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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

Q. A. No. 1761 of 1997 decided on 16.9.1998.

Name of Applicant : Shri Rishipal & others

By Advocate : Shri R. Venkataramani along with
Shri S.M. Garg

Versus

Name of respondent/s Union of India & others

By Advocate : Shri P.H. Ramchandani

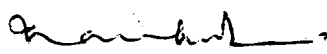
Coram:

Hon'ble Mr. N. Sahu, Member (Admnv)

Hon'ble Dr. A. Vedavalli, Member (J)

1. To be referred to the reporter - Yes/No

2. Whether to be circulated to the other Benches of the Tribunal. - Yes/No


(N. Sahu)
Member (Admnv)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.1761 of 1997

New Delhi, this the 16th day of September, 1998

Hon'ble Mr. N. Sahu, Member(Admnv.)
Hon'ble Dr.A.Vedavalli, Member(J)

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1. Shri Rishipal S/o late Shri Chandan Singh, working at Security Office, 'H' Block, Ministry of Defence, DHQ PO, New Delhi-110011.
2. Chintamani, S/o Shri Bal Kirshan, CAO's Office.
3. Gopi Chand S/o Shri Harpat Singh, Naval HQ.
4. Naresh Chander S/o Shri Ramanand, AG's Branch.
5. Ramesh Chandra, S/o Shri Shiv Dutt, CAO's office.
6. Rishi Pal, S/o Shri RS Verma, Air HQ.
7. S.K.Dogra, S/o Shri Amar Chand, QMG's Branch.
8. Surya Prakash, S/o late Shri Keshav Dett, RCPO
9. Surender Kumar Sharma, S/o Shri Harbans Lal, E-in-C Branch.
10. Naresh Kumar, S/o Shri Sis Ram, Air HQ.
11. P.C.Barthwal, S/o late Shri Tota Ram, DGAFMS
12. Harak Singh, S/o Shri Hayat Singh, Air HQ.
13. Kishan Pal, S/o Shri E-in-C Branch.
14. Mohan, S/o late Shri Deva Ram, DGQA.
15. Sate Singh, S/o late Shri Sunder Singh, P&C.
16. Jaswant Singh, S/o Shri Hanumant Singh, CAO's Office.
17. Smt. Urmila Badial, W/o R.K.Badial, AG's Branch.
18. Virender Singh Aswal, S/o Shri Purn Chand, MS Branch.
19. Ramphal Singh, S/o late Shri Dharam Singh, MGO's Branch.
20. Gulab Singh Bora, S/o late Shri Prem Singh, MGO's Branch.
21. Daya Nand, S/o Shri Krishan Chand, QMG's Branch.

22. Sudhir Salhotra, S/o Shri Madan Mohan Lal, AG's Branch.
23. Rajinder Singh Negi, S/o Shri J.S. Negi, R&D.
24. Kamal Kumar Sharma, S/o late Shri Gupt Ram DGAFMS.
25. Prem Lal Chauhan, S/o Shri Surat Ram, Air HQ.
26. Braham Singh, S/o Shri Bhim Singh, R&D.
27. Dharam Bir Singh, S/o Shri Raghubir Singh, MS Branch.
28. Dharam Pal Singh, S/o Shri Udi Ram, Air HQ.
29. Kundan Chand, S/o late Shri Kamlapati, DGQA.
30. Shiv Raj Singh, S/o Shri Jagat Singh, Air HQ.
31. Gagan Singh, S/o Shri Dilwan Singh, Air HQ.
32. Madan Singh Rawat, S/o Shri Shiv Singh, E-in-C Branch.
33. Jaswant Singh, S/o Shri DK Singh, MGO's Branch.
34. Dhan Singh, S/o Shri Sher Singh, GS Branch.
35. Smt. Chander Prabha, W/o Shri P. Ram, R&D.
36. Smt. Neelam Naithani, W/o Shri DGDE.
37. K. Rajan, S/o Shri MS Nair, E-in-C Branch.
38. Dharam Vir Singh, S/o Shri Aujun Singh, Naval HQ
39. Sohan Lal S/o Shri Horam Singh, MGO's Branch.
40. KS Mehra, S/o Shri Gulab Singh, AG's Branch.
41. Radha Charan, S/o Shri Bhajan Lal, R&D Dte.
42. Lila Dhar, S/o Shri Manorath, R&D Dte.
43. Rajeshwar Prashad, S/o Shri Ram Lakhan, DGQA.
44. Mehrwan Singh, S/o Gabar Singh, NHQ.

