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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH

ORIGINAL APPLICATION NO.27/2005

DATED THIS THE 8th DAY OF NOVEMBER, 2007

CORAM: HON'BLE SHRI N.D. RAGHAVAN, VICE CHAIRMAN
HON'BLE SMT. K.N.K. KARTHIAYANI, MEMBER (A)

Shri Ramesh Chandra Mishra
Son of late Udayanath Misha of Vill/
PoRaichakradharapur Ps-Satyabadi
Dist.Puri at present working as Sepoy
Central Excise & Customs
Sambalpur-I Division, Sambalpur.

... Applicant

(By Advocate Shri Achintya Das -Amicus Curie)

vs.

1. Union of India through Secretary
to Govt. of India, Ministry of
Finance, Department of Revenue
New Delhi .

2. Commissioner
Central Excise & Customs
Orissa, Bhubaneshwar.

... Respondents

(By Shri U.B. Mohapatra, SCGSC)

ORDER
HON'BLE SMT. K.N.K. KARTHIAYANI, MEMBER (A)

The applicant is a Sepoy in the Department of Central Excise and Customs. He submits that he qualified for the post of LDC in a Departmental Qualifying Examination held on 20.12.1995 in accordance with the provisions contained in "Central Excise and Land Customs Department Group 'C' posts

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Recruitment Rules, 1979" (Rules, for short), (A copy of the Rules is annexed as Annexure-A2 to the O.A) as amended by Gazette Notification dated 19.10.1991.

As per these Rules the vacancies are to be filled up in the following manner:

"By direct recruitment:

- (i) 90% by direct recruitment through the Staff Selection Commission.
- (ii) 5% from amongst the Group 'D' staff and Record Keepers who possess Matriculation or equivalent qualification and rendered 5 years (regular service in Group 'D' or in Group 'D' and Record Keeper taken together, as the case may be on the basis of a departmental qualifying examination with typing test:

The maximum age limit for eligibility for examination is 45 years

Note (a) Unfilled vacancies pertaining to a particular year shall not be carried over;

(b) If more of such employees than the number of vacancies available under clause (ii) qualify at the said examination such excess number of employee shall be considered for filling the vacancies arising in the subsequent years so that the employees qualifying at an earlier examination are considered before those who qualify at a latter examination"

Seven of the applicant's seniors who qualified along with the applicant in the year 1995 were promoted as LDCs. In March, 2002, the applicant learnt that another promotional test for the post of LDC was being conducted for which he was not allowed to appear on the ground that he had crossed the age of 45 years. The applicant submitted a representation on 28.3.2002 requesting to be promoted to LDC grade, which was forwarded to the Commissioner on 1.4.2000 (Annexure-A6). While his representation was pending with the respondents, the

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respondent department issued a Circular dated 16.12.2002 (Annexure-A7) announcing a departmental examination for the promotion to the post of LDCs to be held on 19.12.2002. The applicant's name did not figure in the list of candidates who were allowed to appear for the said test. The applicant contends that as he had already qualified in the examination of 1995, he did not have to appear for the examination held on 19.12.2002. After the said examination, only those who qualified in the said examination were considered, for promotion to LDC ignoring the applicant. To a query made by the applicant he was informed that he was not being promoted as he had crossed the age of 45 years. Meanwhile, the applicant was granted financial upgradation under ACP Scheme vide order dated 18.9.2003 (Annexure-A8). As the applicant's representation at Annexure-A6 has not been disposed of by the respondents, he made a further representation on 24.8.2004 (Annexure-A9). The said representation is also pending with the respondents. Hence, the applicant has filed this O.A seeking the following reliefs:-

- (i) To declare that the age bar prescribed in the Rules is for eligibility to appear at the qualifying examination for promotion and no such age bar prescribed for giving promotion;
- (ii) To direct the respondents to promote the applicant as Lower Division Clerk against the subsequent year vacancies, after 1995 since the applicant had qualified at the departmental examination held on 20.12.95.

