

CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A.No. 1089/95

Date of Decision 17 April, 1996

N N Tandel

Petitioner

Mr. M.S. Ramamurthy

Advocate for the Petitioner.

Mr. I.J. Naik

Versus

U.O.I. & Anor.

Respondent.

Mr. R.K. Shetty

Advocate for the Respondents.

Coram:

The Hon'ble Mr. B.S. Hegde, Member (J)

The Hon'ble Mr. M.R. Kolhatkar, Member (A)

1. To be referred to the Reporter or not?
2. Whether it needs to be circulated to other Benches of the Tribunal?


Member (J)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, 'GULESTAN' BUILDING NO.6
PRESCOT ROAD, MUMBAI 400 001.

O.A. No. 1089/95

DATED: THIS 17th DAY OF APRIL, 1996

Coram: Hon. Shri B.S. Hegde, Member(J)
Hon. Shri M.R. Kolhatkar, Member(A)

N.N. Tandel
Assistant Engineer
Administration of Daman & Diu
PO. Nani Daman 396210

(By Mr. M.S. Ramamurthy with
Mr. I.J. Naik, Advocates)

..Applicant

V/s

The Administrator
Union Territory of Daman & Diu
Administrator's Secretariat
Fort Area
Moti Daman & Anor.

(By Mr. R.K. Shetty, Counsel)

..Respondents

Mr. V.S. Masurkar, with Mr.
Sureshkumar, Advocates for
intervenors.

ORDER

(Per: B.S. Hegde, Member(J))

In this O.A. the applicant has not challenged any impugned order but the inaction on the part of the respondents in the matter of regularising the promotion of the applicant in the post of Assistant Engineer (A.E.) after 8 years of continuous service and accordingly prayed for the following reliefs:

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- (a) that the respondents be directed to declare the applicant as regular A.E. with effect from the date from which he has been continuously working as A.E. i.e., with effect from December 1987 and assign to him seniority and all other benefits and
- (b) that the respondents be directed not to hold any fresh selection for appointment/promotion to the post of A.E.(E) which post the applicant is already holding since 1987.

2. This case has a chequered background. When the matter came up for admission and interim relief/order on 13.9.94 on the basis of the statement of the Id. Counsel for the Applicant that the selection/appointment of the applicant to the post of Assistant Engineer (Electrical) in 1987 was in accordance with the recruitment rules which then existed with effect from 1980 and on merits in a properly held DPC and sought for ad-interim direction not to proceed with a fresh selection for the post of A.E.(E), accordingly the Tribunal had ordered that the respondents may complete the DPC proceedings, however, the same shall not be published for a period of 14 days. Respondents filed their reply to the O.A. and also opposed the admission of the O.A. and the continuance of the interim order and prayed for the vacation of the interim order. After hearing the arguments of both the parties the Tribunal passed its order on 13.10.95 For the reasons stated therein the Tribunal while vacating the interim order has observed as under:

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"That the applicant has not been appointed on regular basis but only on ad hoc basis. Adhoc appointment by itself does not confer the benefit of regularisation or ~~for~~ seniority whatever be the length of continuous ad hoc appointment." and allowed the respondents to publish the result of D.P.C. held on 12.9.95 and admitted the O.A. and modified the interim order dated 13.9.95 that any appointment made pursuant to the recommendations of the DPC would be subject to the final outcome of the O.A.

3. After the pronouncement of the order, the Id. Counsel for the Applicant requested that in the background of this case his client would like to move the Hon. Supreme Court by filing a Special Leave Petition (SLP) and thus sought for stay of the Tribunal's order dated 13.10.1995 for a period of four weeks. Normally such prayers are not entertained, however, after considering the rival contentions of the parties and in the facts of the case the Tribunal order dated 13.10.1995 was stayed for a period of four weeks - status quo to be maintained by the department till 12.11.1995, stating that failure to get any order from the Supreme Court contrary to the present one, the interim order stand vacated on 12.11.95.

