

**Central Administrative Tribunal
Principal Bench, New Delhi.**

**OA-369/2016
MA-349/2016**

Reserved on : 26.05.2016.

Pronounced on : 01.06.2016.

**Hon'ble Mr. Shekhar Agarwal, Member (A)
Hon'ble Mr. Raj Vir Sharma, Member (J)**

1. Smt. Sudha V. Gopinath, 45 years
W/o Sh. K. Gopinath,
R/o K-254, Sarita Vihar,
New Delhi-110076.
2. Smt. Kanchan Ahuja, 47 years
W/o Sh. Rajesh Ahuja,
R/o 11 Sahyog Apartment,
Mayur Vihar, Phase-I.
New Delhi-110091.
3. Smt. Gurminder Bindra, 45 years
W/o Sh. J.S. Bindra,
R/o C-5A/275, Janakpuri,
New Delhi-110058.
4. Smt. Shalini Tewari, 47 years
W/o Sh. Rajarshi Tewari,
R/o D-64, Saket, Marg No. 10,
New Delhi-110017. Applicants

(through Sh. Avneesh Garg with Sh. Kirat Singh, Advocate)

Versus

1. Union of India through
the Secretary,
Union Ministry of Health & Family
Welfare, Government of India,
Nirman Bhawan, New Delhi-110011.
2. National Institute of Biologicals through

Its Director,
Ministry of Health & Family Welfare,
Government of India,
A-32, Sector-62,
Institutional Area, Phase-II,
Noida-201309.(UP).

And also at:-

Registered Office at
Union Ministry of Health & Family
Welfare, Room No. 252,
A-Wing, Government of India,
Nirman Bhawan,
New Delhi-110011. Respondents

(through Ms. Jyoti Singh with Sh. Vaibhav Kalra and Sh. H.K. Gangwani with Sh. Amit Chawla, Advocates)

ORDER

Mr. Shekhar Agarwal, Member (A)

Respondent No. 2 National Institute of Biologicals is an autonomous organization under the Ministry of Health & Family Welfare carrying out quality control and research work in the field of biologicals. The applicants joined this organization in the year 1995 as Junior Scientists after going through a rigorous selection process. According to them, after some time, they were shocked to know that this organization was being run without any rules or guidelines pertaining to service matters of the employees. The respondent No.2 was following DoP&T guidelines for the purpose of recruitment and promotion but there was no consistency in following the same. Consequently, the applicants were initially granted wrong pay scale also, which was corrected only after they had made several

representations. The applicants had also become eligible for promotion as Scientist Grade-III in the year 1998 but the respondents did not conduct any DPC thereby virtually denying to the applicants their right to be considered for promotion. The applicants made several representations but it was only after a lapse of 11 years that the applicants were granted their next promotion as Scientist Grade-III. They joined the said post between February, 2009 and May, 2009.

2. Being aggrieved by lack of promotional avenues, some of the similarly placed Scientists filed OA-2372/2007 before this Tribunal. This was disposed of by the Tribunal on 15.07.2008. The operative part of the order reads as follows:-

“5. In this view of the matter, following the ratio laid down in cases cited above, we dispose of this OA with a direction to the respondents to finalize the proposal for grant of promotion under FCS and also in-situ promotion besides one time promotional avenue to all Group ‘A’ officers including Scientists in the NIB. This also includes a deliberation on lack of promotional avenues and framing of recruitment rules, which is in the wisdom and prerogative of the Government but strictly in accordance with law. The aforesaid exercise shall culminate within a period of two months from the date of receipt of a certified copy of this order. The aforesaid finding is also supported by 5th Central Pay Commission recommendation wherein proposal to amend the rules to grant promotional avenues has been made, which has not yet been considered even after the expiry of ten years.

6. At this stage, learned counsel for the applicants states that when opportunity of promotion is denied to an employee on the ground that he fell within a category of employees excluded from promotional prospect, the Superior Court will have the jurisdiction to issue necessary direction. However, being the court of first instance, the Tribunal cannot issue any such direction and it is the sole prerogative of the government

to frame such rules which shall be in valid compliance of ratio laid down in Bansal's case (supra). No costs."