All are working in the Office of the JS(TRG) & CAO, C-II Hutments, DHQ PO, New Delhi - 110 011.

-APPLICANTS

(By Advocate Shri R. Venkataramni along with Shri S.M. Garg)

Versus

1. Union of India through the Secretary, Ministry of Defence, South Block, DHQ PO, New Delhi-110011.



2. The Joint Secretary (Trg) & Chief Administrative Officer, C-II, Hutments, Ministry of Defence, DHQ PO New Delhi-110011.

3. The Deputy C.A.O. (P), Ministry of Defence, C-II Hutments, DHQ PO New Delhi-110011.

-RESPONDENTS

(By Advocate Shri P.H.Ramchandani)

O R D E R

By Mr. N. Sahu, Member (Admnv) -

This Original Application is directed against the impugned order dated 27.5.1997 passed by respondent no.2 rejecting the applicants' claim for appointment as Lower Division Clerk (in short 'LDC') on regular basis on the ground that it would infringe the right of other senior Group 'D' employees eligible for appointment and thus would amount to violation of Articles 14 and 16 of the Constitution. A brief background picture leading to the dispute is presented hereunder.

2. The applicants were selected to the post of LDC in Group 'C' between 29.4.1985 and 25.1.1988 on due selection after an opportunity offered to all educationally qualified (Matriculate) Group 'D' employees who had completed two years of regular service in that grade in Armed Forces Headquarters (in short 'AFHQ'). Those who qualified in the type test amongst the eligible candidates were promoted. It is true that the promotion orders described their promotion as adhoc and stop gap. These promotions were made under Rule 9(3) of the AFHQ (Clerical Services) Rules, (hereinafter referred to as "the Recruitment Rules) because a large number of

vacancies in the grade of LDC had arisen and the Staff Selection Commission (in short 'SSC') could not supply sufficient number of hands over a long period of time between September 1982 and 1988. The initial appointments were only for a period of six months but they were continued year after year. Instructions were issued by O.M. dated 30.3.1988 to the effect that such adhoc appointments to the grade of LDC from Group 'D' employees were not to be continued. Consequently, a decision was taken not to extend the adhoc appointments beyond 31.12.1989. Under the orders of this Court in O.As. Nos. 2553/89, 16/90 and 254/90 the applicants continued as adhoc because of the status quo ordered by this Court. Eventually these OAs were dismissed by a common judgment dated 8.6.1995 and the stay orders were accordingly vacated. Out of the 116 original applicants, 57 were promoted to the grade of LDC based on seniority or because they qualified in the Limited Departmental Competitive Examination (in short 'LDCE'). The remaining 59 were reverted to Group 'D' by an order dated 27.7.1995. These 59 reverted applicants filed an SLP before the Hon'ble Supreme Court. As a Full Bench was constituted in O.A.No.1751/88 on the very issue referred before the Hon'ble Supreme Court, it was decided amongst the counsel to withdraw the SLP. Their Lordships accordingly permitted the parties to withdraw with liberty to move the Full Bench of the Tribunal. Accordingly, OA 2553/89 along with OAs 254/90 and 16/90 were revived and tagged on to OA 1751/88 by a Division Bench of this Court vide order dated 15.12.1995 (Annexure-G). The Full Bench after

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hearing all the parties delivered a judgment on 27.9.1996 and sent back the files of the employees of Agricultural Department (OA No.1751/88) as well as three OAs filed by the applicants for disposal along with the directions set out by the Full Bench. As far as the Agricultural Ministry is concerned, by an order dated 22.4.1997 the services of all the applicants in OA 1751/88 in the grade of LDC were regularised pursuant to the orders of the Division Bench read with orders of the Full Bench. As far as three OAs of the applicants are concerned, the OAs were not taken up for disposal and for the reasons recorded in the order, the review applications were disposed of by an order dated 18.3.1997. As regards the merits of the applicants' claim, the Division Bench directed a fresh representation on which the respondents were to apply the ratio contained in the Full Bench judgment dated 27.9.1996 and the judgment dated 27.5.1996 in OA No.702/96. The impugned order is the result of this representation.

