CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

OA NO.3636/2014

Reserved on 18.02.2016
Pronounced on 26.04.2016

HON'BLE DR BIRENDRA KUMAR SINHA, MEMBER (A)
HON'BLE DR BRAHM AVTAR AGRAWAL, MEMBER (J)

Vijay Singh Gosain,
Aged about 43 years
Security-cum-Fire Guard Grade-I,
S/o Shri Madan Singh Gosain
A-8, Ayurvigyan Nagar AIIMS Campus,
New Delhi-110049. …Applicant

(By Advocate: Mr. M.K. Bhardwaj)

VERSUS

1. All India Institute of Medical Sciences
(AIIMS), Ansari Nagar,
New Delhi
Through its Director.

2. The Professor-in-Charge, Security,
All India Institute of Medical Sciences
(AIIMS), Ansari Nagar,
New Delhi.

3. The Deputy Director (Admn.)
All India Institute of Medical Sciences
(AIIMS), Ansari Nagar,
New Delhi.

4. The Senior Administrative Officer,
Recruitment Cell
All India Institute of Medical Sciences
(AIIMS), Ansari Nagar,
New Delhi.

5. Sh. Satish Kumar-I,
Security cum Fire Guard Grade-I,
AIIMS, New Delhi. …Respondents

(By Advocate: Mr. R.K. Gupta & Mr. Mahmood Pracha)

:ORDER:

HON'BLE DR BRAHM AVTAR AGRAWAL, MEMBER (J):

The applicant, working as a Security-cum-Fire Guard Grade-I in the All India Institute of Medical Sciences and being worried about imaginary wrongful denial of promotion to the post of Assistant Security Officer, has filed the instant OA.

2. For promotion to the post of Assistant Security Officer, required are 15 years of regular service in the cadre of Security-cum-Fire Guard and a Degree of a recognized University or its equivalent, as per the Recruitment Rules (Annexure A-3).

3. It has been pleaded on behalf of the applicant that he acquired his BA degree in 2012, whereas the respondent no.5 did so in April-July 2014, that for two existing vacancies the crucial dates being 01.01.2013 and 01.01.2014, the applicant was eligible and the respondent no.5, not, that, however, the official respondents delayed DPC meeting to favour the respondent no.5, and that DPC meeting took place in September 2014 and promotion order of the respondent no.5 issued.

4. While the official respondents have filed their reply and contest the OA, the private respondent, viz., the respondent no.5, despite service, has remained unrepresented.

5. We have heard the learned counsel for the applicant and the official respondents, perused the pleadings as well as the rulings cited at the Bar, and given our thoughtful consideration to the matter.

6. It appears that the OA is based partly on hearsay and partly on some apprehension that the applicant entertains. The official respondents, in their reply, have not disputed the right of the applicant to be considered for promotion, the crucial dates as noted in paragraph 3 above, the ineligibility of the respondent no.5 for want of degree of graduation, and the eligibility of the applicant for promotion. It has rather been pleaded on behalf of the official respondents that the applicant did not make any representation to the competent authority regarding his grievances.

7. Beyond the aforesaid pleas, nothing has been brought on record about the alleged DPC meeting or its outcome or the alleged promotion of the respondent no.5. The OA can, therefore, be said to be not maintainable for want of cause of action.

8. Hence, the OA is hereby dismissed. No order as to costs.

(Dr. Brahm Avtar Agrawal)
Member (J)

(Dr. Birendra Kumar Sinha)
Member (A)

/jk/

While respectfully agreeing with my brother in his conclusion, I would like to supplement this order in my own way.

2. The issues involved in the instant case are that: (i) whether the applicant can come directly to this Tribunal for adjudication of his grievances without having exhausted the channels of alternative relief provided under Section 20(1) of the Administrative Tribunals Act, 1985 in the form of alternative remedy, and (ii) whether the applicant is served by any cause of action? Either of these issues when established, even individually, would be fatal to the claim.

3. The facts of the case, in brief, are that the applicant was appointed as Security-cum-Fire Guard Grade-II on 23.04.1994. He acquired Degree in Bachelor of Arts in 2012, which was entered into his service book in July, 2013. In October, 2013, he was promoted to the post of Security-cum-Fire Guard Grade-I in pay scale of Rs. 5200-20200+ Grade Pay Rs.2000. It is the case of the applicant that the due date of eligibility for his promotion to the post of Security Officer was 01.01.2014. The final seniority list for the posts in the cadre of Security at the AIIMS was circulated on 03.04.2014 and the DPC was scheduled for April, 2014. However, the DPC was re-scheduled, the applicant alleges, till the respondent no.5 had acquired eligibility in the form of BA degree in April to July, 2014. The DPC was finally held in September, 2014 wherein the respondent no.5 was selected, whereas he had not been eligible on 01.01.2014, the date of consideration. The applicant, despite

being eligible on the date of consideration, was ignored for this promotion and instead the respondent no.5, who was clearly note eligible on the date of consideration, had been promoted.

