

RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD.

Dated: This the 8/5 day of March 2005.

Original Application No. 193 of 2003.

Hon'ble Mr. K.B.S. Rajan, Member (J)
Hon'ble Mr. A.K. Singh, Member (A)

Manoj Kumar Gupta, S/o Late Shri Harish Chandra Gupta,
R/o 233, Krishna Nagar, Kydganj,
ALLAHABAD

.....Applicant

By Adv: Sri R Verma

VERSUS

1. Union of India through Secretary,
Ministry of Personnel & Training,
(Public Grievances and Pension),
Department of Personnel and Training,
NEW DELHI.
2. The Hon'ble Chairman through the Registrar,
Central Administrative Tribunal,
Principal Bench, Copernicus Marg,
NEW DELHI.
3. The Hon'ble Vice-Chairman through Registrar,
Central Administrative Tribunal, Allahabad Bench,
ALLAHABAD.
4. The Registrar, Central Administrative Tribunal,
Allahabad Bench,
ALLAHABAD.

.....Respondents.

By Adv: Sri A. Sthalekar

ORDER

By K.B.S. Rajan, Member (J)

The substantial question involved in this case is as to whether the applicant to the OA has crystallized any rights for regularization of his promotion from February, 1996 as LDC

b2

and if not, what is the extent of right that has accrued to him on account of such ad hoc promotion.

2. The brief facts: - Having been appointed on temporary basis as a Group D employee in 1986, the applicant was positioned on a regular capacity in that grade in 1991. In September, 1995, the applicant was promoted on ad hoc basis to the post of LDC, a Group C post. However, this promotion on ad hoc basis had a short life, as the applicant, on the basis of the recommendations of the S.I.U. was reverted along with another ad hoc LDC to his original Group D post in February, 1996 and on the same day, he was promoted on regular basis as Jamadar. In 1995 by way of promotion of one LDC as UDC, a vacancy in the grade of LDC occurred which could not be treated as regular as long as the promoted individual was made a regular UDC and on the regularization of the promotee as UDC on regular basis in February, 1996, the character of the said vacancy of LDC became regular. By that time, the applicant was only second in the seniority list of Group D employees and from 1998, it was the applicant who was the senior most in Group D. That the applicant was senior to certain other employee had been affirmed in the order dated 08-11-2001 in OA No. 731/1996 in which the applicant was arrayed as a private respondent. In fact, the applicant to the said OA No. 731/96 who along with the applicant and another was promoted on ad hoc basis as LDC but was sought to be reverted as Group D, challenged the reversion and a status quo order was passed by the Tribunal in 1996, which lasted till the

final order as aforesaid came to be passed in November, 2001.

On 29-11-2001 the applicant was appointed as LDC on regular basis with retrospective effect from 30th August, 2001 and was adjusted against a vacancy at Ahmedabad, but retained in Allahabad. The applicant had preferred a detailed representation dated 24-1-2002, requesting the authorities to effect his regular appointment as LDC w.e.f. 14-02-1996, the date regular vacancy in the post of LDC arose by which date he was already working on ad hoc basis as LDC. This request was renewed in April, 2002 also. Absence of any response has resulted in the applicant's moving this OA with the following relief(s): -

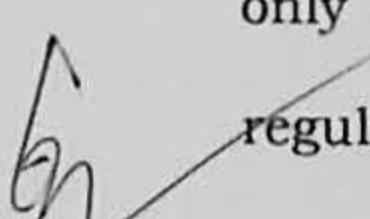
- i. *To issue a writ, order or direction in the nature of Mandamus directing the respondent No. 2 to regularise the services of the petitioner as Lower Division Clerk in the pay scale of Rs. 3050-75-3590-80-4590 with effect from 14.2.1996 with the period as may be stipulated by this Tribunal.*
- ii. *To issue a writ, order or direction in the nature of Mandamus directing the respondent No. 2 to release annual increments of Rs. 75/- in the above pay scale to the petitioner which became due after the year 1995 till November, 2002 and to refix pay of the petitioner accordingly at the appropriate stage with effect from December, 2002 taking into account of the aforesaid annual increments and to pay arrears thereof within a period as may be stipulated by this Tribunal.*
- iii.
- iv."

3. The following are the grounds raised in the OA in support of the case of the applicant:

6/

- (a) That there was a clear vacancy from 14-02-1996 when one of the LDCs was promoted on regular basis as UDC on that date.
- (b) That his promotion as LDC could not be made due to the pendency of OA No. 731/96, whereby status quo order was passed but the said OA having been dismissed with the affirmation that the applicant in this OA was senior to the applicant in that OA.
- (c) While there were as many as 18 sanctioned posts at Allahabad, against one of which the applicant was promoted on ad hoc basis, positioning the applicant against a vacancy at Ahmedabad is misleading and is purely to deny the applicant his right to be adjusted against the vacancy available at Allahabad.
- (d) Applicant is entitled to annual increment in the grade of LDC taking into account his services as Ad hoc LDC.