3. The claim of the applicants is that they form a separate class. The origins of this separate class are to be found in the Recruitment Rules itself. The admitted facts are that over several years the SSC could not make available candidates for appointment to the LDC grade and in view of the large number of vacancies the appointments were made after sieving from amongst all Group 'D' employees those who were educationally qualified with the requisite years of service and from amongst the eligible candidates through a further type test. The Full

Bench held that the source of power in these appointments is under Rule 9(3) *ibid* and that their appointments were in terms of those rules and not *dehors* the rules. The applicants filed OAs only when they were threatened with reversion. On 8.6.1995 two separate judgments were delivered by the same Bench of the Tribunal in two sets of cases filed by affected parties in the Ministry of Agriculture and AFHQ. While in the case of the applicants, the OAs were dismissed, in the case of employees of Ministry of Agriculture it was referred to a Full Bench. By an order dated 27.9.1996 certain observations were made by the Full Bench stating that the three OAs of the applicants were revived and also holding that the appointments of the applicants were made in accordance with Rule 9(3) *ibid*. Rule 9(3) is part of AFHQ Clerical Services Rules, 1987 promulgated on 15.6.1987. Rule 9 deals with mode of appointment in the service. "Service" has been defined to include posts in the UDC and LDC grades under Rule 2(j) of the Recruitment Rules, which are non-gazetted posts, classified as Group 'C'. These posts shall be filled up as per Third Schedule. Rule 9(2) permits an LDC, who has rendered 8 years of continuous approved service in that grade to be appointed on the basis of seniority for a three months' period as UDC if the select list for the UDC is not available, or the persons in the select list are not available for appointment. This period of three months can be

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extended to six months in public interest. Then comes Rule 9(3) which is extracted hereunder -

"If sufficient number of qualified candidates are not available for appointment to the Lower Division Grade on the results of competitive examinations held by the Staff Selection Commission, the vacancies may be filled either provisionally or on a regular basis in such manner as may be decided by the Government".

4. Rule 20 of the Recruitment Rules empowers the Government to relax the rules with respect to any class or category of persons. The Full Bench held that the mere fact that the Government did not quote the provisions of the rules in the appointment order or that it chose to make appointments purely on adhoc basis as a stop gap arrangement, it would not mean that the Government could not later regularise their services under Rule 9(3) or by making an appropriate provision. Admittedly, there were a large number of vacancies. The relevant paragraph of the Full Bench order is as under -

"29. Coming to the facts of the case under reference in OA 2553/89 and the connected cases, it is evident that even at present there are vacancies in the grade of Lower Division Clerks, that the applicants are continuing on those posts on ad-hoc basis and that the Staff Selection Commission has not been able to supply sufficient number of hands to man those posts. This fact is evident from the averments in paragraph 4 of the counter affidavit filed by the respondents in OA 2553 of 1989.

However, in these cases it cannot be said that the appointments were made not in accordance with the rules. Rule - 9(3) provides for making appointments to the posts of Lower Division Clerks either on regular basis or provisionally from amongst the Group-D employees who possess the requisite qualifications in accordance with the

Recruitment Rules, if sufficient number of candidates are not made available by the Staff Selection Commission, on the basis of the results in the competitive examination. All the appointments were made, admittedly in the absence of sufficient number of candidates nominated by the Staff Selection Commission. The mere fact that the Government did not quote the provisions of the Rule in the appointment order or that it chose to make appointment purely on adhoc basis as a stop-gap arrangement does not mean that the Government cannot later regularise their services, either invoking the provisions of Rule 9(3) or making appropriate provisions. Similarly, in the case of applicants in OA No.1751/88, the ad-hoc appointments were made during the period 1976-1984 and the appointees have continued for fairly long time, firstly, at the instance of the Department and later under interim orders of the Tribunal. In such cases as observed by their Lordships in State of Haryana & others Vs. Piara Singh and others, (1992) 4 SCC 118, and in the case of Surinder Kumar Gyani Vs. State of Rajasthan and others, JT 1992(5) SC 293 it would be only appropriate if the Government decides to regularise their services as none nominated by the Staff Selection Commission is presently waiting for appointment and in that view of the matter it would also be proper for the Tribunal to give directions to the respondents to consider regularisation of the services of the applicants."

