

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No.
~~XXXXXX~~

467 of 1991

DATE OF DECISION 30.6.92

V. John Job Applicant (s)

Mr. O. V. Radhakrishnan Advocate for the Applicant (s)

Versus

Director, National Malaria Respondent (s)
Eradication Programme, N. Delhi
and others

Mr. V. Ajith Narayanan, ACGSC Advocate for the Respondent (s)
(for R.1-3)

CORAM :

The Hon'ble Mr. S.P. Mukerji, Vice Chairman

The Hon'ble Mr. A.V. Haridasan, Judicial Member

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. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

(Hon'ble Shri S.P. Mukerji, Vice Chairman)

In this application dated 15.3.91 filed under Section 19 of the Administrative Tribunals Act, the applicant who has been working as a Technician under the Director National Malaria Eradication Programme under Ministry of Health has challenged the impugned orders dated 23.10.87 at Exbt.A.5 rejecting his representation for promotion to the selection grade, the order dated 3.12.90 at Exbt.A.10 rejecting his representation dated 3.8.90 against his non-consideration for promotion to the selection grade in the cadre of Technician and has also challenged the legality of the Office Memorandum dated 10.1.1977 at Exbt.A.11 and O.M. dated 12.9.74 at Exbt.A.14 making provision for reservations for Scheduled Caste/Scheduled Tribe for promotion to the selection grade. He has further prayed that respondents

1&2 be directed to appoint him to the selection grade of Senior Technician in preference to Respondents 4&5 on the basis of seniority and fitness with retrospective effect from the date of his entitlement with all consequential benefits.

2. The brief facts of the case are as follows. Admittedly the applicant is senior to respondents 4&5 in the cadre of Senior Technician as per the Seniority List of 30.11.81 and subsequent lists of 1984 and 1989. On the basis of the recommendations of the Third Pay Commission, the third respondent sanctioned 13 Selection Grade posts for Senior Technicians. The applicant's grievance is that overlooking his claim on the basis of seniority his juniors ie., Respondent No.4 who is a Scheduled Caste candidate was promoted to selection grade on 28.9.83 and respondent No.5 who is a Scheduled Tribe candidate was also promoted. The selection grade was non-functional ie., it did not involve any change of duties and responsibilities. On the recommendations of the Fourth Pay Commission, selection grade posts were dispensed with, with effect from 13.9.86. That does not, however, prevent the applicant to claim promotion prior to that date on the basis of his seniority. He has argued that out of 13 posts, 11 posts were filled up and one post was kept unfilled. He represented in 1987 contending that since the permissible limits of 15 percent to 23 percent of the posts had already been filled up by Scheduled Tribe candidates, promotion of his juniors Respondents 4&5 to the selection grade on the basis of reservation was illegal. His representation was rejected by the impugned order/at Annexure-A.5, on the ground that there was no

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provision of selection grade with effect from 1.1.86.

He appealed against that order on 23.11.87 (Exbt.A6) but received no response. His further representation dated 21.12.88 (Exbt.A.7) to the Ministry and ^{still another} ~~further~~ ⁵ representation dated 3.8.90 (Exbt.A.9) brought forth the impugned communication dated 3.12.90 (Exbt.A.10) informing him that the scheme of reservation applied to selection grade also and because of the availability of respondents 4 and 5 the applicant could not be promoted to selection grade against the two reservation points.

The applicant has also challenged the Government of India O.M. of 10.1.77 at Exbt.A.11 providing for reservation in the selection grade. The applicant has argued that appointment and posting to the selection grade does not constitute promotion to a higher cadre as the duties and responsibilities remain substantially the same. Promotions are made to the selection grade purely on the basis of seniority subject to the rejection of the unfit and accordingly the question of reservation for promotion does not arise. The selection grade posts of Senior ^{intermediate} Technicians do not form an ^{intermittent} ~~intermittent~~ promotion category.