3. According to the applicants, the respondents in utter disregard of the order of this Tribunal, however, did not implement the FCS Scheme nor was any effort made by them to increase the promotional avenues of the applicants.

4. Further, the applicants have contended that the promotional quota of Scientist Grade-III for promotion to Scientist Grade-II was 66.66%. The remaining 33.33% posts were to be filled by direct recruitment. However, amended Rules were notified on 24.03.2015 in which the promotional quota had been reduced to 40%.

5. On 30.10.2015, the respondent No.2 had issued an advertisement inviting applications for various posts including 06 posts of Scientist Grade-II. The applicants have submitted that this advertisement was in flagrant violation of all applicable laws and guidelines inasmuch as there was no policy or provision for giving the existing employees their due opportunity of promotion. It was also in violation of their own promotion Scheme, which provided for 66.66% promotion quota. By doing so, the respondents had denied career progression to the applicants and other similarly placed Scientists in Grade-III. The eligibility criteria notified in the advertisement was also arbitrary and was not based on logical yardstick. No relaxation has been provided for Scientist Grade-III working with the

respondent No.2. Thus, the recruitment process lacks transparency. Even the upper age limit had been arbitrarily reduced from 50 years to 45 years.

6. The respondents have also violated the DoP&T guidelines wherein it is laid down that first or second class division in respect of educational qualification may be avoided. This is because there is difference in assessment of various Universities/Boards.

7. In the amended Recruitment Rules certain M.Sc. subject, such as, allied Biological Sciences, has been arbitrarily removed from the eligibility criteria, thereby, depriving out certain existing/serving Scientists from participating in the selection process.

8. The applicants made several representations dated 04.11.2015 and 23.11.2015 seeking grant of opportunity for promotion. In response, a meeting was also called by the respondent No.2 in which it was assured to the applicants that they shall be given their due promotions. However, this assurance was not fulfilled. Hence, the applicants have filed this O.A. seeking the following relief:-

- “(a) Pass an Order quashing the Recruitment Rules as notified by the Respondent No.1 vide impugned Office Order dated 24.03.2015.
- “(b) Pass an Order quashing the Advertisement dated 30.10.2015 floated by the Respondents No. 2 inviting applications, *inter alia*, for the post of Scientists Grade-II.

- (c) Pass an Order directing the Respondents to grant promotion to the Applicants to the post of Scientist Grade-II.
- (d) Pass an Order directing the Respondents to follow the DoP&T Guidelines for the purposes of calculating and granting the promotions and benefits to the Applicants with retrospective effect; and/or
- (e) Pass such order as deemed fit by the Hon'ble Tribunal in the facts and circumstances of the case."

9. The contention of the applicants is that the action of the respondents was violative of this Tribunal's direction in OA-2372/2007 as well as violation of their own promotion scheme. By their actions, the respondents had denied career progression to the applicants as well as similarly placed Scientists. They have even violated the reservation criteria. No relaxation has been provided for candidates already working with them.

10. Regarding the amended Recruitment Rules, the applicants have submitted that they were untenable as the un-amended Rules had not been published. The said Notification was also silent about the power under which it has been issued. It is violative of the Office Order dated 13.08.2008. There was also anomaly in the total number of posts shown in the amended Recruitment Rules.

10. In their reply, the respondents have strongly opposed the averments made by the applicants. They have stated that the applicants were promoted as Scientist Grade-III only between 03.02.2009 and 20.05.2009. For promotion as Scientist Grade-II 10

years' regular service in this grade was required. This was the position not only in the new Rules but also in the pre-revised Recruitment Rules dated 13.08.2008. Thus, none of the applicants was eligible to be considered for such promotion as they do not meet the eligibility criteria. Further, they have stated that the applicants had made representations to the respondent No.2. However, without waiting for a decision on the representations, they have approached this Tribunal. Nevertheless, the respondents have decided each of the representations and passed speaking orders dated 25/27.01.2016. The applicants have, however, not challenged those orders.