(emphasis supplied)

Shri Venkatramani, learned counsel for the applicants, urged that with this categorical finding of the Full Bench the respondents have no other option except to regularise the services of the applicants as none nominated by the SSC was waiting for appointment. More so, the Full Bench rejected the claim of prejudice of interest of other Group 'D' employees. The Full Bench had stated that the applicants were appointed after a competitive examination and the other Group 'D' employees could not be appointed because either they failed in the test although they were given full opportunity or they did not avail of the same. Theory of prejudice

to other Group 'D' employees is contested on the ground that it amounts to treating unequals as equals and this is violative of Article 14 of the Constitution. Not only the applicants formed a separate class, but also their appointment was not de hors the rules. It is also urged that denial of regularisation would cause undue hardship and would be inequitous. It is urged that there are more than 700 vacancies in the grade of LDC in the respondent-department and it was practically feasible for the respondents to accommodate the applicants against these vacancies, either against the 90% quota for direct recruits or otherwise. It may also be noted that the applicants in the meanwhile during their long service had earned increments in the said grade and were also allowed to cross the efficiency bar. For all practical purposes they were treated as regular LDCs. It is further submitted that there is no difference, in principle, between the employees of the Ministry of Agriculture and the employees of the AFHQ. It would be inequitous and discriminatory to regularise the services of the LDCs in the Ministry of Agriculture and deny the same on the only ground that persons senior to the applicants in Group 'D' cadre are awaiting consideration for appointment. The learned counsel for the applicants submits that Rule 9(3) *ibid* provides deviation from the normal procedure for appointment in case sufficient number of qualified candidates are not provided by the SSC. It is a statutory relaxation besides the power of relaxation under Rule 20 *ibid*. Accordingly, it would be most appropriate for the Government to regularise

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the services either under Rule 9(3) or under Rule 20. ibid. The characteristic of the applicants as a separate class enumerated above was not to be found amongst the Group 'D' employees who could not succeed in the test.

5. The learned counsel for the applicant further urged that although the appointment orders were issued as temporary, adhoc or stop gap, those conditionalities have lost all their edge, meaning and significance after an efflux of time. The point sought to be made by the learned counsel for the applicant is that Rule 9(3) permits an appointment which is either permanent or provisional. It is settled by the order of the Full Bench that the appointments were only made under Rule 9(3), although such a mention did not find place in the order of appointment. The continuance of the applicants after every period of three months or six months by separate orders plus the acceptance of the applicants over years by granting them increments as also allowing them to cross the efficiency bar clearly indicated the intention of the Government to treat the applicants as not merely adhoc or stop gap. Once the applicants are treated as having their source of appointment to a recruitment rule, their continuous service cannot be written off as stop gap. The learned counsel cited the decision of the Hon'ble Supreme Court in the case of Motor General Traders and another Vs. State of Andhra Pradesh and others (1984)1 SCC 222 wherein their Lordships were considering the provisions of Section 32(b) of the

Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 (hereinafter referred to as "the Act"). Their Lordships declared the said Section as invalid being violative of Article 14 of the Constitution. Under that provision there was an exemption for new buildings from the operation of the Act in order to provide an incentive to builders of new buildings. Their Lordships held that exemption was valid when it was made because the exempted buildings were only five or seven years old at the time when the Act was framed but it is no longer valid after a score of years because the continuance of such a provision on the statute book will imply the creation of a privileged class of land owners. The justification for exemption of a class of old buildings is no longer valid after efflux of time. The long period that had elapsed had given rise to the crucial question as to whether the impugned law had become discriminatory. Such an exemption cannot be allowed to last for ever. It is stated that an exemption provision initially valid can become discriminatory with the passage of time because the nexus with the object sought to be achieved did not survive any longer. Thus, after an efflux of time such a provision would be violative of Article 14 of the Constitution. It has also been laid down that a statute which is bad in part is not necessarily void in its entirety. The striking down of Clause (b) of Section 32 of the Act does not in any way affect the rest of the provisions of the Act because Section 32(b) is not inextricably linked up with the rest of the provisions of the Act, as to make the Act

