

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 242/ 1988.
F.A. No.

DATE OF DECISION July 8, 1988.

Theodore Ekka Petitioner

Shri J.P. Verghese Advocate for the Petitioner(s)

Versus

Union of India & Others Respondents

Shri P.P. Khurana Advocate for the Respondent(s)

No. 1 to 3.

Shri Inderjit Sharma Advocate for the Respondents
No. 4 and 5.

CORAM :

The Hon'ble Mr. Justice J.D. Jain, Vice-Chairman.

The Hon'ble Mr. Kaushal Kumar, Member (A).

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. Whether to be circulated to other Benches? *No*

KAUSHAL KUMAR
(KAUSHAL KUMAR)
MEMBER (A)
8.7.1988.

J.D. JAIN
(J.D. JAIN)
VICE-CHAIRMAN
8.7.1988.

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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, DELHI.

Regn. No. O.A. 242/1988.

DATE OF DECISION: July 8, 1988.

Theodore Ekka Applicant.

V/s.

Union of India &
Others Respondents.

CORAM: Hon'ble Mr. Justice J.D. Jain, Vice-Chairman.
Hon'ble Mr. Kaushal Kumar, Member (A).

For the applicant Shri J.P. Verghese, Counsel.

For the respondents No.1 to 3 : Shri P.P. Khurana, Counsel.
For the respondents No.4 and 5 : Shri Inderjit Sharma, Counsel
(Judgment of the Bench delivered by
Hon'ble Mr. Kaushal Kumar, Member)

JUDGMENT

The applicant, who belongs to the Scheduled Tribe community, is working as Superintendent (Accounts) in the Directorate of Estates, under the Ministry of Urban Development, Government of India, New Delhi. Being aggrieved by his non-promotion to the post of Assistant Director of Estates (Accounts), he has filed this application under Section 19 of the Administrative Tribunals Act, 1985. The reliefs claimed in this application are as under: -

(a) To direct the Respondents to promote the petitioner to the post of Assistant Director of Estates (Accounts) as per the selection already made by the Departmental Promotion Committee at its meeting held on 20-11-1986 against the vacancy reserved for the Scheduled Tribe candidate;

(b) To grant all consequential benefits of seniority and pay with arrears;

(c) To restrain the Respondents from de-reserving the said vacancy;

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(d) To restrain the Respondents from appointing a general category candidate against the said vacancy falling on Reserved point when the eligible S.T. candidate is available; and

(e) to pass such other further order or orders as may be deemed fit and proper in the facts and circumstances of the case, as mentioned herein above.

2. There are seven posts in the cadre of Assistant Director of Estates (Accounts). One vacancy at point No.14 reserved for Scheduled Caste candidate in the 40 Point Roster arose in the year 1985. Since this was a single vacancy and filling up the same by a Scheduled Caste candidate would have amounted to 100% reservation for Scheduled Castes, which is against the instructions of the Government of India on the subject, the said reservation against Point No.14 was carried forward to the next year and the vacancy at Point 14 was filled up by a general category candidate. In the year 1986, three vacancies arose at Points 15, 16 and 17 of the Roster. Points 15 and 16 are unreserved whereas Point 17 is reserved for a Scheduled Tribe candidate. However, since the reservation at Point 14 meant for a Scheduled Caste candidate was carried forward to the next year, Point 15 became reserved for a Scheduled Caste candidate. Thus in the year 1986, Point 15 became reserved for a Scheduled Caste candidate, Point 16 was unreserved and Point 17 was a vacancy reserved for a Scheduled Tribe candidate. A Departmental Promotion Committee meeting was held on 20-11-1986, but no minutes were drawn up because one of the Members of the D.P.C. raised the point that not more than 50% of the vacancies on a particular occasion could be filled up by the reserved categories of SC / ST.

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3. The case of the applicant is that the reservation at Point 15 is a carried forward reservation from an earlier year and this should not be added to the reservation in the number of vacancies which arose in 1986. Since Point 16 is unreserved and Point 17 is reserved for a Scheduled Tribe candidate, therefore, one vacancy out of the two should be filled up by a Scheduled Tribe candidate. Thus according to him, the reservation for a Scheduled Caste candidate at Point 15, which is a carried forward reservation from the reservation the earlier year, has to be excluded/in the year 1986.

