

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 528/91 199
T. A. No.

DATE OF DECISION 27.8.91

K.P.Sasidharan Applicant (s)

Mr.M.Girijavallabhan Advocate for the Applicant (s)

Versus

The Postmaster General, Respondent (s)

Central Zone, Ernakulam,
Cochin-682016 and 2 others

Mr.George Joseph,ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr.S.P.MUKERJI, VICE CHAIRMAN

The Hon'ble Mr.N.DHARMADAN, 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 18.3.91 the applicant who has been working as a casual labourer and now working as Extra Departmental Letter Box Peon (E.D.L.B Peon) under the Senior Superintendent of Post Offices, Ernakulam, has prayed that the respondents be directed to consider the applicant for promotion to Group D cadre on a regular basis duly reckoning his full time service as casual labourer since August 1982. According to the applicant he has been working under the Senior Post Master, Head Post Office, Ernakulam as a casual labourer from August 1982 onwards with more than 240 days of service in any period of 12 months . He has passed the S.S.L.C and Refrigeration and Air-

conditioning course. During the period of eight years he has worked also as Stamp Vendor, Group 'D' and Chowkidar in leave vacancies. He is at present working as E.D.L.B Peon provisionally in a permanent vacancy. Referring to the Director General, Department of Posts letter dated 17.5.89(Annexure-A) he stated that in accordance with that letter for purpose of recruitment to Group 'D' posts after the non-test category Group 'D' officials, the next priority categories are EDAs of the same division and casual labourers. His grievance is that in violation of these instructions, casual labourers who are junior to him are being directly promoted to Group D posts without following any norms. He has sought intervention of the Tribunal for getting himself considered for one of the Group D posts lying vacant.

2. The respondents in the counter affidavit have stated that in accordance with the records, the applicant was not working as a full time casual labourer since 1982, as averred by him. The records show that he was engaged to work as Group 'D' Chowkidar and Departmental Stamp Vendor for different spells between 1984 and 1990 as follows.

| | | |
|------|---|-----------------------|
| 1984 | : | 98 days |
| 1985 | : | 141 days |
| 1986 | : | Records not traceable |
| 1987 | : | 112 days |
| 1988 | : | 136 days |
| 1989 | : | 271 days |
| 1990 | : | 181 days |



They have conceded that he is working as E.D.L.B. Peon as a substitute of the permanent incumbent. In accordance with the D.G, P&T's letter No.45-24/88 SPB-1 dated 17.5.89 (Annexure-A) substitutes are ranked last in priority but above the outsiders for the purpose of recruitment to Group D post. They have stated that at present there is no Group D post vacant. They have stated that persons named by the applicant in the application were promoted to Group 'D' posts because they were full time casual labourers, whereas the applicant has only been a substitute. They have, however, conceded that at present the applicant is working as a substitute E.D.L.B Peon, but he has also worked as a substitute in leave vacancies as Group 'D' Chowkidar/Stamp Vendor etc.

3. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. Both the applicant as well as the respondents are relying upon the D.G, P&T's letter dated 17.5.89 at Annexure-A. The letter is reproduced as follows.

" Sub:- Casual Labourers and Part time Casual Labourers-Clarification regarding

Sir,

I am directed to say that references have been received seeking clarification as to which class of workers should be treated as full time or part time casual labourers.

2. It is hereby clarified that all daily wagers working in Post Offices or in RMS offices or in Administrative office or PSDs/MMS under different designations(mazdoor, casual labourer, outsider) are to be treated as Casual Labourers. Those Casual labourers who are engaged for a period of less than 8 hours a day should be prescribed as part time casual labourers. All other designations should be discontinued.

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3. Substitutes engaged against absentees should not be designated as Casual Labourer. For purposes of recruitment to Group 'D' posts, substitutes should be considered only when casual labourers are not available. That is substitutes will rank last in priority but will be above outsiders. In other words, the following priority should be observed.

- (i) NTC Group 'D' officials
- (ii) EDAs of the same division
- (iii) Casual labourers(full time or part-time. For purpose of computation of eligible service, half of the service rendered as part time casual labourer should be taken into account. That is if a part-time casual labourer has served for 480 days in a period of 2 years he will be treated, for the purpose of recruitment, to have completed one year as of service as full time casual labourer).
- (iv) EDAs of other divisions in the same region.
- (v) Substitute (not working in metropolitan cities)
- (vi) Direct recruits through employment exchange.

Note:- Substitute working in Metropolitan cities will, however, rank above No.(iv) in the list."