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4. Thereafter the applicant filed a M.P. No.760/95 in that the main contention of the applicant was that the adoption of DOP circular of 1989 for a vacancy that occurred in 1987 is not in accordance with the rules and the respondents should be directed to consider the applicant on the basis of rules prevalent in the year 1987. After considering the contention of the parties on the said M.P. was dismissed on 3.11.1995 and the O.A. was kept in sine die list. Thereafter the applicant filed an SLP which was heard and dismissed by the Supreme Court on 24.11.95 with the following observations:

"Since the order of the Tribunal is an interlocutory ~~one~~ we do not wish to entertain this SLP. It is accordingly dismissed. We however request the Tribunal to dispose of the connected O.A. as expeditiously as possible, preferably within a period of six months."

Thereafter, as per the direction of the Hon. Supreme Court the matter was fixed for hearing on 3.4.96. Immediately after the Supreme Court direction, the Applicant filed a M.P. No. 898/95 seeking to amend the O.A. and one Mr. Vishwambar Singh also filed an M.P. No. 797/95 seeking direction to the applicant to make the petitioner party respondent in O.A. No. 1089/95. Parties were given time to file reply to the M.Ps. and direction was given that the M.P.s shall be

heard along with the O.A. No.1089/95

5. The Ld. Counsel for the applicant advanced two ~~fold~~ arguments i.e., (i) for the 1987 vacancies, whether the respondents can adopt the 1989 DOP O.M. and whether the appointment of the Applicant was ~~ad~~ hoc or regular. The applicant's counsel stated that in the case of ANTONIO FERNANDES V. THE ADMINISTRATOR, GOVERNMENT OF GOA, DAMAN & DIU, & ANOR, O.A. No. 298/87 there is no general order passed by the Tribunal and the ~~entire~~ selection made in 1987 is found to be bad in law and the Tribunal is not supposed to lay down any general direction, therefore, the applicant is not subject to any further selection made by the respondents in 1985 irrespective of the order passed in ANTONIO's case, since his selection to the post of A.E. was in accordance with the then existing rules and against clear vacancies, such vacancies are not required to be reopened because mere label stating that it is ad hoc does not determine the conclusive nature of the appointment. Selection held for the post of A.E. in 1987 was challenged by ANTONIO by filing O.A.No. 298/87 stating that he was the seniormost in the cadre of J.E. and the recommendation of the DPC in 1987 while filling up the vacancies of A.E. was for 'ad hoc promotion' to the post of A.E. On perusal of the record, we find that in this case the

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the appointment of the applicant and Makwana was not quashed nor questioned. The issue in that case was that since the appointments were treated as 'ad hoc appointments', the DPC should have selected candidates who are eligible to be considered on the basis of 'seniority-cum-fitness'. In other words, the DPC should draw up the panel of selection strictly on the basis of seniority subject to the rejection of unfit, irrespective of the fact whether the posting is classified as selection or non-selection post. Since ANTONIO fulfilled all the requirements to be considered for promotion on 5.1.1987 as he was senior to the persons who have been promoted as A.E. in the grade of J.E. on ad hoc basis, accordingly the O.A. was disposed of on 23.6.1994 by giving a direction to the respondents to consider and promote him as A.E. on ad hoc basis from 14.12.1987. Consequent upon this judgment one Mr. Vishwambar Singh was reverted by the respondents to the post of J.E. on 13.1.95, which he challenged by filing O.A. No. 61/95, which was disposed of on 7.4.95 by the Tribunal. Shri Vishwambar Singh was respondent in O.A.No. 298/87, and his main contention was that since he was senior to the applicant in the present O.A. in the grade of J.E. and the appointment to the post of A.E. was on ad hoc basis, the criteria adopted by the DPC was wrong. Admittedly, V. Singh had questioned the selection made in 1987, though he was party to the same, stating that Tandel was junior to him in the list of J.E.s which

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was the basic cadre from which the promotion to the post of A.E. has to be made. His promotion came to be made on 8.5.90 on ad-hoc basis. The Tribunal held that in view of the orders secured by ANTONIO Fernandes in the earlier O.A.No. 298/87 and Mr. V. Singh was a party to that petition, he cannot now question the appointment of Fernandes and also observed that the entire selection process was vitiated and all the appointments which were made were only on ad-hoc basis. Since the respondents have adopted defective procedures and with the undertaking given by the Ld. Counsel for the respondents, a fresh selection was ordered within four months period and accordingly Mr. Singh's application was dismissed.