11. The applicants have also suppressed relevant facts from the Tribunal and have not indicated correct position regarding the number of posts sanctioned in the grade of Scientist Grade-II. Actual No. of posts is 10 and not 09 as mentioned by them. As per the amended Rules, 40% of the posts were required to be filled by promotion and 60% by direct recruitment. Thus, 04 posts will fall in the promotion quota while 06 have to be filled through direct recruitment. Out of 04 promotion quota posts, 03 have already been filled by promotion. 01 post was lying vacant as none of the Scientists Grade-III including the applicants herein was eligible for promotion. Only 06 posts falling under the direct recruitment quota

had been advertised. The applicants herein do not have any locus to challenge the same.

12. As regards reservation rosters, the respondents have submitted that they have gone strictly by the instructions of Government of India on the subject. The roster is scrupulously maintained by the respondent No.2 and periodically inspected by the Liaison Officer of the Ministry. Last such inspection was carried out on 23.06.2015.

13. The respondents have further contended that another Scientist working in Grade-III Ms. Ajanta Sircar has filed a separate OA bearing No. 4205/2015 challenging the advertisement dated 30.10.2015. The aforesaid case is now listed for final arguments and its outcome may have substantial bearing on the present O.A.

14. The respondents have also disputed that the applicants have been denied career progression. According to them, following benefits have been extended to the applicants:-

(i) Initial appointment as Junior Scientists was in the pay scale of Rs.1640-2900, which was revised to Rs. 5500-9000 w.e.f. 01.01.1996. This was further revised to Rs. 9300-34800 with Grade Pay of Rs. 4200 w.e.f. 01.01.2006.

(ii) They were placed in the higher pay scale of Rs. 6500-10500 i.e. Rs. 9300-34800 with Grade Pay of Rs. 4600 w.e.f. 01.01.1996.

(iii) The applicants were granted MACP Scheme benefit w.e.f. 01.09.2008 and given Grade Pay of Rs. 4800 with benefits of pay fixation.

(iv) The applicants were given promotions to the posts of Scientist Grade-III in the pay scale of Rs. 15600-39100 with Grade Pay of Rs.5400.

Thus, since their joining the Institute, the applicants have been granted four upgradations/promotions.

15. Respondents have further submitted that in compliance with the directions of this Tribunal in OA-2372/2007, the Recruitment Rules for Scientific posts were suitably amended in the year 2008 after consultation with respondent No.1 i.e. Ministry of Health & Family Welfare. Promotions were granted based on the amended Recruitment Rules. Further, amendment to the Recruitment Rules had become necessary in the larger interest of the Institute with changing requirements, efficiency, public interest and the overall growth of the Institute. The amended Rules have come into force after they had been carefully examined by an Expert Committee constituted by the Governing Body of the Institute. The recommendations of this Committee were further examined in the Ministry of Health & Family Welfare at various levels before being

approved by them. There was no reason for the applicants to challenge the same as it was not prejudicial to their interest.

16. As regards Flexible Complementing Scheme (FCS), it has been stated by the respondents that the Institute had mooted a proposal to the Ministry of Health & Family Welfare. The said proposal was also discussed in the 19th meeting of the Governing Body of the Institute held on 14.10.2008 under the Chairmanship of Secretary, Ministry of Health & Family Welfare. In that meeting, it was informed that DoP&T/DST were not agreeing to this proposal as it was felt that this Institute was not engaged in basic Research & Development (R&D) Activities, which was an integral part of the FCS.

17. Finally, the respondents have stated that in the pre-amended Recruitment Rules, Ph.D was an essential qualification for Scientific posts. However, this has been done away with in the amended Recruitment Rules. Consequently, the applicants herein have become eligible to apply against the direct recruitment quota vacancies also. In fact, 03 of the 04 applicants, namely, Ms. Sudha V. Gopinath, Ms. Gurminder Bindra and Ms. Shalini Tewari have applied for direct recruitment posts also. The 4th applicant Ms. Kanchan Ahuja could not apply as she did not have the requisite 60% marks at post graduate level and was not eligible.

