

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.7393 OF 2019

Ajay Patil s/o Bhagwan Patil,
Age 48 years, Occupation-Nil,
R/o. Near Nagarkar's House,
Raj Bhavan Garden, Sadar,
Nagpur-440001.

.. Petitioner

.. Versus ..

1] The Central Administrative Tribunal,
Mumbai Bench, through The Registrar
Gulestan Building, Dr. Ghanshyam
Talwalkar Marg (Prescot Road), Fort,
Mumbai-400001.

2] The Union of India, through The
Secretary, Ministry of Finance,
Department of Revenue, North Block,
New Delhi-110001.

3] The Chairman, Central Board of Excise
Custom, Ministry of Finance,
Dept. of Revenue, 5th Floor,
HUDCO Vishala Building, Bhikaji
Cama Place, R.K. Puram,
New Delhi-110066.

4] The Chief Commissioner, Goods and
Service Tax & Central Excise,
Kendriya Utpad Shulk Bhavan,
Telenkhedi Road, Nagpur-440001.

.. Respondents

Shri P. S. Sahare, Advocate for the petitioner,
Shri N.S. Deshpande, Assistant Solicitor General of India (ASGI) for the
respondents.

**CORAM : SUNIL B. SHUKRE AND
SMT. M.S. JAWALKAR, JJ.**

DATED : 25.04.2022.

ORAL JUDGMENT : (Per : Sunil B. Shukre, J.)

Heard. **Rule.** Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

2. The case of the petitioner is that he was a daily-wager who worked on the establishment of respondent no.4 with effect from 01.02.1990 continuously and therefore was entitled to be regularized in the same Group-D post, in which he rendered such continuous service. The petitioner had also alternatively claimed that he be given a chance to take part in the selection process that was initiated for filling up two posts of Farash, for which he was eligible and that the petitioner was being deprived of such a chance. With these grievances, the petitioner had approached the Central Administrative Tribunal, Mumbai Bench at Nagpur by filing an Original Application bearing O.A. No.936/1999.

3. In response, the respondents contended that the petitioner performed his duties only on contract basis and therefore, as held by the Supreme Court, there was no relationship of master and servant between the petitioner and the respondents and thus the petitioner was ineligible for being regularized in his service as daily-wager. It was

further submitted by the respondents that the claim of the petitioner was indeed considered for his selection as Farash as well as Sepoy in the selection process, but the selection process having been initiated for filling up only general category candidates and the petitioner not fulfilling the age criteria prescribed for general category candidates, he was not eligible for his such consideration.

4. Considering such rival contentions and keeping in mind the rendering of 10 years continuous service by the petitioner with the respondents and also the proof of service on contractual basis, produced by the respondents, pertaining to only the year 1998, the Tribunal thought it fit to dispose of the Original Application with certain directions. Such consideration made and directions issued by the Tribunal are to be found in paragraph 3 of its order dated 26.09.2001 whereby the Original Application No.936/1999 came to be disposed of by the Tribunal. For the sake of convenience, they are reproduced as under :

“Having carefully considered the rival contentions of the parties and keeping in mind that the applicant has already rendered 10 years continuous service with the respondents and the proof of service on contractual basis produced by the respondents pertains to 1998 only, the present OA is disposed of with a direction to the respondents that in the event that exists a post of Group ‘D’ either Sepoy or Farash in the reserved category the applicant shall be given preference and after being subjected to selection process he shall be

appoint in case he conforms to the eligibility criteria. Till then the applicant shall be allowed to continue on contractual basis. No costs.”

5. It would be clear from the above referred directions that the Tribunal did not accept the contentions of the petitioner regarding his regularization of service as a contractual employee. Rather, the Tribunal directed the respondents that if there existed any post in Group-D either of Sepoy or Farash, the petitioner's claim would be given preference and the petitioner would be appointed only after being subjected to selection process, provided the petitioner also fulfilled the eligibility criteria. These directions were considered by the respondent no.2 sometime in the year 2014 and by the decision communicated vide its letter dated 01.04.2014, the respondent no.2 held in paragraph 8 as follows :

“8. Therefore, the Department has fully complied with the Hon'ble CAT's order dated 26.9.2001 which require that Shri Ajay Patil shall be appointed in case he conforms to the eligibility criteria. However, as Shri Ajay Patil did not fulfill the eligibility criteria he could not be appointed as Sepoy or Farrash or as Sweeper-cum-Safaiwala.”

