

**CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI**

ORIGINAL APPLICATION No.210/00074/2015

Dated this Friday, the 13th day of July, 2019

**CORAM : R.VIJAYKUMAR, MEMBER (ADMINISTRATIVE)
RAVINDER KAUR, MEMBER (JUDICIAL)**

1. Susheel Parjpat, Age 31 years,
Working as Staff Nurse on contract basis,
in Govt. Hospital Diu,
R/at C/o Arun Pandya, Somnath Mandir,
Waniya Sheri, Panchvati Road, Diu 362 520.
2. Salim Sajibhai Vadviya, Age 30 years,
Working as Staff Nurse on contract basis,
R/at C/o Arun Pandya, Somnath Mandir,
Waniya Sheri, Panchvati Road, Diu 362 520.
3. Vineet Kumar Dhilan, Age 36 years,
Working as Staff Nurse on contract basis,
in Govt. Hospital Diu,
R/at C/o Arun Pandya, Somnath Mandir,
Waniya Sheri, Panchvati Road, Diu 362 520.
4. Pappulal Meena, Age 32 years,
Working as Staff Nurse on contract basis
in Govt. Hospital Diu,
R/at C/o Arun Pandya, Somnath Mandir,
Waniya Sheri, Panchvati Road,
Diu 362 520.

... Applicants

(By Advocate Shri Vicky Nagrani)

Versus

1. Union of India, Through the Secretary,
Ministry of Home Affairs, North Block,
New Delhi 110 001.
2. The Administrator, Administration of Daman & Diu,
Department of Personnel Administrative Reforms,
Secretariat, Daman 396 220.
3. The Director,
Department of Directorate Medical and Health Services,
Daman, (UT Daman & Diu).
4. The Health Officer, Office of Senior Surgeon,
Govt Hospital Diu. (UT Daman & Diu) ... Respondents

(By Advocate Shri B.K.Ashok)

ORDER

Per : R.Vijaykumar, Member (Administrative)

This application was filed on 30.01.2015 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :-

“8.a. This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same quash and set aside the impugned OM dated 16.12.2013 and 14.11.2014 only to the extent of allocating 20 marks to the local candidates in all categories where the same is allocated with all consequential benefits.

8.b. This Hon'ble Tribunal may further be pleased to direct the Respondent to proceed with the selection process in pursuance of the advertisement dated 16.10.2014 without applying the OM dated 16.12.2013 and 14.11.2014 in the selection process.

8.c. Costs of the application be provided for.

8.d. Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed.”

2. The applicants were appointed as Staff Nurse on contract basis for the period of 2006 to 2013. An advertisement was issued on 16.10.2014 (Annex A-4) for filling up 48 vacancies of the Staff Nurses in the respondents' units of Daman and Diu. In this OA, the applicants challenge the vires of Office Memorandum No.1-1-87-CS/PF/2823 dated 16.12.2013 (Annexure A-1) read with OM No.1-1-87-CS/PF/2173 dated 14.11.2014

(Annexure A-2) for grant of 20 marks as weightage for candidates domiciled in the Union Territory of Daman and Diu, out of a total of 100 marks provided for the entire selection process.

3. The learned counsel for the applicant relies on the case in which rulings of the Hon'ble Apex Court in **Union of India and Others Vs. Sanjay Pant and others in Civil Appeal No.5316 to 5338 of 1992** decided on 11.12.1992. He also refers to the orders previously passed by the Tribunal in OA No.170/2015 and others decided on 21.12.2018 which held against the respondents in their attempt to grant 20 marks for domicile candidates that OA has been appealed to the Hon'ble High Court of Bombay and this is being heard but no interim order has been granted in the matter. In his view, these orders were binding on this Bench.

4. The learned counsel for the respondents submits in reply that the case of Sanjay Pant supra, the reservation in question applied 100% to residents of the Andaman and Nicobar Islands and that, the

Hon'ble Apex Court in its judgments, did not express any opinion on the question whether it was permissible for the administration to make a provision under Article 16(4) of the Constitution providing that only 'local' candidates will be entitled to or preferred in the matter of appointment to the services and posts under the said administration.