4. The case of the respondents is that as per the Recruitment Rules for the post of Assistant Director of Estates (Accounts), only Superintendents (Accounts) with 5 years' regular service in the grade failing which with 10 years combined regular service in the grades of Superintendent (Accounts) and Accountant are eligible for promotion to the post of Assistant Director of Estates (Accounts) and since the applicant has not put in 5 years' regular service as Superintendent (Accounts), he is not eligible for promotion. It is further contended that the "failing which" clause of 10 years combined regular service in the grades of Superintendent (Accounts) and Accountant cannot be invoked and applied so long as candidates whether in the general or reserved categories fulfilling the first criterion of 5 years regular service as Superintendent (Accounts) are available.

5. Two points arise for determination in this case: (1) As to how the three vacancies at Points 15, 16 and 17 which arose in 1986 are to be filled up, that is, whether by S.C., General or S.T. candidates; and (2) whether the "failing which" clause can be invoked for filling up a vacancy by a reserved category candidate while candidates

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of the General category fulfilling the first criterion of having put in 5 years regular service as Superintendent (Accounts) are available.

6. As regards the first point referred to above, reliance has been placed on the Department of Personnel & A.R. O.M. No. 1/9/74-Estt. (SCT), dated 29th April, 1975 on the subject of 'Reservation for Scheduled Castes and Scheduled Tribes in services - Single vacancy arising in a recruitment year'. The relevant portion of the said O.M. is extracted below for ready reference: -

"2. The matter has been considered in the light of the judgement of the Supreme Court dated the 11th October, 1973 in the case of Areti Ray Choudhury vs. Union of India (Railway Ministry) and others, and it has now been decided that in partial modification of the O.M. dated 4th December, 1963, and 2nd September, 1964, referred to in para 1 above, while in cases where only one vacancy occurs in the initial recruitment year and the corresponding roster point happens to be for a Scheduled Caste or Scheduled Tribe, it should be treated as unreserved and filled accordingly and the reservation carried forward to subsequent three recruitment years as hitherto, in the subsequent year(s), even if there is only one vacancy, it should be treated as "Reserved" against the carried forward reservation from the initial recruitment year and a Scheduled Caste / Schedule Tribe candidate, if available, should be appointed in that vacancy, although it may happen to be the only vacancy in that recruitment year(s). For instance, if a single vacancy arises in the initial recruitment year 1975, and it falls at a reserved point in the roster, it will be treated as 'unreserved' and filled accordingly in that year but the reservation would be carried forward to subsequent recruitment year(s). In the first subsequent year, i.e., 1976, if, again a single vacancy occurs,

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then it should be treated as reserved against the reservation carried forward from 1975, and a Scheduled Caste/Schedule Tribe candidate, as the case may be, should be appointed against that vacancy, in spite of the fact that the vacancy happens to be the only vacancy in that recruitment year. (emphasis supplied). In/ a Scheduled Caste / Scheduled Tribe candidate not being available to fill the reserved vacancy in 1976, the reservation would be further carried forward to 1977 and 1978, when also a single vacancy, if any, arising in those years should be treated as "reserved" against the carried-forward reservation, whereafter the reservation will lapse.

3. In this Department's O.M. No.16/5/74-Estt. (SCT), dated 11.6.1974, it was clarified that a recruitment year during which only a single vacancy arises and hence gets treated as unreserved need not be counted as an effective year towards period for which the reserved vacancy is to be carried forward. Since a single vacancy arising in a year will now also be treated as reserved in the manner indicated in para 2 above, the orders contained in this Department's O.M. dated 11.6.1974 are hereby cancelled. The year in which no vacancy arises will, however, continue to be ignored, as at present, for purposes of counting the effective years towards the period of carry-forward." (Emphasis supplied)

7. The genesis and rationale of the above mentioned O.M. based on the decision of the Supreme Court in Areti Ray Choudhury vs. Union of India and others (1974 SCC (I&S) 73) preceded by the earlier decisions of the Supreme Court in T. Devadasan vs. Union of India (AIR 1964 SC 179) and M.R. Balaji vs. State of Mysore (AIR 1963 SC 649) have been dealt with at great length in the judgement dated 14.1.1988 of a Bench of this Tribunal to which one of us (Mr. Justice J.D. Jain) was a party, in Regn. No. T-1052/85 (C.W.P. 2089/84) - S.M. Jain v. Delhi Administration & others