- (iii) To direct the respondents to promote the applicant from or earlier to the date of promotion of Group -D employee as L.D Clerk who qualified later;
- (iv) To direct the respondents to allow all consequential service and pecuniary benefits;
- (v) To grant such other reliefs including directing the respondent no.2 to dispose of the applicant's representation forthwith;
- (vi) To allow the application with cost.

2. The applicant has also filed an M.A for condonation of delay in filing of the O.A. The applicant admits that there is a delay of one year and 20 days in filing the O.A and has prayed that it may be condoned for the reason that when he approached the departmental authorities vide his representation dated 28.3.2002 he was assured that his case would be considered. As there was no positive response, he further represented on 24.8.2004 instead of approaching the Tribunal as he feared that he would be put to some difficulties by the authorities if he had approached the Tribunal.

In the O.A, the applicant's contention is that the maximum age limit prescribed, i.e., 45 years is only for the eligibility to appear for the examination and it does not apply for consideration for promotion. Once a person qualifies in the departmental examination, he has a right to be considered for promotion in

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preference to those who have qualified in the examination in subsequent years.

3. The applicant has also filed "Notes of Submission" with two Annexures. Annexure-A to the 'Notes' is a copy of the Fax message from the applicant to CAT, Cuttack Bench with copy to his counsel informing that seven candidates from Group 'D' cadre were promoted to LDC after conducting the qualifying examination in 1995. Annexure-B is a copy of the judgement of the Chandigarh Bench of the CAT in O.A. 333/PB/87 decided on 3.4.1991, Rajinder Singh vs. Union of India and Others, 1991(2) ATJ 321.,

4. In the reply statement, the respondents have stated that the Recruitment Rules for appointment to the post of LDC were amended with effect from 21.9.2002; a copy of the said Rules is produced as Annexure-R2. On introduction of new Recruitment Rules, the old Rules were no longer applicable and the list of qualified persons as per old rules has been replaced by the persons who passed under the new rules. If at all the applicant had a grievance for non-inclusion of his name in the list of qualified candidates published in 2002, he should have challenged the said eligibility list of 2002 immediately thereafter. The applicant has slept over the matter for 3 years and the persons qualified in the test of 2002 have already been promoted. The case of the applicant is therefore, barred by limitation. The respondents further admit that the applicant's name figures in the "1995 pass list". Seven of his seniors from the said list were selected for promotion in the grade of LDC as per the existing


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vacancies. From 1996-2002, no vacancy in the grade of LDC had arisen. On the implementation of cadre restructuring in the department, seven additional posts were sanctioned. However, those who qualified in the departmental examination for promotion from Grade 'D' to LDC under the Recruitment Rules of 1991 were not considered for appointment against these posts 'as per Rules'. It is further submitted that an examination was conducted for promotion of Group-D officials to LDC in March 2002 but the applicant was not eligible to appear for the said examination as he had crossed the age limit of 45 years. Further, new Recruitment Rules for LDC came into force with effect from 21.9.2002. After the new Recruitment Rules came into effect the passing of earlier examination held during the year 1995 as per Recruitment Rule of 1991 was null and void and hence his representations were not considered. The applicant was granted financial upgradation under ACP scheme to the pay scale of Havildar which is a Group-D post. It is further stated that the representation of the applicant dated 24.8.2004 was addressed to the Commissioner of Central Excise, Bhubaneswar – II whereas the cadre controlling authority for promotion to the post of LDC is Commissioner of Central Excise, Bhubaneswar-I. His representation is not traceable in both the Commissionerates, Notwithstanding this, the applicant is not entitled for promotion as he is overaged. It is further submitted by the respondents that "the applicant was qualified in 1995 examination pertaining to the vacancy arose during the said year not to be carried forward to the recruitment in later years (i.e year 2002), since the vacancies filled against 50% quota during the said year as



per new Recruitment Rule came into force with effect from 21.9.2002. Hence, those applicants who were declared qualified during 1995 and not appointed in that year, their candidature (ie. Passing departmental examination) automatically cancelled and can't be considered for the vacancy arose in the subsequent years (i.e. In 2002) after introduction of new Recruitment Rules". The applicant had qualified in the examination of 1995 against 10% quota of the sanctioned strength of LDC (43 in nos.) under the Recruitment Rules of 1991. it is admitted that some of the seniors to the applicant who qualified in the 1995 examination were promoted to the post of LDC. The examination of December 2002 was held afresh against 50% quota vacancies and the promotion was made after the implementation of the order of restructuring. As per the new Recruitment Rules of 2002, the applicant was not allowed to write the said examination as he had crossed the age of 45 years. In view of the facts submitted in the counter, the O.A is liable to be dismissed.