5. In this case, he argues that only 20% marks has been set aside for giving preference to the Daman and Diu of the Union Territory. He also refers to the instructions of the Ministry of Home Affairs in letter No.54 dated 14.10.2013 which had advised the Administrator of the Union Territory of Daman and Diu that as follows :-

“4. Accordingly, UT Administrations of Daman & Diu and Dadra & Nagar Haveli are requested to consider giving some weightage / preference to the local people in direct recruitment in respect of Group 'D', 'C' & 'B' (non-gazetted) posts instead of making a provision for exclusive reservation for local people under these categories.”

6. The learned counsel for the respondents states that following the orders of this Tribunal in OA No.170/2015 and others decided on 21.12.2018, the

respondents had taken the matter to the Hon'ble High Court and after one hearing the matter is still yet to be listed for hearing and all pleadings are upon on question. He submits that the issue of grant of additional marks for domicile had not been specifically challenged in that OA No.170/2015 and it appeared that this Tribunal had taken up, considered, and decided that aspect suo motu. He, therefore, requests that orders on this OA may be deferred until orders of the Hon'ble High Court are passed in the above OA given that the identical issue is already involved and is under consideration, inter alia, by the Hon'ble High Court.

7. We have gone through the OA along with Annexures filed on behalf of the applicant. We have also gone through the reply along with Annexures filed on behalf of the respondents and have examined the files and cognized all relevant facts of the case.

8. We have heard the learned counsel for the applicant and the learned counsel for the respondents and carefully considered

the facts and circumstance, law points, case law and rival contentions in the case.

9. The challenge in the present case is to the adoption by the respondents, while issuing the said advertisement notification on 16.10.2014 (Annexure A-4), of the office OM dated 16.12.2013 (Annexure A-1) read with OM dated 14.11.2014 (Annexure A-2) which provides for grant of 20 marks for candidates domiciled in the Union Territory of Daman and Diu. The respondents have argued that they have issued this letter based on the instructions of Ministry of Home Affairs in a letter dated 14.10.2013 which requested the Administrator to consider by giving some weightage or preference to local people in direct recruitment in respect of Group 'D', 'C' and 'B' (non-gazetted post).

10. The learned counsel for the applicant has invited attention to the decision of this Tribunal in OA No.170/2015 and others decided on 21.12.2018. As mentioned by the learned counsel for the respondents, in that OA, the reliefs sought were for regularization and to declare the

notification of vacancies as contained in the advertisement as illegal etc. There was no specific challenge to the issue of grant of marks of domicile candidates. However, that aspect came to be considered while passing orders in that batch of cases considering that the marks for domicile candidates had been included as an integral part of the selection process and the decision of the Tribunal to pass orders on that matter was taken suo motu.

11. The learned counsel for the respondents has argued that the decision in that OA has been challenged and is under consideration of the Hon'ble High Court and therefore, the decision in the present case may be deferred. However, the decision in OA No.170/2015 batch of cases drew on the earlier decision of this Tribunal in OA No.489/2015 wherein the applicants had specifically challenged and set out detailed grounds of challenge, inter-alia, on the basis that such discrimination was ultra-vires of the Constitution and that such powers in respect of discriminating in favour of the respondents of the Union

Territory only lay with Parliament under Article 16(3) or with the President of India under Article 240. They also objected to the high level of the extra marks for such domicile. This was an addition to the other issues raised in that OA in which the private respondents had been preferred over the applicant in respect of both qualifications and for the reason that no written examination had been conducted. In that context, this Tribunal has considered the extra 20 marks given for domiciled candidates and had recorded the following orders :-

"18. On the aspect of additional weightage given domicile in Daman & Diu by way of 20 marks to Respondent No.4 by respondents, the applicant has relied on the rulings of the Hon'ble Apex Court in Kailash Chand Sharma (Supra) in which the grant of bonus marks to residents of certain district and rural areas in which residents of Rajasthan were given 10 marks, residents of particular district were given additional 10 marks and residents of rural area of district were given further additional 05 marks. The issue that arose for this selection to a State Service was with regard to the 10 marks for district residents and 05 marks for residents in rural areas of concerned districts in the context that there was no written examination. The Hon'ble Court moulded reliefs in the special facts and circumstances of the case and observed in its conclusion : *"...Another parting observation. While we realize the need to generate better employment opportunities to the people of rural backward areas and an affirmative action in this regard is not rules out, any such action should be within the framework of constitutional provisions*

relating to equality. Equalising unequals by taking note of their handicaps and limitations is not impermissible under the Constitution provided that it seeks to achieve the goal of promoting overall equality. However, measures taken by the State on considerations of localism are not sanctioned by the constitutional mandate of equality."