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and Regn. No. T-1123/85 (C.W.P. 1144/85) - Om Parkash v. Delhi Administration and others. Thus, there can be no doubt whatsoever that as per the Government of India instructions based on the judgement of the Supreme Court in the case of Areti Ray Choudhury v. Union of India when in a particular year a single vacancy arises, it cannot be filled by a reserved category candidate and it has to be treated as 'unreserved' and filled accordingly and the reservation carried forward to subsequent three recruitment years. However, in the subsequent year even if there is only one vacancy, it has to be treated as 'reserved' against the carried forward reservation from the earlier recruitment year and the S.C. / S.T. (as the case may be), if available, has to be appointed against that vacancy.

8. The Department of Personnel & A.R. O.M. No. 36012/3/78-Estt. (SCT), dated 9.2.82 on the subject of "Reservation for SC / ST in services - stipulation of 50% limit for fresh and carry forward reservations with reference to the total vacancies in a recruitment year" also prescribes that fresh reservation along with carry forward reservation should not exceed 50% of the total vacancies available on a particular occasion. This decision of the Government is based on the judgement of the Supreme Court dated 14-11-1980 in Writ Petition No. 1041-1044 of 1979 (Akhil Bharatiya Soshit Karmachari Sangh Vs. Union of India). The said O.M. is extracted below: -

"The undersigned is directed to refer to the Department of Personnel & A.R. Office Memorandum No. 16/3/73-Estt. (SCT) dated 27.12.1977 in which it has been stated that the carried forward reserved vacancies should be available together with the current reserved vacancies for utilisation even where the total number of such reserved vacancies exceed 50% of the vacancies filled in that year provided that the overall representation of SC and ST in the total strength of the concerned grade

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or cadre is found to be inadequate i. e., the total number of Scheduled Caste / Scheduled Tribe candidates in that grade has not reached the prescribed percentages of reservation for SC / ST respectively in the grade, as a whole.

2. The validity of this Office Memorandum has been reconsidered in the light of the judgement delivered by the Supreme Court on 14-11-1980 in Writ Petition No. 1041-1044 of 1979 (Akhil Bharatiya Soshit Karmachari Sangh Vs. Union of India). In this case, all the three judges constituting the Division Bench have remarked that the total reservation on a particular occasion should not exceed 50% of the total vacancies. It has now been decided in modification to the instructions contained in the Office Memorandum dated 27-12-1977 that in future, fresh reservation along with carry forward reservation should not exceed 50% of the total vacancies available on a particular occasion.

3. It may happen that due to this 50% limit, it will not be possible to accommodate all the reservations which have accumulated due to the carry forward principle. Hence the surplus above 50% shall be carried forward to the subsequent years of recruitment, subject, however, to the condition that they do not become 'three recruitment years old' which is the maximum period for carrying forward the reservations from year to year and lapse. Hence, to save the lapsing of the reservations, it will be proper to accommodate the oldest carry forward reservations first.

For example, there are 5 carried forward reservations spreading over three preceding recruitment years in the following manner: -

| | SC | ST |
|-------------|----|----|
| Third Year | 1 | - |
| Second Year | 1 | 1 |
| First Year | - | 2 |

Suppose 6 vacancies occur in the succeeding year, 3 should be reserved, taking into consideration the 50% limit. As the oldest carried forward reservations have to be accommodated first, one SC of third year and one SC and one ST of second year are to be reserved out of the 6 vacancies available.

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The two ST reservations of first year will be carried forward to next recruitment year and they will be considered as in the second year of carry forward in the next recruitment year.

4. This order, however, will not affect this Department's Office Memorandum No.1/9/74-Estt.(SCT) dated 29-4-1975, which governs the procedure regarding filling up of single vacancy, occurring in a recruitment year. Ministry/Departments should make the necessary modifications in the dereservation proposals while sending them to the Department of Personnel & A.R. and to the Commissioner for SC/ST. It is further clarified that no dereservation will be necessary for further carrying forward of reservations which could not be accommodated in any recruitment year due to the 50% limit.