4. Respondents have contested the OA. According to them, the applicant's appointment as regular LDC cannot, even a day be, prior to his qualifying in the typing test, which is one of the pre-requisite for promotion or appointment to the post of LDC on regular basis and since he had qualified in the typing test only in 2001, he was accordingly granted appointment on regular basis as LDC from 30-08-2001. And the contention of



the applicant that his promotion was made in 2001 only on account of the currency of status quo order in OA 731/96 is incorrect as the Judicial Decision of the Tribunal in the above case and the Administrative Decision of the Principal Bench in appointing the applicant as regular LDC happened to be a sheer matter of coincidence, but are independent of each other.

5. The applicant, in his rejoinder, has emphatically stated that the contention of the respondents that for a person to be appointed on regular basis as LDC qualification in typing is essential could be easily demolished by a mere reference to the orders passed by the Tribunal whereby, an LDC who was appointed on regular basis as LDC vide order dated 14-08-1996 (Annexure RA-I) did not qualify in the typing test even in 2000, vide order dated 07-02-2000. The applicant had also raised the discrimination meted to him in respect of annual increment, which was paid to one but not to him by way of a supplementary affidavit.

6. The respondents have, in their supplementary counter affidavit in response to the supplementary affidavit have stated that the applicant is not, as per the provisions of FR, entitled to arrears of increment till such time he qualified in the typing test and in fact the in the case of the other LDC who was granted arrears of increment, as the payment of arrears was erroneous, the same had been recovered from him. However, no rebuttal has been made to the rejoinder of the applicant in which the applicant had annexed the orders relating to the regular



appointment of an LDC in 1996 whereas she did not qualify in typing test even in 2000.

7. Arguments were heard and documents produced. Despite opportunity given to the respondents to produce orders, if any, to the effect that for regular promotion as LDC, qualifying in the typing test is a sine qua non, the same has not been made available.

8. We have given our anxious consideration. Regularisation of service in any grade is based on the availability of vacancy and the individual eligible to hold the post. In so far as availability of vacancy is concerned, though initially the applicant was adjusted against the vacancy at Ahmedabad, in fact, subsequent to the dismissal of the OA 731/1996 the status quo order being terminated, vacancy at Allahabad is deemed to be continuing. In fact, the applicant has never been moved from Allahabad, ever since he had been promoted as LDC (either Ad hoc or regular). For, the vacancy made available by virtue of another LDC having been regularly promoted as UDC w.e.f. 14-02-1996 did exist but the same was occupied by the applicant in OA No. 731/1996 and he was continuing by a status quo order. Once the said OA was dismissed, it would amount to the fact that but for the interim status quo order, the applicant in the said OA would not be entitled to continue in that post, in which event, the same shall go to the eligible group D employee and the applicant being the senior most, the vacancy should have gone to him only. It is presumed that the

b

vacancy should go only to the 5% quota meant for promotion from Group D, since, against the same the applicant in OA 731/1996 was promoted. Thus, vacancy position is clear.

9. Now whether passing in the typing test is a sine qua non for regular appointment as LDC is the next question to be answered. One example has been given by the Applicant in his rejoinder, with documentary evidence, which remains unrebutted. It is to be seen as to whether, any hostile discrimination has been meted to the applicant when a similarly situated employee has been given a benefit, which has been denied to the applicant, for, as held by the Apex Court in the case of *Mahendra L. Jain v. Indore Development Authority*, (2005) 1 SCC 639, "**To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination.**" Be it the case of direct recruitment as or promotion to the post of LDC, if a relaxation is granted in respect of one person from qualifying in typing and regularization precedes the passing of the typing test, there is no justification to deny the same to similarly placed individual on the basis of source of recruitment. The decision by a Constitution Bench of the Apex Court in the case of *State of J&K v. Triloki Nath Khosa*, (1974) 1 SCC 19, referring to the judgment in the case of *Roshan Lal Tandon* [1968 (1) SCR 185] is as under:

"The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C', (emphasis supplied). By this was meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn."

10. In the case of an LDC, drawn from the feeder grade or by direct recruit, both of them are to perform the same functions and if for regularization, qualifying in the typing is a pre-requisite for a promotee LDC, the same cannot be otherwise for a direct recruit. Put differently, if exemption is available to a direct recruit in respect of passing in typing test before regularization, the same cannot be denied to a promotee LDC. After all, for a distinction to be made, as held by the Apex Court in the case of ***Basheer v. State of Kerala,(2004) 3 SCC 609,*** ***the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation.*** In the absence of any good ground in discriminating, if discrimination is made, the same amounts to hostile discrimination and hostile discrimination is anathema to equality clause. In the case of ***Gujarat Ambuja Cements Ltd. v. Union of India,(2005) 4 SCC 214,*** the Apex Court has held, ***"If there is equality and uniformity within each group, the law would not be discriminatory.*** Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes." (emphasis added)". In other words, even

in matters of taxation, where classification is admissible, hostile discrimination is not permitted.