The point at controversy is whether the applicant who has been, according to the respondents, working as substitutes of Group 'D' incumbents falls within the category of 'substitutes' referred to in the aforesaid letter. The term 'substitute' as a nominee of an Extra Departmental Agent who works on his behalf when the E.D. Agent goes on leave or ^{is} otherwise absent for short period, occurs repeatedly in the Service Rules for Extra Departmental Staff and the Director General's instructions thereunder. For instance in Director General's instructions(pages 21 to 28 of Swamy's Compilation of Service Rules for Extra-Departmental Staff -4th edition) below Rule 5 of Posts and Telegraphs Extra Departmental Agents (Conduct and Service) Rules, 1964, the following provisions have been made:-

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"During leave, every ED Agent should arrange for his work being carried on by a substitute who should be a person approved by the authority competent to sanction leave to him. Such approval should be obtained in writing."

The E.D Agent has to apply for leave in a particular form (page 22 of Swamy's Compilation) in which he has to give the name, age and address of the substitute and the specimen signature of the substitute.

4. The fact that a substitute of an E.D Agent is a nominee of the E.D Agent is evident from the following provisions in the instructions:-

" 3. Approval of the substitutes in place of ED Agents proceeding on leave -

At present, it appears that the choice of the substitute is left to the ED Agent himself. In most cases, this arrangement appears to have worked satisfactorily. There are, however, a few cases where the substitutes appointed later claim regular appointment as ED Agents and are not prepared to quit when required.

It is provided in the latest instructions that the substitutes should be approved by the appointing authorities. It is not the intention that there should be any elaborate procedure to be followed for according such approval. In cases where leave is not got sanctioned in advance, we may not even insist upon prior approval of the substitute by the department should not be precluded from making such inquiries into the antecedents of the substitutes as considered necessary and to ask an ED Agent to provide another substitute if it is found that the one actually proposed by the ED Agent is not acceptable.

It will be a good working arrangement if substitutes nominated by the ED Agent are approved in advance by the competent authority so that there may be no difficulty in granting leave of absence at a short notice in cases of illness or any unforeseen circumstances affecting the ED Agent."

5. The provision for a nominee of the E.D Agent to work as his substitute during the period of his leave has been extended to situations where an E.D Agent is appointed to regular departmental post for short durations, but where the E.D Agent is not likely to come back, the post has to be filled up in the normal manner. The

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Ministry of Law have advised that the losses suffered by the Department of Posts due to the defaults of the substitutes can be recovered from the original E.D Agent who offered the substitute to work on his responsibility by a Civil Suit. It has been held by the Sub-Divisional Magistrate, Dindigul that the nominee of the E.D Agent remains a private agent of the Branch Post Master and no prosecution would lie against him for criminal breach of trust under Section 409 of the I.P.C. The Ministry of Law did not advise the Postal Department to contest this decision in higher Courts(pages 27 and 28 of Swamy's Compilation). The Ministry of Law further advised that even though disciplinary action cannot be taken against an E.D Agent for the fault of his nominee, but if it is proved that the E.D Agent had not taken reasonable care in appointing his nominee, had failed to verify the antecedents of the nominee or by his negligence had permitted the nominee to commit the tort, it would be possible to proceed against the E.D Agent departmentally. From the above it will be clear that a substitute of an EDA primarily is a nominee of the E.D Agent for the acts of commission and omission of whom the E.D Agent remains liable to a certain extent. He is just a quasi-agent of the EDA.

6. Clarifications were sought from the respondents on the question whether the applicant was engaged as a substitute of a regular Group D employee as distinguished from a substitute of EDA who is a nominee of the EDA, that is to clarify whether the applicant as

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substitute of Group D had been nominated by the regular Group D employee as in case of substitute of EDA or had been selected by the department. It was felt by us that the word 'substitute' used in D.G's letter of 17.5.89 relegating the substitutes to positions below all the EDAs within or outside the division pertains to substitutes of an EDA as his nominee and not to a regularly selected substitute who is in the list of the department for filling up short-term vacancies as a stop-gap arrangement. The learned counsel for the respondents gave the following clarifications which is quoted verbatim as follows:-

" 3. It is submitted that the applicant had been engaged as substitute to Chowkidar, Group D and Departmental Stamp Vendor(both Departmental Posts, DVS belongs to the cadre of Postmen). This is the substitute mentioned at item V of Annexure A of application.