6. The admitted position is that in 1987, two vacancies of A.E. were available and one vacancy of A.E. was available in 1990, against which in 1987 the applicant and Makhwana were appointed and in 1990 Mr. Vishwambar Singh was appointed on ad-hoc basis. However, while giving promotion to Mr. Singh, the same was ^{made} subject to the outcome of the result of O.A. No. 298/87. It is noticed, that the applicant and Makhwana were appointed prior to aforesaid order in O.A.No.298/87. Under the existing rules, 1980 3/7 years Degree/Diploma holders are eligible for promotion to A.E. whereas in 1994 Recruitment Rules the post of A.E. is to be filled up on promotion by selection from J.E. (Elect.) and Foreman (Workshop) with 4/8 years Degree/Diploma holders were made

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eligible for the post of A.E. As stated earlier, the main emphasis of the Ld. Counsel for the applicant Mr. Ramamurthy is that having adopted selection method by the DPC in 1987, there was no need to label the appointment as 'ad-hoc' and since there were clear vacancies existed and not a stop-gap arrangement, therefore, appointments made then should be treated as regular. It is also noticed, though the appointment made in 1987 was treated as adhoc, neither the applicant nor Mr. V.Singh objected to the same. The applicant for the first time filed O.A. in 1995 raising objection that 1987 appointment should be treated as regular after a lapse of 8 years. Therefore, the question to be seen here is whether the respondents are justified in filling up the two vacancies for the year 1987 by adopting the criteria of 1989 O.M. of the DOP. The contention of the applicant is that the criteria for selection should be the then existing Recruitment Rules of 1980, and not the modified O.M. of DOP of 1989. In support of this contention, he relies on the decision of the Supreme Court in Y V RANGAIAH & ORS. V. J. SREENIVASA RAO & ORS., AIR 1983 SC 852, wherein it is held that vacancies shall have to be filled in according to the existing Rules prior to amendment. Therefore, he states that for vacancies of 1987 it is not open to the respondents to adopt 1989 O.M. of DOP, which prescribed 'Bench Mark' for the first time for the selection post and

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for all the posts in the grade of Rs.3500^{and above,} the Bench Mark rate should be very good, and the seniority will be in accordance with the lower feeder cadre is not justified. He further contended that V.Singh does not have any locus standi to intervene in this O.A. as he is not a necessary party and he has to claim his relief from the Govt. of the official respondents and not against any individual. Since he has already been reverted to the post of J.E. he should not be allowed to intervene.

7. Mr. Masurkar, -Ld. Counsel for the intervenors in his M.P. submitted that the applicant has suppressed some material facts. The Tribunal while disposing of O.A.298/87 held that order of promotion made as per recommendation of DPC is vitiated in 1987 because of faulty procedure adopted by DPC. Further while deciding O.A.No. 61/95 it was observed that cases of promotions both in 1987 and 1990 were not made as per Rules and hence vitiated and thereafter directed to conduct fresh selection for regular promotion.

8. In response to the M.P. filed by the applicant and Mr. V.Singh the respondents have denied that they have violated any statutory rules in dealing with the appointment i.e., promotion as A.E. It is further contended that the instructions dated 10.4.89 ^{an} _{my} is administrative instruction and not administrative rule as sought to be implied by the applicant. In this

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connection he drew our attention to D.O.P. O.M. dated 20.6.89 which reads as follows:

"The revised procedure to be observed by the DPC laid down in this Departments OM dated 6.3.89 has to be followed by all the DPC held after 1.4.1989 irrespective of the date of occurrence of vacancy."