19. In response, the respondents have relied upon the decision of the Hon'ble High Court of Rajasthan in Mr. M.S.Singhvi V/s. Manoj Bhandari decided on 30.11.2015 in SBC Civil Writ Petition No.6207/2009 etc., in which the preference for engagement of local resident staff for the National Rural Health Mission (NRHM) programme was upheld. They have noted that the object of the NRHM is to provide accessible, affordable and accountable quality health service to the poorest households in the remotest rural regions. Therefore, such preference could not be held to be irrational or in violation of Article 14 of the Constitution of India. While taking this view the Hon'ble High Court has also relied upon the decision of the Hon'ble Apex Court in Chirangji Lal V/s. Union of India (AIR 1951 SC 41) where it was held that to consider differentiation or inequality of treatment as amounting to discrimination, it was necessary to show that the selection or differentiation was unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view. The Court considered the nature of the NRHM Scheme, the need for local participation and involvement, and the consequent need to grant preferences to on the basis of place of residence and/or local criteria among equals and held that it was not violative of Article 14. In the present case, no such rationale exists except a plea, inherently parochial, for preferring local persons in all Government jobs funded by the Central Government and national tax payers.

20. On the aspect of marks for domicile, the applicant has, in his reply, referred to the instructions he has received from the Government of India Letter No.U-14014/38/2012-CPD dated 14.10.2013 based on which, notification was issued in OM No.1-1-87-CS/PF/2823 dated 16.12.2013 and which has been challenged by the applicant. We had occasion to examine this reference in another OA No.862/2010 in which it was discovered that the Administrator of Union Territory of Daman & Diu had awarded these

marks after taking strength from a letter of the Deputy Secretary, Ministry of Home Affairs in letter No.U-14014/38/2012-CPD dated 14.10.2013 on the U.T. Administration's letter No.6/14/94-PER/1919 dated 13.9.2013 requesting consideration to be given to local candidates of the U.T. for recruitment to government service. They advised the Administrator and the Department of Personnel and Training, the Nodal Ministry for finalizing the Recruitment Rules and for such matters under the terms of the Government of India (Allocation of Business) Rules, 1961 had recorded their inability: "the Department of Personnel & Training have regretted their inability to provide their comments on this issue as O.M. No.6/14/94-PER/404 dated 23.08.2006 giving the benefit of domicile to the local people in direct recruitment in cases of group 'C' & 'D' posts was issued without obtaining the approval of Government of India." Communicating this information, the Ministry of Home Affairs, in the letter cited, have further advised as below :-

"4. Accordingly, UT Administrations of Daman & Diu and Dadra & Nagar Haveli are requested to consider giving some weightage/preference to the local people in direct recruitment in respect of group 'D', 'C' & 'B' (non-gazetted) posts instead of making a provision for exclusive reservation for local people under these categories".

21. It appears that the Union Territory Administration then issued orders granting 20 marks for local candidates based on these instructions which were clearly not in consonance with the rules and practice by which the Administrator did not have the requisite authority delegated to him under the Constitution for this purpose which requires him to take instructions from the President namely, the Central Government, and which is bound by the Rules supra of 1961. However, it may be argued that in view of the equivocal instructions of the Ministry, they resorted to this grant of additional marks for local candidates and substituted the consequent vacuum with their own instructions. Setting aside this argument for the moment however, the settled law on the subject is amply clear. The definition of domicile has been settled by the judgment of the Hon'ble Apex Court in Pradeep Jain V. Union of India 1984 AIR.