4. Chowkidar is in Group D Cadre. Incumbent of all these own substitutes where they wish to avail casual leave provided the substitutes are acceptable to the head of the office (normally Postmaster.). In all other cases (such as in regular leave vacancies where no leave reserve official is available or vacant posts (till they are filled up by the appointing authorities) the head of the office may engage a substitute to manage the work of the person as on regular leave or of vacant post by simply employing a substitute who will be paid wages for that. The applicant is such a substitute and not a casual labourer. Item V of the Annexure does not include substitutes to ED Agents. (Substitutes to ED Agents are provided by them solves as a condition of ED service). Both types of the substitutes are not formally selected by the Department. The first type of substitutes one engaged by each head of the office for managing the work of absentee or vacant post till regular arrangement made by the Competent Authority."

We are afraid the clarification makes the confusion worse confounded.

Apart from the vagueness of certain words like the " incumbent of all these own substitutes where they wish to avail" which the learned counsel himself could not explain or correct , the learned counsel has gone on to conclude on his own that the "applicant is

such a substitute and not a casual labourer" and that the substitutes referred to in D.G's letter does not include substitutes to E.D Agents. He has, however, conceded that there are two types of substitutes, one the nominees of regular incumbent and the other those who are engaged by the head of the office. In the rejoinder to the clarification the applicant has vehemently urged that he had never been nominated by any Group D staff to work as his substitute, but he was selected as a mazdoor by the department.

7. While we are prepared to accept the contention of the respondents that the applicant is now working as an E.D.L.B Peon as a substitute of the permanent incumbent to the post of E.D.L.B. Peon, we have no reason to accept the contention of the respondents that the applicant has been working as a substitute of even regular Group D officials like the Chokidars/Departmental Stamp Vendors. The respondents have not produced before us any instructions or rules by which regular Class IV staff like the regular EDAs can nominate substitutes to work in their leave vacancies. From whatever light is available from the clarification of the learned counsel for the respondents, it appears that for filling up short-term vacancies of regular Class IV staff as distinguished from EDAs, the head of the office and not the incumbent fix up the substitute. Thus the applicant who admittedly was working in short-term vacancies as Chowkidar and Departmental Stamp Vendor between 1984 and 1990, cannot be

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taken to be a substitute of an EDA as contemplated in the D.G's instructions date 17.5.89 at Annexure-A. At his worst, he has to be considered to be a full time casual labourer in employment since 1984.


8. It appears that in compliance with the directions of the Hon'ble Supreme Court the Department of Posts has drawn up a scheme of granting temporary status and regularising casual labourers and have issued the same by a circular No.45-95/87-SPB dated 12th April 1991. In accordance with that scheme, casual labourers in employment as on 29.11.89 who have rendered continuous service of at least one year with 240 days of engagement are to be conferred temporary status with certain benefits of wages, leave entitlement etc. They are also entitled to be treated at par with temporary Group D employees after three years continuous service after conferment of temporary status. They are entitled to be regularised under the existing Recruitment Rules even in units other than their recruitment units. For such regularisation they will be allowed age relaxation to the extent of service rendered by them as casual labourers. The conferment of temporary status has no relation to availability of sanctioned regular Group D posts. Open market recruitment to Group D posts except on compassionate appointment is banned till casual labourers with requisite qualifications are available.

9. In the conspectus of facts and circumstances we allow

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this application to the extent of declaring that the applicant is deemed to be a casual labourer with more than 240 days of service in 1989 and directing the respondents to confer on him temporary status and consider him for regularisation with all consequential benefits in accordance with the Scheme of Temporary Status and Regularisation promulgated by the circular of 12.4.1991. There will be no order as to costs.

(N.Dharmadan)
Judicial Member
(Please turn over)


27.8.91
(S.P. Mukerji)
Vice Chairman

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N. Dharmadan, Member(Judicial)

10. I have gone through the judgment written by my learned Brother, Hon'ble Vice Chairman. I agree with him. But I think I should also make a few observations in view of the importance of the topic discussed by him.

11. The question considered is the status and rights of a 'substitute' Extra Departmental Letter Box Peon (EDLB Peon for short) engaged in the Postal Department in the Post Office at Ernakulam, from the list kept by R-3.

12. The applicant was appointed in August 1982 by the 3rd respondent, Senior Post Master, Head Post Office, Ernakulam as 'substitute to Chowkidar, Group-D and Departmental Stamp Vendor', in terms of Annexure-A, the relevant portion is extracted below:

"...Substitutes engaged against abscontees should not be designated as Casual Labourers. For purpose of recruitment to Group-D posts, substitutes should be considered only when casual labourers are not available. That is substitutes will rank last in priority but will be above outsider. In other words, the following priority should be observed.