5. The applicant has filed a rejoinder. It is stated that the "respondents have misconceived and misconstrued the relevant provisions of the Central Excise & Land Custom Department Group C Recruitment Rules, 1979 (hereinafter referred as 'the 1979 Recruitment Rules') as amended in 1991, as well as the relevant provisions of the Central Excise and Customs Department Lower Division Clerk Recruitment Rules, 2002 (for short 'the 2002 Recruitment Rules') with regard to filling up of the vacancies in the cadre of Lower Division Clerks from among the Sepoys/Havildars, etc., who passed the departmental qualifying



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examination. The stand taken by the respondents to justify their action in not promoting the applicant, who had passed the departmental qualifying examination in 1995 on the ground that the list of qualified persons as per old rules has been replaced by the persons passed under the new Rules is not tenable in as much as the applicant having once passed the departmental qualifying examination and having been included in the list of qualified incumbents, had an indefeasible right to be considered for promotion to the grade of LDC, when vacancies arose in the said grade in the year 2002 and the qualification so acquired by him in passing the departmental qualifying examination in 1995 cannot be said to have been obliterated/wiped out by operation of the 2002 Recruitment Rules."

6. The averments of raising the point of limitation made by the respondents is a clever ruse. When the respondents called the juniors of the applicant to the interview scheduled on 19.12.2002 for filling up the vacancies in the grade of LDC, he had made a representation to the respondent-authorities on 16.12.2002 (Annexure-A7 to the O.A). When the said juniors who qualified in the 2002 examination were promoted by a wrong decision taken by the respondents, the applicant had made a representation dated 24.8.2004 before the respondent authorities. The O.A has been filed in 2005 and hence it is not correct to say that the O.A is barred by limitation. The applicant submits that "the 2002 Recruitment Rules did/do not debar the incumbents who had passed the departmental qualifying examination under the 1979 Recruitment Rules (as


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amended in 1991) from being promoted to the grade of LDC in the event of vacancies arising after the 2002 Recruitment Rules came into force in as much as the latter rules do not obliterate/wipe out the qualification so acquired by the applicant and other similarly placed candidates". The condition of age limit of 45 years wholly misapply to the case of the applicant who had already passed the departmental qualifying examination for promotion to the grade of LDC as he was already in the list of qualified persons during the year 1995. There was no need for the applicant to appear again for the departmental qualifying examination after the promulgation of 2002 Rules as there is no provision in the said Recruitment Rules of 2002 that those who had passed in the earlier examination have to again appear and pass the examination for promotion against vacancies that have arisen due to cadre restructuring etc. The applicant cannot be said to have lost his qualification of passing the departmental qualifying examination held in 1995 by operation of the 2002 Recruitment Rules. Further, the contention of the respondents that as per the old Recruitment Rules only 10% of the quota of sanctioned strength of LDC were to be filled up from candidates who qualify in the departmental examination whereas under the 2002 Recruitment Rules 50% of the vacancies are to be filled from among Sepoy/Havildars etc., who pass the departmental qualifying examination held in accordance with 2002 Recruitment Rules is not sustainable because the decrease or increase in the grade of LDC cannot be said to be factor which stands in the way of officials who have already qualified in the earlier departmental examination for getting promoted to the grade of LDC. In view of



the admitted fact that the applicant had passed the departmental examination in 1995, he had a right to be promoted against subsequent vacancies. It is not the fact that 2002 Recruitment Rules have changed the procedure, qualifying in the departmental examination being the basic requirement for consideration for promotion.