The applicant has referred to the Department of Personnel's O.M. of 12.9.74 at Exbt.A.14 in which it was clarified that appointment to the selection grade constitute promotion and accordingly the orders regarding reservation and concessions for Scheduled Castes/Scheduled Tribes will apply to such promotions also whether they are made by selection or on the basis of seniority. He has stated that the Hon'ble High Court of Kerala in Rajan Vs. Union of India, IIR 1984 (1) Kerala 120 struck down this O.M. as violative of Articles 14 and 16 of the constitution. He has argued

that the impugned O.M. at Exbt.A.10 dated 10.1.77 making similar provisions of reservations in selection grade is also thus violative of Articles 14 and 16 of the Constitution.

3. In the counter affidavit Respondents 1 to 3 while accepting the factual position as indicated above have stated that the reservations of vacancies are done on a roster prescribed by the Government of India and the question of exceeding the reservation limit for the application of the roster does not arise. The applicant represented about his promotion to the selection grade for the first time in September, 1987 by which time the ^{concept} ~~grade~~ of selection grade had been abolished on the recommendations of the Fourth Pay Commission. They have explained that three posts in the selection grade falling against the reservation points 8, 14 and 17 could not be filled up as no eligible Scheduled Caste, Scheduled Tribe candidates were available and before these posts could be filled the Fourth Pay Commission with the concept of selection grade and only those who had been given selection grade upto 30.9.86 were allowed to retain the scale as personnel to them. They have conceded that the selection grade is non-functional in nature but because of reservation the promotion of juniors Respondents 4&5 cannot be challenged. They have referred to the O.M. of 10.1.77 at Exbt.A.11 which provides for reservation in the selection grade.

4. Respondent No.4 has contested the application as time barred and also disputed the various contentions of the applicant. He has stated that even though the selection grade is non-functional, since it carries higher pay scale, appointments to the selection grade have to be by promotion.

5. In the rejoinder the applicant has argued that the declaration by the High Court of Kerala about the unconstitutionality of reservations in selection grade by their striking down of the O.M. of 12.9.74 at Exbt. A.14 applies with equal force to his case also. About limitation he explained that since he came to know the appointments to the selection grade in 1987, he could not have made any representation earlier. He has also argued that in accordance with the circular of the Department of Personnel at Exbts A.15 and A.16, vacancies which cannot be filled up by Scheduled Caste/Scheduled Tribe candidates should have been dereserved and made available to the general candidates like him. He has also argued that respondents 4 and 5 were promoted to the selection grade in 1983 when they had not completed 14 years of service as per the Recruitment Rules.

6. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The main question in this case is whether there can be reservation for Scheduled Castes and Scheduled Tribes in the Selection Grade. It goes without saying that reservation for Scheduled Caste/Scheduled Tribe is possible only if appointment to the Selection Grade is held to be appointment by promotion and not a case of automatic upgradation of the pay scale. It should not detain us much to consider the question whether the modality of promotion, i.e., by merit or by seniority should make any difference. The following extracts from the Department of Personnel and Administrative Reforms O.M. dated 12th September, 1974 at Ext. A14 makes the position very clear:-

" The undersigned is directed to say that in this Department's O.M No.27/2/71 Est.SCT dated the 27th November, 1972 reservation have been provided at 15% for Scheduled Castes and 7 1/2% for Scheduled Tribes in posts filled by promotion on the basis of seniority subject to fitness in grades or services in which the element of direct recruitment, if any, does not exceed 50%. In Ministry of Home Affairs O.M No.1/12/67-Est.(C) dated the 11th July, 1968 read with O.M No.10/41/73 Est(SCT) dated the 20th July, 1974, reservations at 15% for Scheduled Castes and 7 1/2% for Scheduled Tribes have been provided in posts filled by promotions on the basis of selection to and/or in posts belonging to Class IV and III and II, and from Class II to the lowest rung of category in Class I , in grades or services in which the element of direct recruitment, if any does not exceed 50%."

The above will show that whether the promotion is made by competitive selection or by seniority subject to the rejection of the unfit if the element of direct recruitment does not exceed 50%, there would be reservation in both types of promotion. Since in the Selection Grade, the question of direct recruitment does not arise, if it is held that appointment to the Selection Grade either by selection or by seniority is by promotion, the reservation for Scheduled Castes and Scheduled Tribes will prevail.

