

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Original Application No: 839/98 and 901/98.

Date of Decision: 24/4/01

U.B.Solanki & Anr.

Applicant.

S/Shri G.S.Walia & E.J.Naik

Advocate for
Applicant.

Versus

Union of India & Ors.

Respondent(s)

Shri V.S.Masurkar

Advocate for
Respondent(s)

CORAM:

Hon'ble Shri. B.N.Bahadur, Member (A),

Hon'ble Shri. S.L.Jain, Member (J).

- (1) To be referred to the Reporter or not?
- (2) Whether it needs to be circulated to other Benches of the Tribunal?
- (3) Library?

B.N.BAHADUR
MEMBER (A)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

1) Original Application No. 839 of 98.
2) Original Application No. 901 of 98.

Tuesday this the 24th day of April, 2001.
(24-4-2001)

Coram: Hon'ble Shri B.N.Bahadur, Member (A),
Hon'ble Shri S.L.Jain, Member (J).

1. Original Application No.839 of 98.

U.B.Solanki,
At & Post Naroli,
Taluk Nava Fala,
Via Station Bhilad
Union Territory of
Dadra & Nagar Haveli.
(By Advocate Shri G.S.Walia)

...Applicant in OA 839/98.

2. Original Application No.901 of 98.

Smt. U.N.Panwala,
Education Officer,
(Science and Maths),
Dept. of Education,
U.T. of Dadra and
Nagar Haveli,
at : Silvassa - 396230.
(By Advocate Shri I.J.Naik)

...Applicant in OA 901/98.

Vs.

1. Union of India through
Administrator,
Union Territory of Dadra & Nagar
Haveli,
Silvassa.

2. Administrator,
Union Territory of Dadra
& Nagar Haveli,
Silvassa.

...Respondents in both
OAs 839 & 901/98.

3. Smt. U.N.Panwala,
Education Officer,
(Science & Maths),
Department of Education,
Union Territory of
Dadra & Nagar Haveli,
Silvassa.

...Respondent in only
OA 839/98 as R-3.

(By Advocate Shri V.S.Masurkar)

Sub

: O R D E R :

(per Shri B.N.Bahadur, Member (A))

We are considering here two OAs bearing No.839/98 and 901/98 together, as the matters are inter-related. We have taken first the facts in OA 839/98 which are in brief as follows.

2. The Applicant Shri U.B.Solanki, states that he was working as Assistant Director Education (ADE) and was in fact, originally promoted as In-charge ADE on 16.4.1997 (Ex. 'E'). He had started his service with the Respondents in 1986 as an Assistant Teacher, promoted as Head Master in at Sl. Group 'B' w.e.f. 22.2.1990 on regular basis and is/No.2 in the seniority list of Head Masters. Whereas, the Respondent No.3 is at Sl.No.1. He further states that R-3 was given regular promotion w.e.f. 4.10.1996 and notional seniority w.e.f. 22.2.1990. It is averred by the applicant that the post of ADE is required to be filled in by promotion failing which by transfer on deputation, and Head Masters with three years regular service are eligible to be considered. Applicant claims that he fulfills this requirement, whereas Respondent No.3 does not fulfill this requirement, having been given notional promotion only w.e.f. 22.2.1990. He submits that notional service cannot be counted towards regular or actual service for the purpose of acquiring experience to be counted for the next higher grade. Thereafter, in the further part of the OA, the applicant describes the steps taken by him to make a representation and how the Respondents have invited applications vide impugned order dt. 27.7.1998 for filling up the post (of ADE) by deputation ignoring the claims of the applicant. It is with such grievance that

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the applicant is before us seeking the relief in substance for quashing the impugned order dt. 27.7.1998 and for a direction to R-2 to fill up the post of ADE by first considering the applicant's case along with Recruitment Rules. Applicant also seeks a declaration from this Tribunal to the effect that R-3 is not eligible to be considered to the post of ADE on 27.7.1998.