7. We have heard the counsel on both sides. The counsel for the applicant has reiterated the arguments put forth in the rejoinder which are repeated in the Note submitted by him on 9.3.2007. The Senior Central Government Standing Counsel appearing for the respondents based his arguments on the four grounds mentioned below.

- (i) No new facts can be brought out in the written submission including citations. The Standing Counsel also requested the Bench to take note of the fact that the applicant had sent a Fax message (Annexure-A to the Note) to the Bench, which is objectionable.
 - (ii) The O.A suffers from non-joinder of parties. The candidates who qualified in the 2002 examination and who have already been appointed to the grade of LDC have not been made party.
 - (iii) The O.A is barred by limitation.
 - (iv) The applicant has only a right to be considered for promotion and he has no right to be appointed against a promotional post.
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8. We have carefully gone through the written submission. It is seen that the applicant has not brought out any new point in the Note of Submission. He has only reiterated the points mentioned in the rejoinder. Regarding the Fax message at Annexure-A, the applicant had already mentioned in the O.A that some of his seniors had been promoted based on the result of the 1995 examination. This fact has been admitted by the respondents in the reply statement. We are also of the view that there is no objection to the applicant sending a Fax message to the Registry of the CAT. Also there is no objection of citing decisions in support of the points put forth in the original pleadings, at the time of arguments or in the written submission filed.

9. As regards non joinder of parties, we note hat the respondents have not raised this objection in the counter. This is a new fact brought out during the argument by the counsel for the respondents. The applicant has not made any prayer for cancellation of the promotion of the candidates who qualified in the 2002 examination and his prayer is limited to directing the respondents to promote him "from or earlier to the date of promotion to Group-D officials as LDC who qualified later". The applicant has not made any prayer for cancellation of the promotion of the candidates who qualified later in the 2002 examination. The respondents can very well create supernumerary posts for considering the applicant for promotion in case the O.A succeeds. Moreover, in *Girdharlal J. Dabhi & Ors. vs. Union of India & Ors.*, of Ahmedabad Bench decided on 23.6.1987 reported in 1987 (4) ASLJ 316, the Ahmedabad Bench of this

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Tribunal had categorically stated that non-joinder of parties is immaterial when relief was sought not against anyone but on the basis Rule 321 of IREM. In the present case, the applicant is seeking the relief on the basis of the provisions in the statutory rules framed by the respondents.

10. Regarding the question of limitation, the applicant's counsel pointed out that the applicant had filed an M.A for condonation of delay in filing the O.A. Further, when Group-D officials were promoted to the cadre of LDC based on the result of the 2002 examination, the applicant had made a representation dated 24.8.2004 which still remains unattended by the respondents. The O.A was filed in January 2005 and hence in fact there is no delay in filing the O.A. We accept the arguments of the counsel and condone the delay in the interest of justice.

11. Now we shall discuss the merits of the points raised in the O.A. The SCGSC has invited our attention to Annexure-R1, a memo dated 5th June 2002, wherein it was mentioned that "no vacancy in respect of post included in the cadre restructuring should be filled up till such time as further orders are issued". It was also mentioned elsewhere in the said letter that detailed instructions/orders/Recruitment Rules governing the manner of filling up of the vacancies at all levels were being issued separately. As per the Annexure to the said letter seven new posts of LDCs were sanctioned in the Office of the Commissioner of Central Excise, Bhubaneswar. The above cited instructions

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only stipulate that these seven posts should be filled up only after receipt of further instructions from the Government of India. The further instructions contained revision of Recruitment Rules which were published in Gazette on 21.9.2002. The new Recruitment Rules lay down the procedure for filling up vacancies in the grade of LDC. It is true that these rules supersede the earlier Recruitment Rules. However, in the manner of filling up the vacancies to the grade of LDC by a departmental qualifying examination there is absolutely no change in the rules from the 1971 Rules modified in 1991. The only change is in the quota of vacancies to be filled by the said qualifying examination. Hitherto only 5% total vacancies in the grade of LDCs were to be filled by candidates who qualify in the departmental examination. As per the new Recruitment Rules, the said number has been increased to 50% of the total vacancies. All other conditions regarding departmental qualifying examination, i.e, the age restriction, non carrying forward of the unfilled vacancies and keeping the qualified candidates in the waiting list remain the same. There is no mention at all that the candidates who had qualified in the earlier years are not to be considered for promotion from the date of publication of new Recruitment Rules. In fact, cancellation of the earlier select list will adversely affect the candidates who had qualified in the earlier examinations and have been waiting since long for want of vacancies, as many of them might have crossed the age limit of 45/50 years like the applicant and would not be eligible for appearing for examinations after the promulgation of the Recruitment Rules of 2002. The preference for consideration for promotion to LDC is the year of passing the examination and