18. We have heard both sides and have perused the material placed on record. We have considered the various issues raised by the applicants.

18.1 The first issue raised by them was that the respondent No. 2 (Institute) was functioning in an ad hoc and arbitrary manner as no Recruitment Rules had been framed. This contention of the applicants has to be rejected at the outset as on our directions the respondents have filed the bye-laws of the Institute along with the Rules & Regulations. Attached with these bye-laws are the Recruitment Rules of 1994. Thus, it is obvious that Recruitment Rules existed in this Institute even before any of the applicants had joined service. It is also an admitted position that the Recruitment Rules were amended on 13.08.2008 and again amended on 24.03.2015. Thus, it is clear that not only Recruitment Rules have existed all along in the Institute, they have been frequently amended in accordance with the changing requirements of the Institute. The respondents, however, have not taken steps to make these Recruitment Rules known to their employees by displaying the same either on the notice board or on their website. To that extent, they were lacking in transparency. Nevertheless, it cannot be said that they were functioning in an ad hoc and arbitrary manner without Recruitment Rules.

18.2 The next contention raised by the applicants was that the respondents have acted in violation of the orders of this Tribunal by not implementing the FCS. According to them in OA-2372/2007 clear directions were given by this Tribunal vide their order dated 15.07.2008 to implement the FCS in the Institute. However, the same has not been implemented by the respondents so far.

18.3 We do not find any merit in this contention of the applicants. The directions given by this Tribunal in the aforesaid O.A. have been extracted in earlier part of this judgment. The respondents were only directed to finalize the proposal regarding implementation of FCS in the Institute. In their reply, the respondents have stated that they had mooted the aforesaid proposal but it was not found to be acceptable to DoP&T/DST on the ground that FCS has been implemented only in those scientific departments of the Government, which are engaged in basic R&D activities. It was felt that respondent No.2 did not fall in that category.

18.4 Thus, we find that in implementation of this Tribunal's order, the respondents have taken the proposal regarding implementation of FCS in the Institute to its logical conclusion. Finally, they decided not to have this Scheme in this Institute. We do not see any violation of this Tribunal's orders in the aforesaid conduct of the respondents. Even if the contention of the applicants is accepted that orders of

this Tribunal have not been implemented by the respondents, remedy lies elsewhere and not in filing afresh O.A. for the same relief.

18.5 The applicants have also disputed the exact number of vacancies of Scientist Grade-II existing in the Institute. According to them in the Rules notified on 24.03.2015 07 posts of Scientist Grade-II have been mentioned along with the remark depending upon work load. In this regard, learned senior counsel for the respondents Ms. Jyoti Singh had argued that some more posts had been created in Grade-II considering the workload in the Institute. The total posts have now become 10 including the newly created posts. As per the new Recruitment Rules, since the direct recruitment quota was 60%, 06 posts had been advertised for filling up through direct recruitment whereas 04 posts have been allocated to promotion quota. After the aforesaid clarification, we do not see any need to dwell on this issue any further.

18.6 Next, the applicants had argued that as per 2008 Rules, the promotion quota was 66.66 whereas in the new Rules notified on 24.03.2015 this has been reduced to 40%. The applicants were aggrieved both by reduction in their quota as well as by the action of the respondents in filling up even the vacancies existing prior to the amendment in the Recruitment Rules, by new Recruitment Rules. This, according to the applicants, was contrary to the law laid down

by Hon'ble Supreme Court, which provides that old vacancies have to be filled by old Recruitment Rules. Thus, two issues have to be adjudicated, namely, whether the respondents were right in reducing the promotion quota of the applicants from 66.66% to 40% and whether they were right in filling up vacancies existing prior to the amendment of Recruitment Rules on 24.03.2015 in accordance with new Recruitment Rules.