It is made clear, that the intention of the respondents to apply the changed administrative instruction which is a policy matter to all DPC to be held after 1.4.1989 irrespective of the date of occurrence of vacancy. In their ~~Dux~~ rejoinder, the respondents have conceded that they have followed the Recruitment Rules of 1980 and the guidelines applicable at that time. However, there is a change in the policy of Government with regard to promotion upto the level of A.E. That the vacancy against which the applicant was promoted on ad-hoc basis at that time was regular one. It is true, that the Tribunal did not pass any order regarding DPC of 1987 and has not set aside the promotion order of the applicant. It is also a fact that the Tribunal in its order dated 7.4.95 in OA No.61/95 confirmed the action taken by the respondents in reverting V.Singh. In the seniority list of J.E. the name of the applicant is appearing at Sr.No.6 ~~as~~ on 31.5.1992, however, since the applicant is a Degree holder and others are diploma holders he seeks higher position i.e., at Sr.No.4 in the eligibility list of 1987 for promotion to the post of A.E.

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9. All the candidates who are otherwise eligible to be considered have been considered on the crucial date i.e., 1.10.1987 by the D.F.C. who selected candidates for promotion based on selection and the applicant stood at Sr.No.2. Recruitment Rules in force on the date of occurrence of vacancy was taken into consideration. Since the OM would apply to any DPC held after 1.4.89, therefore in the new DPC 1989 OM was taken into consideration. The ad-hoc promotion of the applicant made in 1987 was on merit-cum-seniority basis and in accordance with the Recruitment Rules of 1980 and on the recommendation of DPC in 1987.

10. We have considered the arguments of the parties including the counsel for intervenors Mr. V.S. Masurkar and carefully perused the pleadings and the D.P.C. proceedings of 1987, 1995 and the outcome of the result of O.A No.298/87 and O.A.No.61/95 in so far as this case is concerned. In so far as M.P.No.797/95 filed by the intervenors, the same is not maintainable because by virtue of filing this O.A. his interest is in no way prejudiced and by virtue of the decision of the Tribunal in O.A.No. 61/95 he has been reverted to the post of J.E. by the respondents. In this O.A. the applicant is not seeking a direction to upset the promotions already made but is seeking a direction to the respondents to make him regular in the post of A.E.(Elect.). In the circumstances, we do not see any justification in entertaining an M.P. filed by V.Singh

and accordingly we dismiss M.P. No.797/95.

Similarly in the case of Applicant, M.P. No.898/95 seeking amendment of the O.A. at this stage when the O.A. itself is taken up for hearing as per the directions of the Supreme Court, there is no merit in allowing the M.P. seeking amendment of the O.A. at this stage and the same is dismissed. However, in view of the direction by the Hon'ble Supreme Court to dispose of the O.A. expeditiously we are disposing of the same accordingly.

11. In the light of the above, the question to be determined is whether the DPC is justified in adopting the guidelines of DOP OM dt. 10.3.89 to a selection made before coming into effect of the above guidelines. The Ld. Counsel for the Applicant in support of his contention cited a decision of the case of Y.V.RANGAIAH & ORS. V. J.SREENIVASA RAO & ORS., AIR 1983 SC 852 wherein it was held that vacancies which occurred prior to the amended rules would be governed by the old rules and not by new rules. We have perused the decision and in our opinion, the law laid down in the above case is in respect of statute and not in respect of executive instructions or OM's of DOP. He also urged that the DPC cannot adopt 1989 instructions for the vacancies to be filled in 1987 with retrospective effect. The instructions of 1989 was given effect w.e.f. 1.4.1989, that being so, it is not open to the respondents to adopt in 1989 OM of DOP while filling up the vacancies in 1987. In this connection, the