not the seniority in the grade of Group-D. Thus the batch of qualified candidates of 1996 will en bloc get preference for consideration for promotion to the grade of LDC, over those who passed the qualifying examination in the subsequent years, even if some of the candidates who qualified later may be senior in the grade of Group-D. The candidates who have already passed the examination and are awaiting for promotion for want of vacancies have a legal right to be considered for promotion to the grade of LDC as and when vacancies arise. This is clear from the Note-C below column-12 of the Recruitment Rules of 2002. The same condition was there in the 1979 Rules as modified by the Gazette Notification dated 19.10.1991. Thus, the applicant along with similarly situated candidates who had passed the qualifying examination earlier to the promulgation of the Recruitment Rules of 2002 and who were still awaiting promotion have a right to be considered for promotion over and above those who qualified in the departmental examination after the promulgation of the new Recruitment Rules of 2002.

12. The decision of the Chandigarh Bench of CAT produced as Annexure – B to the Notes of Submission has no direct application to this case. In the said case, the applicant was selected based on a Competitive Departmental Examination where the number of candidates selected was limited to the number of vacancies announced and subsequent to the announcement of select list, there was a change in the number of vacancies. In the decision it was laid down that after such selection if the number of vacancies underwent a change,

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the candidate selected based on the number of vacancies announced before conducting the examination had a right for appointment before the candidates selected in the subsequent examinations. In the present case where the examination is only a qualifying one, it is possible that more number of candidates qualify in departmental examination than the number of vacancies. The Rule clearly provides that such candidates are to be considered in the subsequent years against future vacancies.

13 Coming to the reliefs, we have no hesitation to grant the prayer quoted at 1(i) above. There is absolutely no doubt that the age bar prescribed in the rules is only for eligibility to appear in the qualifying examination and is not for consideration for promotion. As already stated, the applicant has a right to be considered for promotion against vacancies of LDC that have arisen after 1995 as admittedly he was declared qualified in the 1995 examination. The respondents have stated that the seniors to the applicant who were included in the 'pass list' of 1995 have been promoted against the vacancies that arose in 1996 and from 1996-2002 there were no vacancies in the grade of LDC. It is not clear to us as to whether there are still some candidates of 1995 examination who were senior to the applicant in the grade of Group-D and still awaiting promotion to the grade of LDC. The respondents have to consider the qualified candidates for promotion to the grade of LDC, with reference to the year of passing the examination, the persons who qualified earlier examination getting preference over those who qualified in the later examination. Now having

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promoted candidates from the junior batch of 2002, the respondents have to consider the applicant for promotion against a supernumerary post to be created if he is the senior most of the candidates awaiting promotion from the 'pass lists', earlier to 2002. Of course, the promotion will be subject to other eligibility conditions, viz., satisfactory service records etc. Such supernumerary post will be created with effect from the date the qualified officials in the 2002 examination were promoted.

14. Regarding the seniority of the applicant in grade of LDC against candidates who have already been promoted based on the 2002 pass list, the respondents shall consider the question of seniority as per law, by giving sufficient notice and opportunity of being heard to the candidates of the 2002 list who have been promoted to the grade of LDC, overlooking the claim of the applicant for promotions.

15. The O.A. is disposed of as above. There will be no order as to costs.


(K.N.K. KARTHIAYANI)
MEMBER (A)


(N.D. RAGHAVAN)
VICE CHAIRMAN

mr.