3. The Respondents in the case, have filed a written statement of reply, stating that the seniority list of Assistant Teachers has been revised in view of the Judgment dt. 12.8.1994 in OA 604/90 decided by this Tribunal. As a result, the promotion issued in the cadre of Head Masters from the grade of Assistant Teachers came to be reviewed, Review DPC was convened in July, 1996 and revised the promotion orders issued on 4.10.1996 vide Ex. R-2. A provisional seniority list was published, but it could not be finalised because one Shri T.R.Gholap who was holding the post of Head Master earlier in 1979 had come up to the Tribunal in OA 1103/1996 and in the Judgment on this OA, Respondents orders dt. 9.3.1996 and 4.10.1996 were quashed. Further details are provided in this regard.

4. One important assertion that is made by the Respondents is that the notional promotion granted w.e.f. 22.2.1990 to R-3 ^{who} ~~is~~ is entitled to count for seniority from that date even though there is no entitlement for backwages. The contention made otherwise by the applicant, on this aspect is denied. It is further stated that applicant has never been promoted to the post of ADE, but only re-designated as ADE (Academic) from his existing designation as in-charge

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ADE. The post of ADE could not be filled in by promotion in view of *lack of availability of Abh* a valid seniority list due to litigation of the issue as pointed out earlier, avers the Respondents, and hence the Respondents have taken resort to the second proviso in the Recruitment Rules to fill up the post by deputation, since they cannot keep the post vacant, in administrative interest. *has*

5. The Respondent No.3 Smt. U.N.Panwalla/also filed a written statement of reply, in which she states that while the post of ADE should be filled in by promotion, the applicant Shri Solanki cannot be promoted to the post and in fact she herself is eligible for promotion, being senior. She avers that her seniority was never objected to by the applicant. She also challenges the legality of the OM dt. 27.7.1998 and seeks the relief herself to consider her for promotion as ADE being seniormost among 10 Headmasters.

6. In this context, we come to the Application No. 901/98 which is filed by the same Smt.U.N.Panwalla who is Respondent No.3 in OA 839/98. Here, *in* the second OA No.901/98, she seeks the relief in substance for the arrears *of difference* between *Abh* two salary /emoluments *Abh*: *the difference in the salary* of Head Master and Assistant Teacher *(for the period of* from 22.2.1990 to 4.10.1996). She also seeks a direction to Respondents to consider her for the promotion to the post of ADE and the quashing of the attempt to fill up the post by alternative methods. To give the facts, in brief, in Smt. Panwalla's case:-

Smt. Panwalla states that the Review DPC held on 24.7.1996 recommended her name for promotion to the post of Head Master and the said promotion was granted with

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retrospective effect from 22.2.1990. She is the seniormost amongst Head Masters at Sl.No.5 since the four people above her are no longer in service. The facts of her background of her previous career prior to promotion are given in detail. She states that her grievance is that although under the order dt. 4.10.1996, she was promoted as Head Master w.e.f. as per 22.2.1990 she was not paid the pay scale attached to the post of Head Master from 22.2.1990 till 4.10.1996. It is with such grievance that she has come before this Tribunal.

7. The Respondents, in the case have filed a written statement of reply where the reasons for their attempt to fill up the post of Assistant Director of Education by deputation is explained. In the first stage, a legal objection is taken that two causes of action are being agitated in violation of Rule 10 of the Central Administrative Tribunal (Procedure) Rules, 1987. It was further prayed in the written statement that the application of Smt. Panwalla being the similar to that of Shri Solanki in OA 839/98, both applications of identical nature may be clubbed and heard together and that to avoid repetition, contentions of Respondents are relied on the detailed statement filed in OA 839/98.

8. Arguing the case of Shri Solanki (OA 839/99), his Learned Counsel Shri Walia pointed out the facts of the case and asserted that while applicant has been given the actual seniority, the grievance now is that the post of ADE cannot be filled in, in the manner that it is now sought to be done and it has to be filled in by promotion first.