4. Per contra, the respondents have filed their counter affidavit reverting all the averments of the applicant. The principal ground, which was repeatedly harped upon by the learned counsel for the respondents, was that the formalities of Section 20(1) of AT Act had not been fulfilled, and the applicant had not exhausted the recognized channel of vindication of grievances. Moreover, the respondents have denied in Paras 4.1.9, 4.1.10 and 4.2 that they have made up their mind to grant promotion to the respondent no.5, despite the fact that he was ineligible and DPC had been postponed to accommodate the respondent no.5 and that no order has been produced by the applicant which is under challenge. Therefore, it has been argued that this OA has been made in violation of Section 19 of the AT Act, as the same is without cause of action and further in violation of Section 20(1) of AT Act, as the alternative mode of vindication of his grievance has not been gone through and the OA thus deserves to be dismissed.

5. The applicant has submitted a rejoinder application reiterating the averments already made in the OA. The learned counsel for the applicant argued vehemently that it is a settled position of law that existence of alternative remedy cannot act as a bar to invoke the jurisdiction of the judicial review of the Tribunal. Besides Section

20 of AT Act had also provided a window in the form of use of term "ordinarily" therein. Therefore, it lay within the discretion of the court to allow applications even where process prescribed under Section 20(1) of AT Act had not been exhausted. For the sake of clarity, we reproduce Sections 19 and 20 of the AT Act, 1985 as below:-

> "19. Applications to Tribunals – (1) Subject to the other provisions of this Act a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance.
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> Explanation - For the purposes of this sub-section, "order" means an order made –
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> (a) by the Government or a local or other authority within the territory of India or under the control of the Government of India or by any corporation [or society] owned or controlled by the Government ; or
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> (b) by an officer, committee or other body or agency of the Government or a local or other authority or corporation [or society] referred to in clause (a).
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> (2) Every application under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee (if any, not exceeding one hundred rupees) [in respect of the filing of such application and by such other fees for the service or execution of processes, as may be prescribed by the Central Government].
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> [(3) On receipt of an application under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary, that the application is a fit case for adjudication or trial by it, admit such application; but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons.]
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> (4) Where an application has been admitted by a Tribunal under sub-section (3), every proceeding under the relevant service rules as to redressal of grievances in relation to the subject-matter of such application pending immediately before such admission shall abate and save as otherwise directed by

the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules.

20. Applications not to be admitted unless other remedies exhausted – (1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.

(2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances, -

(a) if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or

(b) where no final order has been made by the Government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired.

(3) For the purposes of sub-sections (1) and (2), any remedy available to an applicant by way of submission of a memorial to the President or to the Governor of a State or to any other functionary shall not be deemed to be one of the remedies which are available unless the applicant had elected to submit such memorial."

Section 19(1) of AT Act provides that a person aggrieved by any order may make an application to the Tribunal for the redressal of his grievances. The explanation also provides that the "order" means an order by the Government or a local or other authority within the territory of India or under the control of the Government of India or by any Corporation or Society owned or controlled by the Government.

6. We would at the same time like to set the perspective straight in this respect. The powers bestowed upon the Tribunal under Section 19 of the Administrative Tribunals Act, 1985 is that of Article 226 of the Constitution. This power was originally vested in the High Courts. The object of Article 226 is to provide quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any Government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *ceritiorari.* It has been held in **Babubhai Muljibhai Patel v. Nandlal Khodidas Barot,** (1974)2 SCC 706 that if the procedure of a suit had also to be adhered to in the case of writ petition, the entire purpose of quick and inexpensive remedy would be defeated. The very purpose of Article 22 is that no man should be subjected to injustice by violation of the law not merely on account of any error of law through an academic angle, but to see whether injustice has resulted on account of erroneous interpretation of law. The Hon'ble Supreme Court have held in **Roshan Deen v. Preeti Lal**, (2002)1 SCC 100 that if justice became the by-product of an erroneous view of law, the High Court is not expected to erase such justice in the name of correcting an error of law. Under Article 226, the High Court is required to enforce the rule of law and it, therefore, cannot pass an order or direction contrary to what has been rejected by law as held by the Hon'ble Supreme Court in **Karnataka State Road**

Transport Corporation v. Ashrafulla Khan, (2002) 2 SCC 560. We would also like to hold here that power of Article 226 encompasses not only to strike down an erroneous order but also to give directions so that justice may be done. Hence, in summary, we hold that absence of an order is not by itself sufficient to attract the provisions of Article 226, but injustice and denial of fundamental rights are. However, where the exception under the term 'ordinarily' is recoursed to, it has to be established that there were extraordinary circumstances that prevented the applicant from availing of the remedies prescribed.