- i. N.T.C. Group-D officials.
- ii. EDAs of the same division
- iii. Casual Labourers (full time or part time. For purpose of computation of eligible service, half of the service rendered as part time casual labourer should be taken into account. That is if a part time casual labourer has served for 480 days in a period of three days he will be treated, for the purpose of recruitment, to have completed one year as of service as full time casual labourer.)

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- iv. EDAs of other divisions in the same region.
- v. Substitutes (not working in metropolitan cities).
- vi. Direct recruits through employment Exchange.

Note: Substitute working in Metropolitan cities will, however, rank above No.(iv) in the list...."

was not nominated by any other employee but
13. Admittedly the applicant worked more than eight years in the leave vacancies with the label 'substitute' and completed 240 days within the period of 12 calendar months. He seeks statutory protection and claims seniority over M/s. Ayyappan, Babu and Mohammed, who had been promoted as Group-D employee on 16-3-91. Accordingly the applicant prays for a direction to promote him to Group-D post reckoning his present full time service as EDLB Peon and earlier casual labour service in leave vacancies from August 1982 onwards.

14. The point for consideration on the above facts as to whether the applicant is an employee of the Postal Department eligible for promotion as Group-D taking into account his period service from 1982 with the label 'substitute'.

dictionary
15. The meaning of the word 'substitute' is 'a person who takes the place of or acts instead of another; an heir instituted in Roman, Civil or Scots law to succeed to property in case another heir named cannot or will not accept the succession' (Webster's Third International Dictionary Vol.III page 2280). According to Corpus juris Secundum,

"....The word 'substitute' does not have of itself a common law meaning or any fixed and definite legal meaning, but usually it presents the idea of something or some one substituted for another, and, as a noun, 'substitute'

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is defined as meaning one put in place of another; one who acts or appears in another's stead; one acting for, or taking the place of another, one who or that which stands in the place of another; one who or that which takes the place or serves in lieu of another; that which is put in the place of another thing, or used instead of something else; that which stands in lieu of something else.." (Corpus Juris Secundum Vol. 83 pages 766 and 767 respectively)

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".....'substitution has been held synonymous with 'subrogation' and it has been distinguished from 'alternation', 'amendatory', 'amendment' and 'modification'....." (Corpus Juris Secundum Vol. 83 pages 766 and 767 respectively)

16. In order to understand the scope and legal implications of substitution and a substituted employees's right it would be appropriate in this context to examine the meaning of the doctrine of 'subrogation' for it has been held synonymous with 'substitution'. Doctrine of subrogation is defined as the substitution of another person in the place of a creditor, so that person in whose favour it is exercised, succeeds to the rights of the creditor in relation to the debt. In other words a subrogation generally arises by operation of law where a person having a liability or a right or a fiduciary relationship pays a debt due to another under such circumstances that he is in equity entitled to the security or obligation held by the creditors for whom he has paid. This doctrine is closely akin to the equitable principle of 'restitution' and 'unjust eviction' as is contemplated in Sec. 69 of the Indian Contract Act. But it does not owe its origin to statute, custom or

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common law. It is really a creature^{of}/equity adopted either from Roman Law or the civil law founded on principles of justice and equity. The very object of this doctrine is to promote justice and to prevent injustice by compelling the payment of debt by one who in justice, equity and good consciousness should pay it. It is an appropriate means of preventing unjust enrichment. In *Kakshina Mohan Roy V. Saroda Mohan Roy*, (1893) 20 I.A 160, "a person in possession under a decree of a court paid money to prevent a sale of the estate for arrears of revenue and was entitled to reimbursement even though the decree was after wards set aside, because according to judicial Committee of Privy Council, the claim was in the nature of salvage and the law relating to sale of arrears of Govt. revenue recognises an equity of repayment in the case of a person who not being a proprietor pays the Govt. money in good faith to protect a claim which turns out to be unfounded".

17. Applying the same logic and equitable principle which underlies the doctrine of subrogation, a substitute employee is entitled under the civil law considering the equity, justice and good consciousness, all the rights previlages and benefits which a person, in whose place and on his behalf a substitute employee works, would enjoy had he been in office at the relevant period.

Otherwise it would cause injustice to the substitute employee who works in the absence of a regular employee in his place. The principles of criminal law and the liability of a substitute employee for crimes and offences have no bearing when we examine the scope and legal implications and rights of a substitute worker who works in the Post Office for getting his legal rights under the respondents by way of regularisation in service.