7. Therefore the question before us boils down to determining whether appointment to the Selection Grade can be held to be by promotion or not. The Department of Personnel's O.M dated 12th September, 1974 at Ext.A-14 indicated in the shape of a clarification that appointments to Selection Grade constitutes promotion and accordingly, the reservations for Scheduled Castes/Scheduled Tribes

have to be made. The following extracts from that O.M. gives the clarification:

" The matter has been carefully examined and it is now clarified that since appointment to Selection Grade also constitutes promotion the appropriate orders relating to reservations/concessions for Scheduled Castes and Scheduled Tribes, in promotion made by 'Selection' or on the basis of 'Seniority subject to fitness' would apply to appointment to the Selection Grade, accordingly such appointments are made on the basis of 'Selection' or 'Seniority-cum-fitness'.

The contention of the learned counsel for the applicant is that the High Court of Kerala in A.V.Rajan vs. Union of India and others, 1984(1)ILR 120 rejected this clarification as violative of Articles 14 and 16 of the Constitution. The following extracts from the judgment of the Single Judge XXXXX would be pertinent:-

"5. The position taken up by the respondents that posting as Selection Grade/Senior Grade Preventive Officers is a promotion and in that case, reservation as is provided in O.M No. 27/2/71-Estt. (SCT) , dated 27th November 1972 should be observed does not seem to be justified in view of the facts and circumstances mentioned above. It is of course true that in Ext. R-1 it has been clarified by the Department of Personnel and Administrative Reforms O.M.No. 8/11/73-Estt. (SCT), of 12.9.74 that "since appointment to Selection Grade also constitutes promotion, the appropriate orders relating to reservations/concessions for Scheduled Castes and Scheduled Tribes in promotions made by 'selection' or on the basis of 'seniority subject to fitness' would apply to appointments to the Selection Grade, according as such appointments are made on the basis of 'selection' or 'seniority-cum-fitness'. It is difficult to accept this clarification, since, if the clarification be correct, Senior Grade Preventive Officers alone would be the

feeder category for the purpose of promotion to posts of Superintendents. As long as the recruitment rules have not been amended by providing that Selection Grade Preventive Officers, are intermediary category between Preventive Officers, Grade I and Superintendents, the posting of Officers in higher salary which were accorded for purposes of avoiding stagnation among Preventive Officers, Grade I, cannot be considered as promotion. If that be so, the rules of reservation in the O.M., dated 27th November 1972 would not be applicable and the postings may have to be in the order of seniority from among Preventive Officers Grade I, subject of course to fitness of the officers in accordance with the provisions contained in the relevant rules.

6. Necessarily therefore I have to hold that Ext. R-1 clarification in so far as it provides that posting of Preventive Officers, Grade I as Selection/Senior Grade Preventive Officers is promotion and therefore the rules of reservation will apply is unsustainable. Since the posts of Preventive Officers, Grade I and Selection/Senior Grade Preventive Officers are identical and interchangeable having same duties, powers and functions, the appointment of juniors with lesser service earlier to the petitioners, would be violative of Article 14 and 16 of the Constitution of India. The reservation provided for scheduled castes and scheduled tribes candidates are confined only to promotion posts. In so far as the posts of Selection/Senior Grade Preventive Officers are not promotion posts for Preventive Officers, Grade I as per the relevant Recruitment Rules, it is obvious that the rules of reservation will not apply. "

The learned counsel for the applicant has argued that applying the ratio of the aforesaid judgment, para 4 of the O.M. of the Ministry of Finance dated 10th January 1977 stating inter alia that "the scheme of reservations for candidates belonging to Scheduled Castes/Scheduled Tribes will apply in making appointments to the Selection Grade

enunciated above" is unconstitutional.