Ld. counsel for the applicant relies upon the decision of Cuttack Bench of CAT in SMT. BINA DEVI V. UNION OF INDIA, AISLJ III 1996(1) 518, wherein it was held that non-promotion due to OM 1989 was not justified as she was selected under OM dated 30.12.76. Similarly, the Principal Bench in O.A. No.2055/89 Smt. Bina Devi vs. UOI it was held that the guidelines of 10.3.1989 were not made known to the applicant nor were they published before 10.3.1989, her case thereby was directed to be considered afresh. The decision of both the Benches referred to above, have been reiterated in a Full Bench decision of the Tribunal in S.K.BALLAR SINGH V. UNION OF INDIA, Full Bench Decisions Vol.III (1991) stating that a guideline which is in the nature of executive instruction cannot be made applicable to a selection made prior to its coming into effect. Therefore, keeping in view the ratio of the Full Bench decision and other two division Benches decisions of the Tribunal, since it is binding on all the Benches of the Tribunal, we cannot ignore the same unless the same is reversed by the Supreme Court which is not the case here. Therefore, the vacancy of 1987 are to be filled in accordance with the existing guidelines or the Recruitment Rules of 1980 and the respondent department and the DPC cannot resort to 1989 guidelines for filling in those two vacancies of the year 1987 especially, having stated, that the guidelines would come into effect w.e.f. 1.4.1989, they cannot operate that guidelines for filling up the vacancies of 1987 with retrospective effect.

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12. The applicant, further contended that the table given by the respondents that it is an "Ad-hoc Appointment" and not Regular one does not seem to be correct because his appointment was done by duly constituted DPC and for a clear existing vacancy of A.E. In this connection, it may be recalled here that we had disposed of O.A. No.298/87 ANTONIO's case on the plea made by the respondents that the appointments were made on ad-hoc basis. That being the stand of the respondents, we had observed in that case that the criteria of seniority-cum-fitness should be adopted for filling up the vacancies of the said posts on ad-hoc basis, thereby the criteria adopted by the DPC on the basis of selection is not only contrary to the existing frame of rules but the same is not tenable. Since Antonio is the seniormost amongst J.Es, the post to be filled as A.E. was on ad-hoc basis, the criteria adopted by DPC was found faulty. Respondents, having taken the stand that the appointments made in 1987 was on ad-hoc basis, the Tribunal has upheld the contention of Antonio and directed the respondents to consider his appointment as A.E.

13. Further question is whether the appointment of applicant treating it as ad-hoc by the DPC is justified in the facts and circumstances of the case. In a recent decision the Supreme Court in SMT. NUTAN ARVIND V. UNION OF INDIA & ANR., 1996(1) SLR P.774 held that Departmental Promotion Committee (D.P.C.) is a

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high level committee and Court cannot sit over the assessment made by the DPC as an appellate authority - whether or not an officer was competent to write the confidential report is for the DPC to decide and call for report from the proper Officer, if necessary. Needless to say that the DPC in this case has considered the candidature of those who are otherwise are eligible for appointment on the basis of information supplied by the respondent department. The respondents in their 'sur-rejoinder' to the OA have stated that the vacancy against which the applicant was promoted on ad-hoc basis at that time was a 'Regular One'. Further the Tribunal in O.A.No.298/87 did not pass any order regarding DPC of 1987 nor set aside the DPC proceedings held on 14.12.87 and the promotions made thereunder and further observed that since the applicant is a degree holder and others are diploma holders he ranked higher in the eligibility list of 1987 for promotion to the post of A.E. It is also averred that the recruitment rules in force on a particular date of occurrence of vacancy was taken into consideration and the ad-hoc promotion of the applicant made in 1987 was on merit-cum-seniority basis and in accordance with the recruitment rules of 1980 and based on the recommendation of the DPC held on 14.12.1987. In the light of these pleadings, in our view, a review DPC is required to be convened, especially in view of the fact, that the adoption of 1989 guidelines cannot be resorted to the vacancy that occurred in 1987 because that OM came into

effect from 1.4.89 and cannot be applied with retrospective effect. Therefore, it cannot be said that the ad-hoc promotion given to the applicant was only a stop-gap arrangement and having given a specific averment that it was a regular vacancy, it was for the DPC to consider afresh keeping in view the then existing guidelines and recruitment rules and fill up the vacancies of 1987 accordingly.