11. The above decisions of the Apex Court if telescoped upon the facts of the case of the applicant, would fully support his case as for no good ground, he has been meted with hostile discrimination and the same has affected his fundamental right to equality as enshrined in Art. 14 read with Art. 16(1) of the Constitution.

12. The Apex Court through a Constitution Bench in the case of *Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 laid down the law relating to regularization of ad hoc services. The same is as under:-

“47. To sum up, we hold that:

(A) *Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.*

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) *If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.”*

13. Again, the law on the subject has been reiterated in another Constitution Bench in the case of *Rudra Kumar Sain v. Union of India*, (2000) 8 SCC 25 has held as under:-

20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly



long period, how long an appointment cannot be held to be 'stopgap or formality of purely ad hoc'.

14. The competent authority, by the order dated 29-11-2001 ratified the recommendations of the DPC which means that the appointment of the applicant as ad hoc LDC was in order right from the beginning and the applicant was entitled to regularization. The question is as to when from. Is it from the date the vacancy arose or from the date he was appointed, though on ad hoc basis but continuously, or from the date he has qualified in the typing test. Availability of vacancy is a must and this has been discussed in one of the paragraphs and the finding as to the tenacy position is clear. That the applicant has been working continuously as LDC from 21-06-1996 is also the admitted fact. As per the counter filed on behalf of the respondents, in so far as typing test is concerned, the precedent clearly shows that such a requirement is not a sine qua non. The respondents have not stated anywhere that the regular examination LDC referred to by the applicant, vide order dated 11-07-1996 read with order dated 07-02-2000 (Annexure 1-A under) was made by mistake. That was a conscious action and as such, the applicant can safely rely upon the same for parity.

15. The claimant has thus, certainly made out a cast iron case in favour for regularization in the grade of LDC from the date he has been continuously working as LDC, even without going in for typing test, on the ground that another LDC was started in the grade of LDC prior to her passing in

the Typing Test or from the date when regular vacancy in the post of LDC occurred. The vacancy position, as discussed in para 8 above is clear and that the applicant cannot be singled out in regard to regularization on the ground of non clearance of the Typing Test, when certain others (at least one cited by the applicant) would have been regularized prior to clearing the Typing test.

16. In their supplementary counter, in para 5 thereof, the respondents have stated that the applicant has been 'continuously working as L.D.C. since 21.06.1996'. As such, notwithstanding the fact that vacancy in the post of LDC was available w.e.f. 14-02-1996 by virtue of one LDC having been regularly promoted as UDC from that date, in so far as the applicant is concerned, his continuous working as LDC being from 21.06.1996, he cannot claim regularization from a date prior to it.

17. At the same time it has to be kept in mind that for the post of LDC the seniority is maintained at All India level and the Principal Bench of the Tribunal is controlling matters relating to maintenance of seniority list of LDC. It is not exactly known as to in how many cases (similar to the example cited by the applicant) the respondents have granted regularization prior to qualifying in the Typing Test or in how many cases especially of promotees, regularization was denied on the ground of non-clearance in the typing test. This calls for a thorough exercise by the Principal Bench so that it may be ensured that



uniformity is maintained throughout and no discrimination is made save on substantial ground.

18. In so far as increment is concerned, the applicant has already enjoyed the same as admitted by him vide supplementary affidavit dated 20-07-2003. And the respondents are right in the applicant's not being granted the arrears in accordance with the relevant provisions of the F.R. The one erroneously granted to another LDC was also recovered. Hence, in so far as the relief sought for grant of increment is concerned, the grievance no longer subsists.

19. In view of the above, the OA succeeds in respect of the claim of the applicant for regularization from the date of his continuous ad hoc service. It is declared that the applicant is entitled to regularization as LDC from 21-06-1996, and his seniority has to be accordingly fixed. Needless to mention that the applicant is entitled to consequential benefits i.e. seniority for purpose of further promotion. The respondents may also conduct an exercise of verifying from records cases of identical nature so that those cases may also be dealt with by them accordingly, in order to avoid multiplicity of litigation. It is appropriate to cite the judgment of the Apex Court in the case of ***Amrit Lal Berry v. CCE, (1975) 4 SCC 714*** wherein the **Apex Court has held, "We may, however, observe that when a citizen aggrieved by the action of a government department has approached the Court and obtained a**

G

declaration of law in his favour, others, in like circumstances, should be able to rely on the sense of responsibility of the department concerned and to expect that they will be given the benefit of this declaration without the need to take their grievances to court"

20. Time calendared for passing necessary orders amending the order dated 29-11-2001(Annexure XVII) is six months from the date of communication of the order.

No cost.



Ar. Singh
Member (A) J. D. Singh
Member (J)

/pc/