1420, which makes it clear that the Constitution recognizes only one domicile viz. Domicile in India for which, the Territory of Daman & Diu became a part, after liberation from the Portuguese. The word domicile is a loosely used term when the actual intention is 'permanent residence'. Further, under the Constitution, there are only two types of services in the country: Union Services and State Services. The Union Territory of Daman & Diu falls within the category of Union Services and therefore, if there is no distinction or bar or denial of opportunity for Indian domiciled candidates to seek employment opportunity in the Union government and its Union Territories, granting weightage to the permanent residents of Daman & Diu may not be in compliance with the constitutional provisions. It will also need to be considered that in the present case, the advertisement itself does not incorporate an intention to award as much as 20 marks for local candidates in addition to written marks and for education/experience. If this had been notified, it would clearly present a threat and deterrence against applications from candidates living outside the Union Territory who will compute their slender chances of overcoming this hurdle. Therefore, the question whether this advertisement, by not disclosing the intention to award 20 marks for domicile, ever offered the scope of open, fair competition for all Indian candidates is rendered highly questionable and liable to be quashed. It may also be appropriate to consider at this stage, the relative weightage assigned for local candidates. This has been fixed by the respondents at 20 marks out of a total of 100 marks set for the assessment of which, 70 marks have been given for written test and 10 marks for academic qualification and experience. From the nature of the results for 15 persons, which is perhaps a standard across such examinations at this level, persons have scored between 25.5 to 42.5 marks except applicant who obtained 53 marks. Therefore, the Respondent No.4 who scored just 38 marks in domicile but ranked well below has become the topper. The question that arises then is whether the assigning of 20/70 or nearly 30% for local candidates could be considered as arbitrary and heavily biased against open competition from candidates from outside the Union Territory. We might even consider the selection process as farcical. In this connection, we refer to the decision of the Hon'ble Apex Court in Ashok Kumar Yadav and Ors. v. State of Haryana and Ors. - 1985 STPL 2408 SC.

where the Public Service Commission of the State of Haryana had fixed interview marks at a very high level and which enabled the members to discriminate in favour of some particular candidates. The Hon'ble Apex Court directed that the percentage of 12.2% for interview marks in proportion to the total marks adopted by the UPSC for selections in AIS/Central Services was a reasonable comparison and determined that the interview, which constituted a subjective evaluation of a candidate, should not bear more than 12.5% of the total marks. Even the award of marks is limited by reasons to be given for giving very low marks or very high marks to exceptionally good/bad candidates. Viewed in this context, the award of 20 marks for local candidates can hardly withstand scrutiny in terms of the Wednesbury test of reasonableness. As we have observed earlier in the context of the discussion on Chirangji Lal (Supra), there must be a reasonable and rational basis for discrimination which is quite absent in the present case. As ruled by the Hon'ble Apex Court in Kailash Chand Sharma (Supra) and in terms of the above discussion, it is apparent that the respondents have no reasons whatsoever to award any marks for domicile in any of their appointments including the present one and such an award would be plainly ultra vires of the Constitution. Even in the Ashok Kumar Yadav case, the reason touted by respondents and for which the Hon'ble Apex Court set a ceiling of 12.5%, there was an examination by a Committee of the candidate's competence by way of an interview. In the present case, not even a fig leaf of cause is available but only a bare claim of local residence, certified accordingly. Therefore, this provision appears to be quite arbitrary and without any basis in logic and in view of the above considerations, shall be deleted for preparation of the merit list in this case and shall be considered as a decision in rem given that we have considered the issue in terms of its universal applicability."

12. That OA has also been challenged before the Hon'ble High Court in Writ Petition No.1501/2019 by the private respondent No.4 who had been heard but was affected by the direction given to the

official respondents to review the selection. The Hon'ble High Court considered the various pleas of the private respondents and granted ad-interim orders on 04.02.2019 and the case was then listed for hearing on 04.03.2019 and continues at that stage.

13. The present case is identical with the portion of the challenge raised in OA No.489/2015 and it is evidently also a part of the consideration being made by the Hon'ble High Court to the decisions involved in that OA. However, the present OA focuses on entirely on the vires of the issue of domicile marks and that would be decided by the Hon'ble High Court in both OA No.489/2015 and the batch of OAs led by 170/2015 and there would be no purpose served by keeping this OA pending the decision of the Hon'ble High Court on those matters. Any decision in regard to this issue by the Hon'ble High Court would evidently apply to the present case binding both the applicants and the respondents. However, this Tribunal is clearly bound by its view in OA No.489/2015 on this specific

challenge and where this Tribunal has concluded specifically that its decision would apply 'in rem'.

14. In the circumstances, we follow the decision of this Tribunal in OA No.489/2015 decided on 12.11.2018 and accordingly, allow this OA by again reiterating that the OMs dated 16.12.2013 and 14.11.2014 (Annexures A-1 and A-2) are entirely illegal and are quashed in respect of the allocation of 20 marks to domiciled candidates in all the categories of employment mentioned therein. There shall be no order as to costs.

(Ravinder Kaur)
Member (Judicial)

(R. Vijaykumar)
Member (Administrative) 12/7/19

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19/7/19