5. The above instructions take effect from the date of the issue of these orders except where selections to posts to be filled by direct recruitment or promotion have already been finalised prior to the issue of these orders.

6. Ministry of Finance etc. are requested to bring the above instructions to the notice of all attached and subordinate offices under them for compliance."

9. Shri Verghese, learned counsel for the applicant heavily relied on para 4 of the above O.M. in support of his contention that the carried forward reservation from the earlier years should not be added up-to the reservations in the subsequent year for determining the 50% limit of the total vacancies available in the year. He contended that since para 4 stipulated that the instructions contained in O.M. dated 9.2.1982, referred to above, "will not affect this Department's Office Memorandum No.1/9/74-Estt.(SCT) dated 29.4.1975, which governs the procedure regarding filling up of single vacancy, occurring in a recruitment year", the intention was that the carried forward reservation should independently be filled up by a reserved candidate without adding up the same to the reservations in the subsequent year.

10. We are unable to agree with this contention. Para 2 of the O.M. dated 9.2.1982 leaves no ambiguity or doubt

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whatsoever that fresh reservation along with carry forward reservation should not exceed 50% of the total vacancies available on a particular occasion.

11. In the above view of the matter, we hold that since in the year 1986 two vacancies, namely, carried forward reservation at Point 15 meant for S.C. candidate and reservation at Point 17 for S.T. candidate out of the three vacancies are for the reserved category candidates which exceeds 50% of the total number of vacancies, only one vacancy, namely, at point 15 which will naturally have precedence since it is a carried forward vacancy from an earlier year, has to be filled up by a S.C. candidate and point 17 has to be treated as dereserved to be filled up by a general category candidate and this reservation for S.T. will be carried forward to a vacancy arising in a subsequent year. Thus point 15 has to be filled up by a S.C. candidate whereas points 16 and 17 will go to general category candidates.

12. As regards the second point as to whether "failing which" clause can be resorted to for filling up a reserved vacancy by a S.C. candidate, even when general category candidates fulfilling the first criterion are available, we have to refer to the Recruitment Rules. The Schedule to the Directorate of Estates, Assistant Director of Estates (Accounts) Recruitment Rules, 1970, item No.11 under the heading "In case of recruitment by promotion/deputation/transfer, grades from which promotion/deputation/transfer to be made" it is prescribed as follows: -

"Promotion:

Superintendent (Accounts) with 5 years regular service in the grade failing which with 10 years combined regular service in the grades of Superintendent (Accounts) and Accountant."

The rule clearly provides that if Superintendents (Accounts) with 5 years regular service in the grade are not available,

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Superintendents with 10 years combined regular service in the grades of Superintendent (Accounts) and Accountant are eligible for promotion. Learned counsel for the respondents Shri P.P. Khurana contended that so long as in the zone of consideration eligible candidates either of the general or reserved categories are available, the "failing which" clause cannot be resorted to. In this connection, he referred to Article 335 of the Constitution which reads as follows: -

"335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.— The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

Shri Khurana argued that resorting to the "failing which" result in clause would/applying relaxed standards which would compromise with the efficiency of service and administration and, therefore, this should not be resorted to so long as candidates fulfilling the first criterion which envisaged a higher standard of eligibility were available. He also referred to O.M. of the Department of Personnel & A.R. No. 22011/3/76-Estt (D) dated 24-12-80 on the subject of "Principles for promotion to 'Selection' posts" and drew attention to the decision contained in para 3 of the said O.M., which is extracted below: -

".... In view of these considerations it has been decided in consultation with the UPSC as under in supersession of this Department's O.M. No. 1/4/55-RPS dated 16-5-57 and all other memoranda having any bearing on the matter herein dealt with.

(a) The Departmental Promotion Committee (DPC) shall for the purpose of determining the number of officers who should be considered from out of those eligible officers in the feeder grade(s) restrict the field of choice as under, with reference to the number of clear regular vacancies proposed to be filled in the year.

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| No. of vacancies (1) | No. of officers to be considered (2) |
|-------------------------|---|
| 1 | 5 |
| 2 | 8 |
| 3 | 10 |
| 4 or more | three times the number of vacancies. |

" (b) Where, however, the number of eligible officers in the feeder grade (s) is less than the number in Col. (2) above, all the officers so eligible should be considered.

