

CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK.

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ORIGINAL APPLICATION NO: 242 OF 1989

Date of decision: 23rd April, 1991

Shri Prashanta Kumar Panda

: Applicant

-Versus-

Union of India and others

: Respondents

For the Applicant

: M/s. S.K. Patnaik, P. Pradhan,  
Advocates.

For the Respondents 1 to 4 : Mr. P. N. Mohapatra, Standing  
Counsel (Central).

For the Respondent No. 5 : Mr. Antaryami Rath, Advocate.

C O R A M:

THE HONOURABLE MR. B.R. PATEL, VICE-CHAIRMAN

A N D

THE HON'BLE MR. N. SENGUPTA, MEMBER (JUDICIAL)

1. Whether reporters of local papers may be permitted to see the judgment? Yes.

2. To be referred to the reporters or not? *Yes*.

3. Whether Their Lordships wish to see the fair copy of the judgment? Yes.

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JUDGMENT

B.R.PATEL, VICE CHAIRMAN: The reliefs sought by the applicant in this case are to promote him:

- (i) As Lower Division Clerk(L.D.C.) with effect from 9-10-1985 on regular basis with all consequential benefits;
- (ii) To declare him senior to Respondent No.5 and Respondent No.6 and to amend the seniority list accordingly;
- (iii) To allow him to sit for the Departmental examination for Upper Division Clerks(UDCs) to be held in June, 1989 and to ~~be~~ quash the eligibility condition of two years regular service in the grade of Lower Division Clerks;
- (iv) To promote him to the rank of UDC if Respondent No.5 has been promoted.

2. Briefly stated the facts are that both the applicant and Respondent No.5 were appointed as 'Sepoy' on 11.1.1978. But Respondent No.5 was placed below the applicant. Both the applicant and Respondent 5 alongwith four others were appointed as Lower Division Clerks on adhoc basis vide order dated 30th January, 82

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(Annexure-2). According to the Central Excise and Land Customs Department Group 'C', Recruitment Rules, 1979 ; 10% of the vacancies in the grade of Lower Division Clerk to be filled up by Direct recruitment, will be reserved for being filled up by Group 'D' employees (borne on regular establishment) subject to the following conditions namely:-

- (a) Selection would be made through a departmental examination confined to such Group 'D' employees who fulfil the requirement of the minimum educational qualification, namely, Matriculation or equivalent;
- (b) The maximum age for this examination would be 45 years (50 years for SCs or ST candidates);
- (c) at least five years service in Group 'D' would be essential;
- (d) the maximum number of recruits by this method would be limited to 10% of the vacancies in the cadre of L.D.Cs occurring in the year, unfiled vacancies would not be carried over.

The Central Board of Excise and Customs decided vide their letter dated 9th December, 1982 that

- (a) the departmental examination provided in

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the recruitment Rules for the post of L.D.C. shall here-after be a qualifying one; and

(b) out of the 10% quota, 5% of vacancies in a calender year shall be filled on the basis of seniority subject to rejection of unfit and the remaining 5% on the basis of a qualifying examination with typing test to be held departmentally;

the letter further says that necessary amendment to the Central Excise and Land Customs, Group 'C' posts Recruitment Rules is being issued separately. The applicant has claimed that having had all the prescribed educational qualification of Matriculation he appeared in the departmental examination conducted in the year, 1984, and he came out successfully in the examination. He also passed the typing test. He has been rightly shown senior to Respondent No.5 in the seniority list of Sepoy as on 30.6.1984. Respondent No.6 alongwith one Shri L.Gouda joined the Bhubaneswar Collectorate on transfer from Calcutta Collectorate in May, 1983. They were promoted as L.D.Cs on adhoc basis with effect

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23.12.1983. Respondent No.6 was regularised as L.D.C. vide order dated 11-5-1988 (Annexure-5) and was given notional seniority in the grade of L.D.C. as per his seniority position in the Grade of 'Sepoy' as on 1.1.1984 over others appointed on 26-4-1984 and 9-10-1985 as L.D.Cs. This was done on the strength of the letter of the Central Board of Excise and Customs dated 9-12-1982 referred to above and dated 30-7-1987.