18. The Industrial Disputes Act, 1947 also envisages a situation analogous to substitute employee, in Explanation to Sec. 25-C. This Explanation defines a 'Badli Workman' as a workman who has been employed in an industrial establishment for a definite period in the place of another workman whose name is borne on the muster rolls. He is a workman whose name is included in badli list and engaged against a post when the real incumbent in that post is temporarily absent. Such a person has been held to be entitled to claim the status of permanent employee when he completes the statutory period (see Mahadev Textile Mills V. Additional Industrial Tribunal, 1976 Lab. I.C. 1284). This Explanation was added by amendment Act 35 of 1965, from 1-12-1965 for the reason, as indicated in Management of Sree Meenakshi Mills Ltd. V. Labour Court, 1970 Lab. I.C. 836, that when an employee had been continuously working in a year within the

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course of which he had been working for 240 days, it is reasonable to presume that in the ordinary circumstances he would also be provided with regular employment notwithstanding the label with which he is working. So the name of the posts or the label under which a person is working is not the crucial thing or the criterion to decide the status, but the real state of affairs - the actual relation between the concerned persons viz. the employer and employee. In order to ascertain the real relationship of employer and employee we have to lift the veil and examine the relationship of the parties and decide the issue, in a given case.

19. The relationship of master and servant is essentially contractual. It is created and continued with mutual consent. There is a body of general law relating to master and servant and the source of this law is English Common Law to a large extent. But the question to find out whether the relationship of master and servant exists in a given case is not an easy task. Test after test have been invented by the courts and applied by the authorities. But most of them were given up as not acceptable. The test now prevailing as predominant is the test of finding out whether the employee is part and parcel of the organisation and its economic reality for the role of a master in a

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contract of service may be assumed by any person having regard to the facts and circumstances of each case. According to Barwell

"..In each instance it is a mixed question of law and fact which has to be faced when the problem posed is-to whom is the service to be rendered and by whom are the duties of a master to his servant to be performed.."
(Law of Service in India by Barwell and Ker Vol. I page 37)

The celebrated jurist, Friedman explains the present contract of employment as follows:

"...It will be seen, therefore, that the relationship of employer and employee in modern times is defined and regulated in part by express or implied terms of contract between employer and employees, partly by statute, imposing duties and restrictions upon employees and partly by collective agreements which though some times extra legal in their operation in effect, cannot be entirely ignored when considering the rights and duties of different parties..." (Modern Law of employment by Friedman page 80)

20. The essence of the relationship of master and servant lies in the rendering of service by the servant to, or for the use of, or on behalf of the master coupled with the power of control which the master enjoys over the work of his servant. The Supreme Court in Dharangadhara Chemical Works Ltd. V. State of Sawrashtra, AIR 1957 SC 264 held that the question whether the relationship between the parties is one as between employer and employee or between master and servant is a pure question of fact depending upon the facts and

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circumstances of the each case. This Tribunal (same Bench) had an occasion to deal with an analogous situation in R. PADMANABHAN NAIR V. SUPDT. OF POST OFFICES, ALLEPPEY AND ANOTHER, (1991)15 ATC 531 and while considering the question of the rights of provisional E.D. Agents stressed the importance of the relationship between the parties, which depends upon nature of service. The nomenclature or the label with which a person works under an employer is not a deciding factor. A substitute was also held to be an employee if he satisfies the test of employer and employee relationship as laid down by and the Courts/Tribunal in this behalf. Relevant portion of our judgment reads as follows:


"..13. Accordingly, almost all categories of employees are now brought within the umbrella of the generic term 'workman'. Thus seasonal and casual employee is a worker (in Rober D8 Souza V. Executive Engineer, Southern Railway, (1982) 1 SCC 645), a provisional employee is a worker (in Surendra Kumar Verma V. Central Govt. Industrial Tribunal-cum-Labour Court, (1980) 4 SCC 433) apprentice is a worker (in Management of Karnataka State Road Transport Corporation, Bangalore V. M. Boraiah, (1984) 1 SCC 244), a temporary employee is a worker (in Prabhakaran V. General Manager, K.S.R.T.C, 1981 KLT 164), a badli worker is also a worker (in Sarabhai Chemicals V. Subhash N Pandya, (1984)1 SLR 693), and even an employee employed by the employer indirectly through a contractor is also a worker (in Workmen of the Food Corporation of India V. F.C.I., (1985) 2 SCC 136). