. there is no reason why an expert from state education council and training in the State of Gujarat and expert from National Council of Educational Research and Training which is a national training & research body/office having its regional at Pune for looking after the academic activities of Maharashtra, Gujarat, Diu and Daman etc. cannot be included in the expert committee in addition to whatever the other officers who are required to be included as per the standing instructions of the department.

14. In view of the orders which we are required to pass the interim orders staying the termination are made absolute. In case the applicant is not able to get selected through the review departmental selection committee as a general category candidate on merit the respondents are at liberty to terminate her services after following the due procedure under the Rules.

15. There will be no order as to costs.

Supplementary orders in other OA are as below:

16. O.A.1472/95

Hirubhai Babubhai Patel.

It is stated in the affidavit of the U.T.

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Administration that he belongs to Goima, Tal.Pardi Dist. Bulsar, Gujarat State and he is staying in Daman for the last 5 years. To the extent applicant does not belong to OBC community in the U.T. he may not be eligible against the OBC reservation but he is required to be considered on merit.

17. O.A.1473/95

Smt.Devyaniben M.Patel

She belongs to Hindu Koli notified as OBC for the U.T. of Daman & Diu. However, she is not able to produce the certificate of competent authority of belonging to OBC community of Diu & Daman. She could be considered both against OBC quota subject to OBC certificate as well as merit.

18. O.A.1474/95

Smt.Naynaben Mangubhai Patel

She originally belongs to Binwada, Atul, Dist.Bulsar,Gujarat and since marriage stays in Daman. She may be considered under merit category.

19. O.A.1475/95

Smt.N.H.Patel

She belonged to Salav, Tal.Pardi,Dist. Bulsar. Her husband belonged to Vapi but she has been staying in Daman for some years. She may be considered under merit category.

20. O.A.1476/95

Smt.Bharatiben Hirabhai Patel

She belonged to Silvassa and her husband belongs to Chanod(Gujarat). She is staying in Daman since 1991. She may be considered under merit category.

21. OAs are disposed of accordingly with no order as to costs.