18.7 In this regard, learned senior counsel for the respondents Ms. Jyoti Singh argued that amendment in the Recruitment Rules had been made after careful examination of the requirements of the Institute by an Expert Committee constituted by the Governing Body of the Institute. During the course of the arguments, learned counsel had even made available to us minutes of this Committee held on 16.07.2013 and 16.08.2013. The same have been taken on record. On going through these minutes of the Committee, we find that the Committee was concerned with the fact that new scientific areas had emerged since the creation of the Institute for which different qualifications were required. Also, certain qualifications provided in the Recruitment Rules had since become out dated. The Committee was also concerned about the duties being performed by the Scientists of the Institute and to align these regulatory aspects of Biologicals and Biotherapeutics with the future scientific and technical requirements. In this context, it was felt that there was an

urgent requirement to revise the existing Recruitment Rules. Thus, comprehensive amendments in the Recruitment Rules were suggested by the Committee to improve the efficiency and fitness of the Institute.

18.8 Learned counsel further argued that in order to meet the changing requirements of the Institute, it was decided to induct fresh blood from open market who were not only younger but also had qualifications in new areas. In this context, the promotion quota was reduced. This decision was taken in public interest. Relying on the judgment of Hon'ble Supreme Court in the case of **P.U. Joshi & Ors. Vs. , Union of India & Ors.** [Appeal (civil) 4679-4680 of 1996 with Appeal (civil) 10983 of 1996] dated 19.12.2002, learned counsel argued that it has been laid down in the aforesaid case that the executive was competent to change the service rules depending on the requirements of the organization and it was not within the competence of the Courts to give any directions regarding a particular method of recruitment to be followed. It was held that no employee had a right to claim that Rule should remain the same for other nor had a right to challenge the authority of the State to amend the Rules.

19. We find merit in the aforesaid submission of the learned counsel for the respondents. It is seen that amendments in the Recruitment Rules have not been made in an arbitrary manner to favour either

the direct recruits or promotees. They have been made after the matter has been considered by an Expert Committee constituted by the Governing Body. The aforesaid Committee has studied the problem and accepted the necessity of changing the Recruitment Rules in view of the changing requirement of the Institute. They have given their recommendations after a lot of deliberations. Since we do not see any element of bias against the applicants in this, we are not inclined to interfere in the reduction of promotion quota brought about by the amended Rules particularly keeping in view the directions given by Hon'ble Supreme Court in **P.U. Joshi's** case (supra).

20. The next issue argued by the applicants was that as per the law laid down by Hon'ble Supreme Court in the case of **Y.V. Rangaiah and Ors. Vs. J. Sreenivasa Rao And Ors.**, (1983) 3 SCC 284 old vacancies have to be filled by old Rules. In the instant case the respondents have not denied that all the 10 posts of Scientist Grade-II existing in the Institute occurred prior to amendment in the Recruitment Rules on 24.03.2015. Thus, these posts should not be filled by new Rules but should be filled by Rules as they existed prior to this amendment i.e. as per Recruitment Rules dated 13.08.2008. As per these Rules the promotion quota was 66.66%. Hence, the respondents should ear-mark 2/3 vacancies for promotion quota rather than allocating 06 vacancies out of 10 vacancies for direct

recruitment. Learned counsel for the respondents, however, argued that the judgment of Hon'ble Supreme Court in the case of **Y.V. Rangaiah and Ors.** (supra) will not be applicable in the instant case as the Institute was under no obligation to hold year-wise DPCs and had also taken a conscious decision not to fill up the posts till the Recruitment Rules were amended. In this regard, she relied on the judgment of Hon'ble Supreme Court in the case of **Deepak Agarwal and Anr. Vs. State of Uttar Pradesh and Ors.**, (Civil Appeal No. 6587/2003) dated 31.03.2011 in which after noting the law laid down by Hon'ble Supreme Court in **Y.V. Rangaiah's** case (supra) the following has been laid down:-

“24. In our opinion, the matter is squarely covered by the ratio of the judgment of this Court in the case of Dr. K. Ramulu (supra). In the aforesaid case, this Court considered all the judgments cited by the learned senior counsel for the appellant and held that Y.V. Rangaiah's case (supra) would not be applicable in the facts and circumstances of that case. It was observed that for reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies as on the relevant date. It was also held that when the Government takes a conscious decision and amends the Rules, the promotions have to be made in accordance with the rules prevalent at the time when the consideration takes place.”

Learned Senior counsel for the respondents has also cited the judgment in the case of **Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and Ors.**, (Civil Appeal Nos. 404-405 with 406-207 of 1997) dated 15.01.1997 in which the following has been held:-

"13 It is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the rules, Rule 3 of the General Rules is not of any help to the appellant. The ratio in the case of *Ramesh Kumar Choudhary & Ors. v. State of M.P. & Ors.* [(1996) 7 SCALE 619] is also not of any help to the respondent. Therein, this Court had pointed out that the panel requires to be made in accordance with the existing Rules and operated upon. There cannot be any dispute on that proposition or direction issued by this Court. As stated earlier, the Government was right in taking a decision not to operate Rule 4 of the General Rules due to their policy decision to amend the Rules. He then relies on paragraph 14 of the unreported judgment of this Court made in *Union of India V/s. S.S. Uppal & Anr.* [(1996) 1 Unreported Judgments (SC) 393]. Even that decision is not of any help to him. He then relies upon the judgment of this Court in *Gajraj Singh etc. v. The State Transport Appellate Tribunal & Ors. etc.* [(1996) 7 SCALE 31] wherein it was held that the existing rights saved by the repealed Act would be considered in accordance with the Rules. The ratio therein is not applicable because the existing Rules do not save any of the rights acquired or accruing under the Rules. On the other hand, this court had pointed out in paragraph 23 thus:

"Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed it, (sic) it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law. Legal fiction is one which is not an actual reality and which the law recognises and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise could not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 w.e.f July 1, 1989, the law in Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or save."

15. Thus, we hold that the first respondent has not acquired any vested right for being considered for promotion in accordance

with the repealed Rules in view of the policy decision taken by the Government which we find is justifiable on the material available from the record placed before us. We hold that the Tribunal was not right and correct in directing the Government to of Assistant Directors of Animal Husbandry Department in accordance with the repealed Rules and to operate the same."

21. In the instant case, we find that the judgments cited by the learned Senior Counsel for the respondents were directly applicable. Due to changing requirements of the Institute the respondents had decided to amend the Recruitment Rules. They constituted an Expert Committee which deliberated on the issue and gave certain recommendations regarding the amendments in the Recruitment Rules. These were duly considered by the Institutes, first by the Governing Body and thereafter by the Ministry of Health & Family Welfare. The Rules were then amended. Under these circumstances, the respondents cannot be faulted for deciding to fill even the old vacancies through the new amended Rules.

22. Finally, the applicants had argued that the respondents had in their advertisement prescribed 60% marks at post graduate level as eligibility condition for applying for the post of Scientist Grade-II. This, according to the applicants, was against the DoP&T guidelines wherein it is laid down that prescribing first or second class division in respect of educational qualification may be avoided as there are differences in the assessment of various universities/boards and there is no uniformity in the percentage of marks awarded to candidates.

23. In our opinion the language of the DoP&T guidelines makes it clear that this direction does not appear to be mandatory. Not following the same would not vitiate the rule. It has been prescribed more for the guidance of various Ministries and Departments and cannot be used to challenge the rule itself.

24. No other issue was raised before us by the applicants.

25. Thus challenge to both the Recruitment Rules as well as advertisement fails. The applicants are also not eligible for promotion at present as they have not put in 10 years of service as Scientist Grade-III. Therefore, we come to the conclusion that there is no merit in the contention of the applicants. Accordingly, we dismiss this O.A. No costs.

(Raj Vir Sharma)
Member (J)

(Shekhar Agarwal)
Member (A)

/Vinita/