6. Before holding so, the respondent no.2 gave detailed reasons in its communication dated 01.04.2014. Being aggrieved by the same, the petitioner filed another application being Original Application No.2077/2015 together with one Misc. Application

No.2088/2015 before the Central Administrative Tribunal, which came to be decided by its order passed on 21.02.2019. By this order, the Tribunal dismissed the Original Application as being devoid of any merit. Being aggrieved by the same, the petitioner has filed the present petition.

7. It is the contention of the learned counsel for the petitioner that while passing the impugned order, the department did not take into account the order passed by the respondent no.3 vide its communication dated 27.02.2009 which requested the department to implement the order of the Central Administrative Tribunal passed on 26.09.2001 in Original Application No.936/1999 stating that this order had attained finality and it was not open to the department to reopen the issue. Ultimately, vide this letter, a request was made to the department to implement the said order of the Tribunal by regularizing Shri Ajay Patil i.e. the petitioner on the post of Sweeper-cum-Safaiwala and send compliance report in the matter to the Board for onward transmission to the National Commission For Scheduled Castes.

8. If we carefully peruse the communication dated 27.02.2009 which is called by the petitioner to be an order of respondent no.3, we would find that it is nothing but an opinion of the respondent no.3 interpreting the order of the Central Administrative

Tribunal dated 26.09.2001 as per its own understanding. The order of the Tribunal dated 26.09.2001 delivered in Original Application No.936/1999, the operative portion of which reproduced earlier, does not say anywhere that the petitioner should be regularized, even when there is not available any post of Farash or Sepoy, even when the petitioner does not fulfill the eligibility criteria including the criteria relating to upper age limit. The order also does not say that the petitioner should be appointed without following the selection process. The communication dated 27.02.2009, however, makes a request to the department to implement the said order of the Tribunal “by regularizing Shri Ajay Patil (the petitioner) on the post of Sweeper-cum-Safaiwala and send a compliance report in the matter to the Board for onward transmission to National Commission for Scheduled Castes”, which is not the import of the order dated 26.09.2001. The order dated 26.09.2001 is, in fact, a balanced order and it considers appropriately the need for fulfillment of eligibility criteria, availability of the vacancy in the relevant post and the requirement of following of proper selection procedure. But, all these aspects, essential elements of Tribunal’s order, have been ignored while sending the communication dated 27.02.2009 by the respondent no.3 to the department and adding something which was not in the Tribunal’s order, a request for regularization was made, which was an illegality manifestly committed.

Therefore, the communication dated 27.02.2009 could, at best, be taken as opinion of respondent no.3 having no binding effect on anyone, in law.

9. The effect of direction issued by the Tribunal in Original Application No.936/1999 in its true sense, however, has been considered appropriately in the order passed by the Tribunal on 21.02.2019 which is impugned herein. Not only that, in the impugned order, the Tribunal has considered appropriately the decision recorded by the respondent no.2 in the letter dated 01.04.2014. This decision notes that the petitioner was not found eligible to be appointed as 'Sepoy', because he did not fulfill the age criteria of 18-25 years, which is the age criteria prescribed for open category candidates. The post of Sepoy, without any dispute, was to be filled up from open category candidates and since the petitioner had crossed the upper age limit prescribed for open category candidates, the petitioner could not have been considered for being appointed to such a post. After all, the original order passed by the Central Administrative Tribunal on 26.09.2001, had categorically stated that before appointing the petitioner, the respondents would have to ensure that the petitioner fulfilled the eligibility criteria. Therefore, nothing wrong could be found in non-consideration of the petitioner for his appointment to the post of

‘Sepoy’ by the respondent no.3. It is further seen from the decision dated 01.04.2014 that the department had also considered on its own, without there being any direction issued in that regard by the Tribunal, possibility of appointment of the petitioner to the post of Sweeper-cum-Safaiwala. Here also, the department found that the petitioner did not fulfill the eligibility criteria for this post, he being over-age for that post even after granting of age relaxation. On factual basis, no error in such a finding was noticed by the Central Administrative Tribunal and there is no reason for us to disagree with the finding so recorded by the department in its decision dated 01.04.2014.