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Learned Counsel referred to the case decided by the Hon'ble Supreme Court in the matter of Rajoria Vs. Union of India [2000 SCC (I&S) 665] admitting that the ratio is squarely applicable to the facts of this case. Learned Counsel for the Respondents started his argument by stating that the only issue before the Tribunal is whether there was justification in going to the second mode of recruitment. He stated that this was a single solitary post and a Group 'A' post and that UPSC was involved in the selection process. In view of litigation, no undisputed list was available and hence there was no alternative, but to take recourse to the method of Recruitment by deputation. He stated that this was not a permanent arrangement and whenever candidates were available as per Recruitment Rules, action would be taken. No junior had been promoted and no prejudice is caused to the applicant.

9. We will also record here the arguments taken by the Learned Counsel Shri I.J.Naik in furtherance of her case in OA 901/98. ~~However,~~ His claim for arrears was pressed by Shri Naik strenuously by taking support of the three Judgments cited by him. These are as follows:-

1. Manohar Sitaram Nandanwar Vs. Union of India, [1986 ATC 531].
2. P.Narayanan Nair and Ors. Vs. Chief General Manager, Telecom, Kerala Circle, Thiruvananthapuram and Ors. [(1994) 26 ATC 883].
3. Samaresh Das Vs. Union of India and Ors. [(1989) 11 ATC 531].

The above case laws in fact was the basis of his arguments.

Learned Counsel for the Respondents Shri V.S.Masurkar stated that because of prolonged litigation, the notional benefit had been provided in the case which does not mean that a



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financial benefit will flow automatically, as claimed. It was argued that Shri Solanki had come to Court and hence he had got the benefit and that those who slept over their rights cannot get the benefits like others as could be seen from the Judgment in OA 604/99 (copy at R-1). Drawing support from the ratio decided by the Hon'ble Supreme Court in the matter of State of Karnataka Vs. S.M. Kotarayya and Ors. (1996) 6 SCC 267, Shri Masurkar stressed the point that applicant came up only after Shri Solanki succeeded and this did not afford her any claim in view of the ratio in S.M. Kotayya's case. A large number of people were involved, Shri Masurkar concluded.

10. We now, take up the first issue regarding the action taken by the Respondent Government in taking up the process of filling up the post of ADE by transfer on deputation, rather than by promotion. It is an admitted position that the Recruitment Rules stipulate that the post will be filled in "by promotion failing which by transfer on deputation." The only defence of the Respondents is that because of Gholap's case the Union Territory Administration could not finalise the seniority list. The Writ filed by the U.T. Administration itself in Gholap's case is referred to and the stand taken that "pending final outcome of the case the respondents have decided to apply second proviso of the Recruitment Rules viz. transfer on deputation.

11. We would like to reproduce here (the relevant) part of the Tribunal's Order dt. 18.1.1999 in this OA, through which the OA was admitted consciously with an Interim Order. Paras 2 & 3 of this order read



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as under:

"2. After hearing both the sides we find that the applicant had himself filed the earlier OA No. 604/90 and as per order dt. 12.08.1994 this Tribunal had directed the respondents to consider the present applicant for promotion and grant other consequential reliefs. In pursuance of this order, the Administration itself has considered the applicant for promotion and promoted him and subsequently a seniority list has been prepared which is at page 19 of the paper book. Respondent No.3 is shown at Sl.No.1 and the applicant is shown at Sl.No.2. Now the administration wanted to fill up this post of Assistant Director of Education by deputation, which is now being challenged by the present applicant in this O.A. and also by Respondent No.3 by filing a separate OA in OA No.901/98, which is also on board today.

The seniority list at page 19 has admittedly become final. Therefore, normally the Administration should have proceeded to fill up the post by promotion as per Recruitment Rules, failing which, they could have gone for deputation. Now the only reason given by the Administration is that, one Mr.T.R.Gholap had filed a subsequent OA in OA No.1103/96 and obtained an order from this Tribunal for considering the case of T.R.Gholap for promotion and for fixation of seniority, etc. But admittedly, the present applicant was not a party in that OA. Further, the judgment in OA No.1103/96 in Gholap's case has not become final, since the Administration itself has filed a Writ Petition in the High Court and obtained stay order. In fact, the applicant who came to know of that order, has also filed a Writ Petition in the High Court and obtained a Stay Order. Therefore, the administration cannot implement the order dt. 22.7.1997 in Gholap's case.