7. In the instant case, it is an admitted position that there is no order before this Tribunal, which is there to be challenged. The learned counsel for the applicant submitted in this regard that he could not lay his hands on the order of promotion of the respondent no.5 despite his best efforts and that it was for the respondents to produce the letter. In absence of this, the OA appears to have been based upon personal apprehension of the applicant in view of the fact that the respondents dispute the contention of the applicant on facts which the applicant has not been able to refute sufficiently in the rejoinder application or otherwise by producing the order of appointment of respondent no.5. In view of the points raised regarding the expense of Article 226 which this Tribunal exercises, particularly, in the form of *mandamus* that this issue stands to be decided conjointly with the next to follow.

8. Insofar as second issue is concerned, we have already discussed that Section 19 of the AT Act, 1985 is akin to the power of the Hon'ble High Courts under Article 226 of the Constitution. It was argued by the learned counsel for the applicant that existence of alternative remedy cannot act as a bar to invoke the jurisdiction of the judicial review of this Tribunal as that would amount to fettering the power which is akin to Article 226. It is well accepted that the prayer for issuance of mandamus under Article 226 must be preceded by a cause of action. It is well settled that remedy provided under Article 226 of the Constitution is discretionary remedy and the Hon'ble High Courts always use the discretion to refuse such relief, even though a legal right might have been infringed. As long back as in 1957, the Hon'ble Supreme Court in **Union of India Vs. T.R. Verma**, AIR 1957 SC 882, held that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoking the special jurisdiction of the High Court to issue a prerogative writ. It is true that existence of another remedy does not affect the jurisdiction of the court to issue a writ, but as observed by the Hon'ble Supreme Court in **Rashid Ahmed Vs. The Municipal Board Kairana**, AIR1950 SC 163 that the existence of adequate legal remedy is a thing to be taken into consideration in matter of granting writs. In **A.V. Venkateswaran, Collector of Customs Bombay vs. Ramchand Sobhraj Wadhwani & Anr.,** AIR 1961 SC 1506, the Hon'ble Judges observed the contention of the learned

Solicitor General was that the existence of an alternative remedy was a bar to the entertainment of a petition under Article 226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has also been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est.

9. In a recent decision of **Aiyubhai V. Patel Patel vs. Union of India** (OA No. 07/2016) decided on 11.01.2016, this co-ordinate Bench of this Tribunal has held as under:-

> "9. Where a statute creates a right or liability and also prescribes the remedy or procedure for the enhancement of that right or liability, resort must be had to the said statutory remedy before invoking the extraordinary and prerogative writ jurisdiction of a High Court under Article 226 as held by the Hon'ble Supreme Court in the following cases:
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> "(i) Delhi Cloth & General Mills Co. Ltd. v. CTO Jaipur : (1976) 3 SCC 443
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> (ii) Titaghur Paper Mills v. State of Orissa : AIR 1983 SC 603."
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> In Titaghur Paper Mills (supra) the Hon'ble Supreme Court held as under:
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> "It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Water Works Co. v. Hawkesford (1859) 6 CBNS 336 at p.356 in the following passage:
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> There are three classes of cases in which a liability may be established founded upon statute.... But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it the remedy provided by the statute must be followed, and it is not competent to the party to

pursue the course application to cases of the second class. The form given by the statute must be adopted and adhered to. The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspaper Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co., 1935 AC 532 and Secretary of State v. Mask & Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

10. Even if the relevant statute does not specifically provide a remedy of an appeal or revision application, the High Court may consider as to whether any other remedy is available to an aggrieved person. Thus, the High Court may refuse to grant relief in favour of persons who may obtain adequate and appropriate relief by filing a Civil Suit or by taking execution proceedings or by filing an application or by making a representation or by taking appropriate proceedings under the provisions of the Constitution. Whether the alternative remedy available to the aggrieved party is suitable, adequate and equally efficacious or not depend upon the facts and circumstances of each case. Onus, however, lies on the applicant to show that the alternative remedy available to him is not suitable or adequate.

11. It is settled law that it is wholly erroneous to assume that before the jurisdiction of the High Court under Article 226 could be invoked, the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not 347obtained proper redress, for when once it is proved to the satisfaction of the court that by State action the fundamental right of a petitioner under Article 226 has been infringed, it is not only the right but the duty of the Court to afford relief to him by passing appropriate orders in that behalf. Nonetheless the salutary principle cannot be forgotten that extraordinary remedies should not be substituted by ordinary remedies. If any liability arises under the Act and an elaborate procedure is prescribed by the statute, it cannot conceivably be contended that enforcing of the provisions of the Act would be violative of fundamental rights guaranteed under Part III of the Constitution so as to invoke the jurisdiction under Article 226 of the Constitution.