" (c) Where adequate number of SC/ST candidates are not available within the normal field of choice as above, the field of choice may be extended to 5 times the number of vacancies and the SC/ST candidates (and not any other) coming within the extended field of choice, should also be considered against the vacancies reserved for them.

" Officers belonging to SC/ST selected for promotion against vacancies reserved for them from out of the extended field of choice under sub para (c) above, would, however, be placed en bloc below all the other officers selected from within the normal field of choice."

Learned counsel Shri Khurana argued that where adequate number of Scheduled Caste and Schedule Tribe candidates are not available, then only the field of choice has to be extended and only the SC / ST candidates and not general category candidates coming within the extended field of choice can be considered against the vacancies reserved for them. The O.M. does not provide for relaxation of standards of eligibility criteria.

13. Shri Khurana further referred to the provision in para 2.3 of Chapter 2 under the heading "PERCENTAGES OF RESERVATION FOR SCHEDULED CASTES AND SCHEDULED TRIBES" of Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services (Sixth Edition), published by the Government of India, Department of Personnel and

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Administrative Reforms, which reads as follows: -

"2.3 Appointments to reserved vacancies will be subject to the overall condition that candidates belonging to the Scheduled Castes / Scheduled Tribes possessing the prescribed qualifications and fit for the appointment to the post/posts in question are forth-coming in sufficient numbers for the vacancies reserved for them. In case Scheduled Caste / Scheduled Tribe candidates fit for appointment to the vacancies reserved for them are not available, such vacancies may be filled by general candidates by getting the reserved vacancies dereserved after following the procedure prescribed in Chapter 10 and the reservations should be carried forward to subsequent three recruitment years."

He also referred to para 4(2) of the Ministry of Home Affairs Resolution No. 42/21/49 NGS dated 13th September, 1950, which reads as follows: -

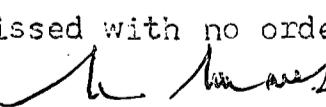
"(2) In all cases a minimum standard of qualifications will be prescribed and the reservations will be subject to the overall condition that candidates of the requisite communities possessing the prescribed qualifications and suitable in all respects for the appointment in question, are forthcoming in sufficient numbers for the vacancies reserved for them."

14. All the provisions referred to above and relied upon by the learned counsel for the respondents envisage that the reservation has to be subject to the overall condition that candidates of the reserved categories should possess the prescribed qualifications and are suitable in all respects for the appointment in question. However, these instructions cannot override the rules framed under the proviso to Article 309 of the Constitution. In the present case, the recruitment rule itself clearly provides that where candidates fulfilling the first eligibility criterion with 5 years experience as Superintendent (Accounts) are not available, Superintendents (Accounts) with 10 years combined regular service in the

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grades of Superintendent (Accounts) and Accountant are eligible for consideration. Thus, even within the prescribed zone of consideration or the extended zone of consideration for SC / ST, if candidates of the reserved categories who fulfil the eligibility criteria under the "failing which" clause are available, they have necessarily to be considered by the DPC for filling up the reserved vacancies. What the statutory rule framed under the proviso to Article 309 of the Constitution guarantees cannot be taken away by any policy guidelines or administrative instructions which also have no direct bearing on the point but are sought to be applied on the ground that relaxed standards would compromise with the efficiency of service or administration. The application of the "failing which" clause may not necessarily amount to compromising with the efficiency of service or administration. If that were so, the "failing which" clause should not at all have been incorporated in the rules. Obviously the intention of the rule-making authority was that candidates fulfilling the criteria under the "failing which" clause can fill the bill and discharge the functions of the post when candidates fulfilling the first criterion are not available. We accordingly hold that so long as candidates of the reserved category under the "failing which" clause are available in the zone of consideration, whether initial or extended, they have necessarily to be considered by the DPC for filling up the reserved vacancies.

15. In the context of the reliefs prayed for as enumerated in para 1 of this judgement and our findings in the preceding paragraphs, the present petition fails and is accordingly dismissed with no order as to costs.


(KAUSHAL KUMAR)
MEMBER(A)
8-7-1988.


(J.D. JAIN)
VICE-CHAIRMAN.
8-7-1988.