3. In this state of affairs, the Administration has no other option but to follow the seniority list at page No.19. It is only when the promotion fails, the administration can resort to deputation. Therefore, we feel that when the seniority list has been finalised and the judgment in Gholap's case has been stayed, the administration should first exhaust filling up the post in question by resorting to promotion. It may be now there is dispute between the applicant and Respondent No.3 regarding seniority, which we can decide later. But as things stand, the administration cannot proceed with the filling up of the post by deputation. We are told that the applicant is already holding the post by way of additional charge and, therefore, he shall continue in the post till the administration exhausts the process of promotion.

For the above reasons, the ad-interim order dt. 12.10.1998 is made absolute. The administration is directed not to resort to direct recruitment till they exhaust the process of promotion to the said post. Since T.R.Gholap is also a contesting party, as could be seen from the pleadings, the applicant may implead Mr.Gholap as party-respondent so that we can dispose of the question of seniority once for all in the present OA."

The above position evidently holds good today since we have not been informed of the disposal of Writ Petition filed in the High Court. The reasoning given in the above order is so cogent and logical even today that we would choose to follow it. Thus it would be fully logical and in fact, incumbent in view of the statutory Recruitment Rules, that the U.T. Administration first makes a full attempt to fill up the post by promotion. Such action will need to be followed.

12. As regards the prayer at para 8 (c) made by Shri Solanki, it cannot be granted in view of the ratio of the Hon'ble Supreme Court in the case of Rajoria [2000 SCC (L&S) 665]. No detailed reasoning is necessary to reject this prayer in view of this Judgment. This, of course, is without prejudice to the prayers of Smt. Panwala. We now come to her case (OA 901/98)

13. The second prayer in this case (OA 901/98) viz. that of the need for going in for promotion rather than deputation has in any case been agreed to by us in principle and hence we will not go into the argument if multiple cause of action raised by Respondents. A direction here is being given in principle and will apply not merely to the applicants herein. Even here if any of the applicants have retired or left service etc. they cannot now be considered.

14. We now take up the first prayer in the case of Smt. Panwala which was most strenuously argued by her Learned Counsel. This relates to the claim for arrears for the period from 22.2.1990 to 4.10.1996. The claim made is that since notional promotion has once been provided w.e.f. 22.2.1990, it would follow that the applicant would be eligible to the arrears also. It is in this context that the three cases

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mentioned at para 9 above were sought strenuous support from. These have been carefully perused, as also the case of Kotarayya cited by Learned Counsel for the other side. In the facts and circumstances of the present case, we are not persuaded that there is a claim for arrears. The cases of the various Benches of this Tribunal cited by Learned Counsel for the applicant provide the applicants therein with the benefit of arrears in the facts and circumstances of the case. There is force in the argument made by Shri Masurkar to the effect that Shri Solanki had come to Court earlier and the applicant had kept quiet. The ratio decided by the Hon'ble Supreme Court in the matter of State of Karnataka Vs. Kotarayya would be the ratio that would be applicable in the facts and circumstances of Smt. Panwala's case. Under these circumstances, we find no infirmity in the action of the Government in not providing the arrears even though the benefit of notional promotion and the other benefits of seniority etc. have been provided, considering that she has come up to the Tribunal only on 26th October, 1998, after a period of over a year subsequent to the passing order dt. 4.10.1996 (Annexure - A-2).

15. In the background of the discussions above, the two OAs being considered herein (viz. 839/98 and 901/98) are disposed of in terms of the following orders/directions :

- (1) The impugned letter dt. 22.7.1998 challenged in both OAs is hereby quashed and set aside. Respondents are directed to first undertake the selection on the basis of promotion, as provided in the Recruitment Rules, on the basis of the available seniority list.
- (2) All other prayers made in OA 839/98 and 901/98 are hereby rejected.
- (3) There will be no orders as to costs.

JLJ
(S.L.JAIN)
MEMBER (J)

B.N.BAHADUR
24/4/01
(B.N.BAHADUR)
MEMBER (A)

B.