Respondent No.5 alongwith Shri L.Gouda was appointed as L.D.C. on regular basis against the 10% quota reserved for Gr'D' departmental staff vide order dated 8-10-1985 (Annexure-3/A). The grievance of the applicant is that he still continues to be as LDC on Adhoc basis, as his representations to Respondent No.4 and to the Board of Central Excise and Customs bore no fruit except that his case would be considered, he has approached the Central Administrative Tribunal hereinafter called the Tribunal for the aforesaid reliefs.

3. The Respondents No. 1 to 4 have maintained in their written reply that the applicant could not be appointed as LDC on regular basis against the 10% quota

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because of his poor performance in the examination (paragraph-B of the counter affidavit). In the aforesaid paragraph they have further stated as follows:

"It may be mentioned here that it was stipulated in the letter dated 9-12-82 vide Annexure-R/2 that basing on the Government's decision an amendment to the Recruitment Rules, 1979 was being issued, but no such amendment has yet been issued by the Government. In the circumstances recruitment was made on merit basing on the result of the examination as laid down in the Recruitment Rules, 1979, vide Annexure-R/1!"

In paragraph-2(c) it has further been mentioned that

"Respondent No.5 was appointed as L.D.Clerk against 10% quota in preference to some of his seniors in Gr'D' cadre like Shri K.N.Gouda, Respondent No.6 and the applicant on merit basis as per the result of the examination". This statement appears to have been contradicted in paragraph -6 of the counter where it has been mentioned that "There has not been any violation of the Board's instructions dated 9-12-1982 filed as Annexure-R/1(it should be R/2)". In this very paragraph it has further been mentioned that except the Petitioner, all others were appointe as L.DClerk

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against 10% quota vacancy on merit, basing on result of the Departmental Examination as per Recruitment Rules, 1979, without taking into account the Board's letter dated 9.12.1982 . . . . . The confusion on the stand of the Respondent is further confounded by paragraph-7 which mentions as follows:-

"It may be here that the case of Shri K.N.Gouda was considered and he was assigned the right position in the light of the Board's circular dated 9-12-1982 and 30-7-1986 since he was much senior in the grade of Sepoy. The representation of the applicant was not considered as he was much junior to Shri Gouda and did not come into the purview of the consideration zone. Further considering the seniority position of Shri K.N.Gouda in the grade of Sepoy and the merit list drawn basing on the result of the examination, the case of the Respondent No.5 and Shri Shri Gouda have been considered. As such question of making room for the applicant does not arise. The position of the applicant as per the list was 6 while Shri K.N.Gouda's was-5".

4. The portions of the written reply quoted above makes it abundantly clear that the Respondents do not have a consistent stand in regard to the validity of the circular of the Central Board of Customs dated

9-12-1982 vis-a-vis the Central Excise and Land  
Customs Department Group 'C' Recruitment Rules, 1979.

It is pertinent to mention here that as yet this  
Recruitment Rules have not yet been amended though  
the assurance to amend was given as long back as  
9th December, 1982. This Bench had the occasion to  
examine the validity of this Circular of the Central  
Board of Excise and Customs vis-a-vis the Recruitment  
Rules in Original Applications 250 and 251 of 1989.

In O.A. 250 of 1989 Respondent No.5 was the applicant.

The judgment was delivered in these cases on 1.3.1990.