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unworkable after the said clause is struck down. The effect of striking down would be that all buildings except those under Section 32(a) are exempted under Section 26. will be governed by the Act, irrespective of the date of their construction. The application of this Supreme Court's decision to the facts of this case are explained in this manner. The conditionality in the appointment order of the applicants may be valid when they were issued but due to efflux of time such conditionality had become iniquitous and discriminatory. More so, in a case of this type where the original appointments as held by the Full Bench were not dehors the rules either on their own upto 1989 or thereafter under the Court's orders till 1995. The applicants continued to serve as LDC with an unblemished record. Nowhere it has been stated that the applicants were inefficient. The applicants admittedly were functioning efficiently and as obedient officials. After such an efflux of time they cannot be written off and reverted on the mere ground that seniors in the Group 'D' cadre are waiting for their promotion. This particular conditionality appears to be unobjectionable as a transitional or a temporary measure at the initial stage but this has become discriminatory and violative of Article 14 of the Constitution if persisted over a long period.

6. The next point urged by the learned counsel for the applicants is that although the order of appointment did not quote Rule 9(3) for that purpose that order would not be an invalid exercise of power.

The exercise of power will be referable to a jurisdiction which confers validity upon it. For this purpose, the learned counsel cited the observations of Hon'ble Mr. Justice G.P. Singh in "Principles of Statutory Interpretation" Fifth Edition 1992, on the "Manner of expression of exercise of power" at page 262 of his book. He also cited N.S. Bindra's Book on Interpretation of Statutes Eighth Edition, 1997 on the "Validity of statutory rules and bye laws, an extract of which is reproduced below -

"Before a bye-law framed by a bye-law making authority is declared ultra vires the Court must be satisfied not only that it had no power to act under the power it purported to act, but also that it had no power at all under any law to so act. If power can be found elsewhere than the section quoted, the rules will be referred to that power and held not to be ultra vires. When rules are framed they may be referred to any power in the Act which validates them. Where an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule.

Provided that the law-making body had authority to make it under some other provisions of law misquoting their authority by oversight or mistake does not take away any authority given by law. It order to justify a rule the rule itself need not show on its face under what particular section of the Act it is being made. So long as the rule can be justified under the rule making power, the non-recital of the fact that it has been so made will not make the rule bad or invalid."

7. For the above reasons it is submitted that the respondents had failed in their duty to appreciate correctly the claims of the applicants and they ignored the observations of the Full Bench in this regard.

8. The respondents' contention is that the appointments were not to be continued pursuant to the instructions issued by the DOPT dated 30.3.1988. The applicants continued upto 1995 under the interim orders of the Court. The mere claim that the applicants stood on a different footing than their colleagues in Group 'D' simply because they pass the type-writing test at the stage of their initial appointment cannot help their case because the nature of the test is different from the test conducted during LDCE in terms of Rule 11 of the Recruitment Rules. It is stated that this distinction was accepted by the applicants before the Division Bench. They had not become ripe for regularisation on their seniority or they did not avail all the opportunity to clear LDCE in the intervening period. The quota for LDCE could not be filled up and even if the applicants had exceeded the quota, they could have been adjusted against future vacancies. The respondents did not consider it proper to relax the rules in the instant case. Only one applicant was initially appointed as LDC on adhoc basis in 1982 and continued till 1990 and thereafter continued under interim orders. Thereafter 29 persons were initially appointed on adhoc basis in 1985 and 21 persons were appointed as late as 1988. Thus, it cannot be construed that all the applicants had been continued by the respondents on adhoc basis as LDC for very long periods. The next point made out by Shri Ramchandani, learned counsel appearing on behalf of the respondents is that there are 278 educationally qualified Group 'D' employees senior to the junior

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most applicant who would be prejudiced and can stake a claim for promotion. The ground canvassed by Shri Ramchandani is that where rules are to be relaxed, such relaxation should not be prejudicial to the other employees and transgress their rights. These educationally qualified LDCs either initially did not apply or did not qualify at the time of initial recruitment. This mere fact should not cause prejudice to their rights. Even in the Constitution Bench order of the Hon'ble Supreme Court in the case of State of Jammu and Kashmir Vs. Triloki Nath Khosa, (1974)1 SCC 19 it is clearly laid down that Government can alter terms and conditions of some of its employees unilaterally and for this purpose consent is not a precondition for validity of the rules of service. The following propositions were laid down in Khosa's case -