12. In view of the enunciation of law on this point by the Hon'ble Supreme Court in catena of judgments the general principles on this issue can be broadly summarized as under:

"(i) The remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ, if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.
(ii) When an alternative and equally efficacious remedy is open to litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ.

(iii) That the existence of the statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But the existence of an adequate legal remedy is a need to be taken into consideration in the matter of granting reliefs and where such a remedy exists, it would be sound exercise of discretion refuse to interfere in a writ petition.

(iv) The rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy and discretion rather than a rule of law and the Court may, therefore, in exceptional cases issue a writ of certiorari notwithstanding the fact that statutory remedies have not been exhausted.

(v) A writ can be granted when manifest injustice resulting from jurisdictional or grave and material legal infirmity, and the alternative remedy cannot be a bar to remedy such a situation.

(vi) Whether or not alternative remedy in a given case is equally adequate, efficacious and speedy depends on its peculiar circumstances.

(vii) Mere existence of an alternative remedy does not itself impose an obligation on the Courts to relegate the aggrieved party to such remedy.

(viii) Where a complaint is made against any act done or purported to be done under any statutory provision, the fact that there exists in the statute itself a possible remedy, is an important fact to be taken into consideration. Whether such provision exists, the Courts will be extremely reluctant to interfere by way of high prerogative writs.

(ix) The existence of an alternative remedy, though an extremely important factor does by no means per se affect, curtail or impinge upon the writ jurisdiction and the same can be invoked by an aggrieved party in a fit case, when the true dictates of justice so demand."

10. However, a major shift was made in the constitutional law relating to the service by the 42nd Constitutional Act, 1976 which inserted into the Constitution Article 323A to take out the adjudication of disputes relating to the recruitment and condition of service of the Public service of the Union and of the States from the hands of the Civil Courts and the High Courts and to place it before the Administrative Tribunals for the Union or of a State as the case may be. This was, however, later changed to a certain extent vide judgment of Hon'ble Supreme Court in **Union of India Vs. L. Chandra Kumar** AIR 1997 SC 1125 where powers under Articles 226 and 227 were considered part of the basic structure of the Constitution. For the sake of greater clarity, we extract para 81 of the said judgment as below:-

> "81. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323B of the Constitution. It is to be remembered that, apart from the authorisation that flows from Articles 232A and 323B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts. This power is available to Parliament under Entries 77, 78, 79 and 95 of List I and to the State Legislatures under Entry 65 of List II; Entry 46 of List III can also be availed of both by Parliament and the State Legislatures for this purpose.

> In view of the above, it is clear that the power that can be exercised by the Tribunal by entertaining an application under Section 19 of the Administrative Tribunals Act, 1985 is akin to that of the jurisdiction of the High Courts under Articles 226 and 227 of the Constitution in so far as the same pertains to service matters."

In view of the above, we have already noted that the powers exercised under Sections 19 and 20 of the AT Act, are akin to powers exercised under Section 226 by the Hon'ble High Courts and that where a statute creates a right or liability and also prescribes the remedy or procedure for the enhancement of that right or liability, resort must be had to the said statutory remedy before invoking the extraordinary and prerogative writ jurisdiction of a High Court under Article 226. [**A.V. Venkateswaran, Collector of Customs Bombay vs. Ramchand Sobhraj Wadhwani & Anr. (supra)].**

11. In the entire OA, there is not a whisper of why the applicant deemed it necessary not to resort to the departmental channels provided for redressal of his grievances. The arguments advanced by the learned counsel for the applicant that his interest was being grievously harmed by the respondents by appointment respondents no.5 and that it was necessary for him to approach this Tribunal at the earliest are simply not sustainable in view of our discussion in respect of Section 19 of the AT Act, 1985.

12. We have considered both the issues and we find that there is no order against which the instant OA has been filed. Therefore,

the OA is bereft of cause of action and the legal machinery created under AT Act, 1985 does not have provisions to swing into action at mere surmises and conjectures. We have also taken note of the fact that the applicant has not come out with any cogent reasons as to why jurisdiction of this Tribunal should be invoked without having exhausted the forum provided for vindication of the grievances. Hence, I entirely endorse the views expressed by my esteemed brother that this OA is not maintainable for want of cause of action and hasten to add that also because the applicant had not exhausted the channels of remedy provided. We are sure that had the applicant exercised patience and filed the OA before the competent authority, all these facts would have been brought to light.

(Dr. B.K. Sinha)
Member (A)

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