8. With great respect we are not able to persuade ourselves to accept the finding of the Hon'ble High Court of Kerala that appointment to Selection Grade does not constitute promotion. The main ground taken by the Hon'ble High Court is that so far as the Recruitment Rules are not amended by providing for a Selection Grade as an intermediate level, the posting of officers to Selection Grade to avoid stagnation, cannot be considered as promotion. The Supreme Court has been holding the view that where statutory rules are silent, promotions to the Selection Grades can be regulated by administrative instructions. In Lalit Mohan vs. Union of India, AIR 1972 SC 995, it was held by the Hon'ble Supreme Court that where in the regular grade of Assistant in the scale of Rs.150-250 the Selection Grade of Rs.225-440 for 25 percent of the posts was provided as Selection Grade in absence of any rules regulating selection of Assistants to the Selection Grade, the Administration was competent to prescribe procedure by which promotion to the Selection Grade is to be made so long as these instructions are not inconsistent with the rules. In that case the Administration had prescribed that the appointment to the Selection Grade is to be made on the basis of seniority-cum-merit based on a test. The Hon'ble Supreme Court ~~had~~ held that since the applicants before them ^{did} _{do} not appear in the test ^{it may be noted that} they cannot complain about the selection. ²⁵ per cent of the posts in the higher grade were provided with the object of ^{mainly} providing ^{intensive} _{to} employees who have no outlets or limited outlets for promotion to higher posts**.

9. In a further judgment in Sant Ram Sharma vs. State of Rajasthan & others, AIR 1967 SC 1910, it was

till held by the Supreme Court that different statutory rules are framed the Government were competent to allow promotion of the IPS officers to the Selection Grade primarily based on merits and not on seniority alone. So long as all eligible candidates ^{are} considered before ~~for~~ appointment to posts in the selection grade there is no violation of Article 14 and 16 of the Constitution.

10. The above two rulings make it clear that absence of any amendment in the Recruitment Rules, cannot take away the identity of the Selection Grade as a specific promotional level. The fact that the appointment to the Selection Grade is made not automatically but by a process of selection on comparative merit as indicated in para 1(ix) of the O.M. dated 10th January, 1977 at Annexure-A11 or as indicated by the respondents in para 10 of their counter affidavit, by screening on the basis of the seniority criterion of seniority-cum-fitness, shows that appointment to the Selection Grade is not automatic upgradation of the pay scales held by the Senior Technicians but after a process of selection cum screening by the selecting authority. In Dayaram Asanand Gursahani vs. State of Maharashtra and others, AIR 1984 SC 850, the Hon'ble Supreme Court held that since the Government resolution provided for the Selection Grade of District Judges in the scale of Rs.1800-2000 as a part of regular pay scale of Rs.900-1800 applicable to the cadre of District Judges and the Government resolution did not indicate that there was any process of selection made otherwise from the cadre of District Judges to the Selection Grade and the latter was sanctioned only to mitigate the hardship caused by ~~the~~ stagnation the

seniormost District Judges would get the Selection Grade and the question of any promotion by selection did not arise.

11. It is thus clear that where there is any process of selection, the element of promotion immediately comes into play. In a well considered judgment in Ashok Kumar Shrivastava and another vs. Union of India and others, (1987)4 ATC 385, the Jabalpur Bench of the Tribunal held that "this mass upgradation of 300 ADMOs to the exactly equivalent number of posts of DMOs is a case of their being simply placed in the higher senior scale of the grade and as admittedly also no selection is involved it cannot be considered to involve any process of promotion or fresh appointment and therefore no fresh reservation of SC and STs in terms of the prescribed percentages can be made to the upgraded posts and to the existing incumbents holding the posts of ADMOs which were upgraded". (emphasis added). These observations also make it clear that where no selection or screening is involved for appointment to the Selection Grade, it cannot be a case of promotion. As was pointed out earlier in para 19 of the O.M. of 10th January 1977 at Annexure A11 which reads as follows:-

"(ix) Appointments to the Selection Grade shall be made on the basis of merit-cum-seniority as indicated below :

(a) The zone of consideration should be limited to twice the number of vacancies expected to be filled in the year;

(b) Officers in the zone of consideration should be graded as 'outstanding', 'good' and 'unfit' on the basis of their records of service. Those graded as 'unfit' will not find place in the Select List;

(c) Those who are graded as 'outstanding' should be placed en bloc at the top of the Select List.