- (i) A rule which classifies employees for promotional purposes, operates on those who entered service before the framing of the rule. This rule governs future right of promotion of those who are already in service.
- (ii) Employment under the Government may originate in contract but the Government of his office. His rights and obligations are statutorily determined. His consent is not necessary for the same.
- (iii) Where a party seeks to impeach the validity of a rule on the ground of its violation under Article 14 of the Constitution, the burden is on him to plead and prove the infirmity in the rule.

9. The learned counsel for the respondents urged that there is no discrimination meted out to the applicants and they do not form a separate class.

He has relied on the following observations of Hon'ble Supreme Court in the case of Triloki Nath Khosa (supra) to buttress his point -

"Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straight-forward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality."

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10. It is very necessary to take note of the subsequent events which have a vital bearing on this issue. The subsequent events were stated in additional affidavit explained on behalf of respondents filed on 29.7.1998. The reply to this additional affidavit was filed on 3.8.1998. The facts in this additional affidavit were filed at our instance. The relevant paragraph of this additional affidavit of respondents are as under -

"2. During the course of hearing on 23 Jul 98 the Hon'ble Central Administrative Tribunal had suggested that the Respondents can file an affidavit on the undermentioned aspects :

(a) The number of selected candidates nominated by the Staff Selection Commission for appointment as LDC in AFHQ/Inter Services Organisation.

(b) The effective date from which departmental quota for group 'D' employees for appointment as LDC has been raised from 10% to 15%.

3. It is submitted that in the counter affidavit filed by the respondents in reply to para 9 of the OA, it was submitted that respondents were bound to appoint candidates nominated by Staff Selection Commission on the results of Clerk's Grade Examination, 1996.

4. It is submitted that 980 vacancies in the grade of LDC were notified to Staff Selection Commission for recruitment on the basis of Clerk's Grade Examination, 1996. Based on the results of

the said examination, a list containing the names of 899 selected candidates have been received from the Commission.Offers of appointments are to be issued to the selected candidates on completion of pre-recruitment formalities.

5. It is further submitted that the quota for group 'D' employees for appointment as LDCs in AFHQ Clerical Services has been raised from 10% to 15% vide an amendment carried out in the AFHQ Clerical Service Rules on 05 May 94.....

11. In the reply the most important point made by the applicant was that against 980 vacancies referred to the SSC only 899 names of selected candidates were sent for appointment. There are 81 more vacancies still available to the respondents. The applicants are only 44 in number. They can easily be accommodated against the said vacancies. It is stated that on an average at least 50% of the candidates do not ultimately join the service and thus there would be more than sufficient number of vacancies available to the respondents to accommodate the applicants in Group 'C' posts.

12. We have carefully considered the rival submissions. We are convinced that in terms of the Full Bench order, the appointment of the applicants can only be referable to Rule 9(3) ibid. These appointments cannot be called the appointments dehors the rules. There was a process of selection involved. The applicants were continued albeit under stay orders for sufficiently long time because they were educationally qualified. They responded to an invitation to compete and because they qualified in the test, they did form a separate class. Not only that they earned increments; they crossed the

efficiency bar; and their performance was considered to be adequate and acceptable. The question at issue

is whether the respondents are justified in not exercising their power of relaxation under the rules.

We do hold that there can be no question of cutting into the direct recruits' quota for accommodating the applicants but being statutorily recruited under Rule 9(3), do they not form part of this quota? Those

orders, to be passed by the respondents in respect of the list of candidates approved for appointment by the SSC in response to the 1996 reference, have to be given effect to. Even so, the reply of the

applicants to the additional affidavit that still 81 vacancies exist has not been countered or contradicted by the respondents. In these vacancies

the applicants claim to be regularised. Even if we assume that all the appointees would join as per the offer given, 81 vacancies stare at the face of the respondents. They have to answer the question

whether it was not for this purpose Rule 9(3) *ibid* was framed or not. Rule 9(3) may be was a measure of convenience, even so, it was a statutory rule. The

appointments were made under that rule. They were continued under that rule. The applicants are qualified and they have served the department creditably as LDCs. We hold that they form a class.