In paragraph-5 of the aforesaid judgment, this Bench  
held as follows:

".... .... There is no dispute that the  
rules for recruitment to Gr' C' of the  
year 1979 were framed by the President  
in exercise of his power under the  
proviso to Article 309 of the Constitution.  
The letter dated 9.12.1982 was issued  
from Central Board of Excise and Customs;  
therefore, there can be no doubt that the  
said letter conveyed executive instructions.  
Provisions of Rules framed under Art.309  
cannot be modified by executive order

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22

(see AIR 1981 SC 1990-State of Maharashtra v. Chandrakant). The administration being alive to this position in para 2 of the letter dated 9.12.1982 stated;

"Necessary amendment to the Central Excise and Land Customs Group 'C' Posts Recruitment Rules is being issued separately".

From the counter it would be found that the proposed amendment has not yet been made. Therefore, the respondents relying on the instructions contained in the letter dated 9.12.1982 could not say that the appointment of the applicants, which were admittedly made in accordance with the Rules of 1979, was invalid. In this connection it would be pertinent to refer to a decision of the Delhi High Court reported in 1970 S.L.R. 8 (K.K.Viz. Vs. The Government of Himachal Pradesh) where a similar question arose. That case also related to promotion of a certain percentage from the subordinate service under a Regulation governing the conditions of service. Subsequently instructions banning appointments and promotions were issued. The appointments of the applicants before the High Court appointed in a regular manner were sought to be invalidated. The High Court observed:

"The appointments which were made in exercise of statutory powers conforming to the mode provided by the statute, could not be rendered invalid by reason of an executive instructions".

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24

It is also now the settled position that executive instructions can only supplement and not supplant any portion of the statutory rules. On reading the letter dated 9-12-1982 there can be no doubt that it purported to modify that part of the 1979 Rules which dealt with promotion of Group 'D' staff to Group 'C' and substitute another rule. This, in our opinion, was not competent".

There is no reason for us to hold a different view so far as this issue is concerned. We would like to reiterate here that the Recruitment Rules would prevail over the Board's Circular dated 9-12-1982 which are only executive instructions. The Recruitment Rules has categorically stated that the selection would be made through a departmental examination confined to the such Group 'D' employees who have the prescribed qualifications. As the applicant disputed the stand of the Respondents in regard to the merit list of the examination held in January, 1984, we asked Mr. Mohapatra the learned Counsel for the Respondents to produce the result of the examination which Shri Mohapatra very kindly produced before us. From the result tabulated we noticed that as many as eight persons took this examination and there

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were three papers. According to the merit list one Shri P.Moharana occupies the first place having secured 256 marks followed by one Shri B.B.Patnaik who had 242 marks to his credit the third place goes to Shri R.N.Patnaik who secured 231 marks. Shri L.Gouda occupies fourth place with 220 marks, Bholanath Majhi Respondent No.5 occupies fifth place with 217 marks, the applicant occupies 6th place with 200 marks, one Shri Ganeswar Singh occupies 7th position with 199 marks and Keshabanand Gouda (Respondent No.6) occupies 8th place with 194 marks. We have therefore, no doubt that by virtue of the Recruitment Rules, Respondent No.5 would be senior to the applicant having secured more marks than the applicant. But the Respondent No.6 has secured less mark than the applicant as such he should be placed below the applicant in the seniority list.

5. We would therefore, direct that the inter se seniority amongst the applicant and Respondents No. 5 and 6 and others concerned should be recast according to the result of the examination held in 1984. This should be finalised within two months from the date of receipt of a copy of the judgment

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and to give all concerned consequential benefits according to their revised seniority.

6. The case is accordingly disposed of. No costs.

7. In this case we have heard Mr. S.K.Patnaik, the learned Counsel for the applicant and Mr. P.N.Mohapatra the learned Additional Standing Counsel (Central) for the Respondent Nos. 1 to 4 and Mr. Antaryami Rath the learned Counsel for the Respondent No. 5.

McLaughlin  
.....  
MEMBER (JUDICIAL)



..... *Franklin* 23.4.91  
VICE CHAIRMAN

Central Administrative Tribunal,  
Cuttack Bench:K.Mohanty.