14. In view of this, we had asked the respondent department to submit the DPC proceedings of 1987 and 1995 for our perusal. On perusal of both the DPC proceedings, we find that in 1987 DPC it was clearly held that there were two vacancies of A.E. existing accordingly the applicant and other person has been appointed, of course on ad-hoc bases, whereas in 1995 DPC it is stated one vacancy was available in 1987 of A.E. Thus, the stand taken by the DPC in both the DPCs are not consistent and requires reconsideration. It is observed in 1987 there were two posts of A.E., one was transferred from Goa to Daman and one post has fallen vacant due to promotion of Ashok M. Sonnad to the post of E.E. whereas in 1995 DPC it is stated that there was one vacancy of A.E. and on perusal of the later DPC, ^{be noted that} they adopted the guidelines of DOP OM dated 10.3.89 and also stated that the ACRs of the applicant as well as Makhwana are missing from 1982 to 1988 in so far as the applicant is concerned and in the case of Makhwana the CRs are missing from 1976 to 1987, thereby as per OM 1989 para 6(2.1.C) the DPC considered their

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ACRs for the subsequent period and accordingly Makwana's name was recommended for the vacancy of 1987. The peculiarity of the case is that on perusal of DPC proceedings of 1987 we find that no ACR remarks *of the Appellant* from 1980 to 1984 and 1984-85, 1985-86, 1986-87 are graded as very good. It is further noticed that the Chief Secretary while putting up the proposal for approval of the Administrator has clearly stated that they have two vacancies of A.E.s in Union Territory of Daman and Diu to be filled in. According to the recruitment rules these are to be filled in by promotion failing which on transfer on deputation failing both by direct recruitment. For promotion a J.E. (Elect.) / Foreman (Workshop) with 3/7 years regular service in the grade in the case of degree holders and diploma holders or equivalent respectively.

15. In view thereof, we are of the opinion, that the opinion formed by the DPC is not based on firm grounds. Normally, the Tribunal would not go behind the recommendation of the DPC, however, ¹ in this case, the peculiarity is that though the vacancy is for regular appointment and not a stop-gap arrangement, the appointment was treated as ad-hoc for the reasons best known to the respondents and the DPC. It is an admitted fact, that under the 1980 Recruitment Rules then existed, the post has to be filled by selection ~~whereas~~, under the existing rules and guidelines and

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and DPC 1995 have resorted to OM of 10.3.1989 for the vacancies that occurred in 1987 does not seem to be in order.

16. In this connection the respondents draws our attention to the OM dated 20.6.1989 states that the OM dated 10.3.89 is to be applied by the DPC irrespective of occurrence of vacancy. In our view, this is to be considered and to be read not out of context, that any vacancy that arises after the promulgation of OM dated 10.3.1989, that the new procedure has to be adhered to, that is not to be construed that any vacancy that occurred prior to 1989 i.e., the O.M. of 10.3.1989 is to be applied. Therefore, it is manifestly clear, that the 1995 DPC having adopted 1989 guidelines for filling up vacancies of 1987, in our view, is not justified.

17. We, therefore, dispose of the O.A. by passing the following order. For the reasons stated above, we are per-force to quash and set aside the DPC proceedings of 1995 and direct the respondents to convene a fresh DPC to consider the entire case afresh in the light of our observations in filling up of vacancies of 1987 under the then existing rules and guidelines and not under the revised procedure/rules of 1989 and consider the case of the applicant on the ground that there were ~~two~~ vacancies of A.E. as on 1.10.1987 and complete the selection process within a period of two months from the date of receipt of this order. In the absence of CRs, summary of the CR available on earlier DPC record may as well be made use of for pragmatic reasons since reconstruction at this late stage will be almost impossible. Till the Respondents convene a fresh

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DPC and consider and decide the promotions of the eligible candidates at that point of time, the interim orders passed earlier by us shall continue.

With these directions the O.A. is disposed of. No order as to costs.

M.R. Kolhatkar

(M.R. Kolhatkar)
Member (A)

B.S. Hegde

(B.S. Hegde)
Member (J)