10. As regards the direction for considering the claim of the petitioner to grant him a temporary status, the department found that the petitioner was not eligible for such a status in accordance with the office memorandums of DOP&T dated 10.09.1993 and 12.07.1994. The Tribunal, in its impugned order, noticed no fault in such a finding recorded in the impugned order dated 01.04.2014 by department. No contrary material has been brought on record by the petitioner to enable us to interfere with such opinion of the Tribunal and therefore, we do not see any reason for us to record a finding that the conclusion so reached by the department regarding ineligibility of the petitioner to be accorded temporary status is erroneous.

11. The learned counsel for the petitioner further submits that there was an admission given by the respondent no.2-Board about the petitioner not being over-age on the date of the order dated 26.09.2001 and that this fact has not been considered appropriately by the Tribunal, while passing the impugned order. He submits that, therefore, a review application was moved by the petitioner being Review Application No.2006/2019, but even, this application was rejected by the respondent no.1-Tribunal, vide its order dated 02.05.2019, which has also been challenged by the petitioner in this petition. In the communication dated 02.09.2008, it is indeed stated by way of admission given by the Central Board of Excise and Customs that the applicant was not over-age on the date of delivery of judgment by the Tribunal on 26.09.2001. The petitioner, while filing Original Application No.2077/2015, had also taken this ground while questioning the legality and correctness or otherwise of the decision dated 01.04.2014. The impugned order passed by the Tribunal in the Original Application as also the impugned order passed in the Review Application by the Tribunal, both do not show any consideration of the submission of the petitioner that as per the own admission given by the Central Board of Excise and Custom, the petitioner was not over-age on the date of delivery of the judgment and order dated 26.09.2001 by the Tribunal. Ordinarily, this fact would have been sufficient for us to

quash both the impugned orders and remand the matter for fresh consideration and decision by the Central Administrative Tribunal. But, the realistic view of the whole issue is required to be taken. In order to find out the factual reality, we made a query to the learned counsel for the petitioner to ascertain the date of birth of the petitioner, to which the learned counsel for the petitioner replied that the petitioner's date of birth is 08.05.1970. Such date of birth of the petitioner would make the petitioner a person of 31 years of age on 26.09.2001 which means that upper age limit of 25 years prescribed for open category candidates had been crossed by the petitioner on the date of the judgment itself. Against the background of this reality, the admission given by the Central Board of Excise and Customs in its communication dated 02.09.2008 is pushed into realm of falsity and therefore, the statement made in the said letter cannot be considered to be an admission which would bind the department. It is only an admission of a fact which exists and not of the one which does not exist is what binds a person in law. Therefore, the department cannot be held to be bound by this so called admission. If this is so, no fruitful purpose would be served by remanding the matter back to the Central Administrative Tribunal.

12. There is one more aspect which requires consideration by this Court. The petitioner had made a complaint against the

department to State Commission For Scheduled Castes. The complaint was about his non-regularization as a regular employee. The State Commission For Scheduled Castes, Pune, in its order dated 25.02.2009, however, found that the petitioner had misled the Commission, had provided fictitious, tampered and forged copies of letters to the Commission and they may result in penal action. With such adverse finding recorded against the petitioner, this petition deserves no cognizance in exercise of extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India. Of course, the learned counsel for the petitioner places reliance upon the order dated 19.03.2013 passed by the National Commission For Scheduled Castes recommending that the order of the Central Board of Excise and Customs be considered as final order in the matter of regularization of service of the petitioner as 'Sepoy'. But, even in this order, the finding recorded by the State Commission For Scheduled Castes has not been upset.

13. The learned counsel for the petitioner also submits that the Central Board of Excise and Customs had convened a meeting on 11.02.2014 before the decision dated 01.04.2014 which was communicated to the National Commission For Scheduled Castes. He submits that the minutes of the meeting recorded by the Board do not

show any consideration of letter dated 27.02.2009 issued by the Board. We have already considered the effect of this communication dated 27.02.2009, which is called as order of the Board by the petitioner and we have found that it is nothing but an opinion given by the Board by interpreting the order of the Tribunal dated 26.09.2001 in its own way, which has no binding effect on the Department. We have also found that it was inconsistent with the order of the Tribunal. Therefore, nothing wrong could be found in non-consideration of an earlier opinion of the Board, not factually correct, in the subsequent Board meeting.

14. In the result, there is neither any error of fact nor any illegality committed by the Tribunal in passing the impugned order and therefore, no interference in the same is required. The petition stands dismissed.

(SMT. M.S. JAWALKAR, J.) (SUNIL B. SHUKRE, J.)

Gulande