The respondents, therefore, should look into this class of persons, namely 44 applicants who wait to be regularised when vacancies still exist and vacancies even as late as 1998 could not be filled by the SSC.

The applicants claim that 50% of the candidates selected by the SSC normally do not join. Let us

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assume that 90% of the candidates would join and 10% would not. Even so, to the vacancies thus caused what is the answer of the respondents? They have again to refer the matter of filling up the vacancies to the SSC who in their turn will take at least on an average 18 months to two years to meet the requisition by the process of advertisement, examination, selection, verification and appointment. The purpose of Rule 9(3) was not to keep a vacuum gaping and imploring the employers to ask as to how they react to these vacancies. Will the employers repeat and say that these vacancies will still be open and vacant for some more time and will remain so till the SSC fills them. That would be denying a just redressal of a valid grievance of the applicants. The employer's claim that seniors in Group 'D' are waiting in large numbers, has not answered one point: that these seniors in Group 'D' cannot encroach on the direct recruit quota. The applicant's appointment however under Rule 9(3) makes them a part of directly recruited quota under Rule 9(1). In fact Rule 9(3) cannot be read in a disjointed manner. If Rule 9(1) prescribes direct recruitment, Rule 9(2) speaks of again adhoc appointment when vacancies are not filled up, Rule 9(3) must be also read as part of the same genus. We hold that the selection of the applicants made under Rule 9(3) through a competitive test distinguishes them from others and they have to be treated as separate from the rest.

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14. After 1995, all Group 'D' employees are treated alike. Vacancies can be filled up either under the 15% promotee quota or under 85% direct recruit quota. We do agree with the respondents' counsel that after reversion the promotional channels of everybody becomes the same in Group 'D' and the promotions can be only in accordance with the rules but the selectees under Rule 9(3) cannot be wished out of existence. Even to fill the existing gap, the respondents can come back to Rule 9(3) and redress the grievance of the applicants. (X3)

15. We, therefore, direct the respondents to consider under Rule 20 as well as Rule 9(3), in view of the above decision of the Full Bench the case of absorption of the applicants in the unfilled posts of LDC. We also hold that during the period of service gap from 1995 till the date of their reappointment they will not be entitled to any pay and perquisites as LDCs on the principle of no work no pay. Once they are now admitted and posted into the vacancies existing under Rule 9(3) it is only for regularisation as LDC from the date they are considered for such appointment to the vacant posts. There cannot be any more adhocism in this exercise; after three or four rounds of litigation, the embattled employees would normally expect a finality. With regard to the benefit of past service, the retrospective benefits claimed cannot be allowed by this Court for two reasons. No Court can substitute for the competent authority and assume the power of relaxation itself. Right or wrong, the power of

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relaxation conferred by the statute has to be exercised only by the respondents. Once such a relaxation is assumed it can be only for the vacant posts existing at the time the regularisation order is issued. The respondents shall in considering the appointment also take a decision on the past services of the applicants. Because of the gap of three years, such past services would not ipso facto enable the applicants to claim seniority over the direct recruits. Either on a representation by the applicants or on their own, the respondents shall consider (a) whether to recognise past services; if so (b) where will they be placed as far as seniority is concerned? We suggest and command the respondents the principles laid down by the Apex Court in the case of Dr. M.A.Haque & others Vs. Union of India & others, JT 1993 (2) S.C. 265 for fixing the order of prioritisation between direct recruits, Rule 9(3) employees, and promotees.

16. We, therefore, direct the respondents to consider the applicants for the vacant posts. For this purpose they may either wait for the ultimate tally to find out whether all the appointees have joined or not but if they are satisfied that even if all the appointees are going to join and still there will be more vacant posts than the applicants, they can forthwith consider and exercise the power of relaxation both under Rules 9(3) and Rule 20 ibid within a period of six weeks from the date of receipt of a copy of this order. In doing so, they shall

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also consider as to how the past services of the applicants be treated. The O.A. is disposed of. No costs.

A. K. S. S. S.

(Dr. A. Vedavalli)
Member (J)

N. Sahu

(N. Sahu)
Member (Admnv)

16/9/98

rkv.