Those graded as 'good' should be placed in the Select List below the 'outstanding' Officers. The arrangement of names within each category should be in accordance with their inter se seniority;

(d) Selection for appointments to the Selection Grade should be made by a Selection Committee to be constituted internally."

By no stretch of imagination can it be said, therefore, that appointment to the Selection Grade is automatic and not by a process of selection. Thus, we are clear in our mind that in the instant case before us since the appointment to the Selection Grade was by selection on merit or later by seniority subject to the rejection of the unfit and not automatic, the appointment is by promotion and not by upgradation of posts by which the incumbents ^{would have been} ~~were~~ automatically given the higher pay scale. The fact that in the Selection Grade there is no substantial change in the nature of duties and responsibilities, should not make any difference so long as there is a process of selection or screening and so long as the pay scale in the Selection Grade is higher than the pay in the Ordinary Grade. In the Webster's Dictionary (Delux Encyclopaedic Edition) 'promotion' is defined as 'advancement to higher ranks or status'. In the Concise Oxford Dictionary also, 'promotion' connotes 'advancement to position or higher office'. A higher position or status can be attained through induction ~~in~~ a higher pay scale without higher duties and responsibilities ~~inasmuch as~~ through induction to higher office or responsibilities with or without any increase in the pay scale. It is, thus, clear that there can be promotion with or without any change in the volume and degree of duties and responsibilities. If it were not so FR-22C

would not have ^{specifically} qualified the term 'promotion' with duties and responsibilities of greater importance as it reads as follows:-

"F.R. 22-C. Notwithstanding anything contained in these Rules, where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued;"

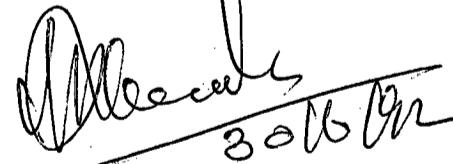
The situation of promotion without any additional duties and responsibilities, therefore, cannot be ruled out. The argument of the learned counsel for the applicant that the Selection Grade officials cannot be held to have been promoted because there is no change in their duties and responsibilities, cannot be accepted.

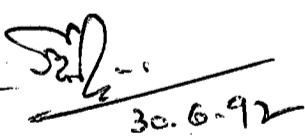
12. The argument that the Selection Grade is given to compensate officials monetarily for stagnation or lack of adequate promotion prospects and therefore, it cannot be taken to be promotion but only a monetary benefit is also not very convincing. Here, we are concerned with the term 'promotion' in its generic connotation including not only enhancement in responsibilities but also enhancement in monetary terms. We are not concerned with the benefits of FR 22-C which are restricted to promotions which must ^{not only} ^{but also} include ^{both} higher pay scale ^{and} higher responsibilities, but promotion in broader terms which may nor may not include

higher responsibilities but includes higher pay scale.

13. As regards the contention of the applicant that respondents 4 and 5 who were promoted against the reserved vacancies were not eligible for promotion, since the applicant does not belong to a Scheduled Caste or Scheduled Tribe community he has no locus standi so far as the eligibility of respondents 4 and 5 to reserved vacancies is concerned. The further contention of the applicant that the unfilled reserved vacancies should have been dereserved and made ~~available~~ ^{available} ~~eligible~~ ^{available} to him and other general candidates, we do not see much force in it. In S.S.Sharma vs Union of India, AIR 1981 SC 588, the Hon'ble Supreme Court held that whether or not reserve vacancies should be dereserved, is a matter falling primarily within the administrative discretion of the Government. There is no right in candidates seeking to fill vacancies belonging to general category to insist on dereservation of reserved vacancies so long as it is possible in law to fill the reserved vacancies.

14. In the conspectus of facts and circumstances we see no merit in the application and dismiss the same without any order as to costs.


(A.V. HARIDASAN)
JUDICIAL MEMBER


(S.P. MUKERJI)
VICE CHAIRMAN

n.j.j/ks.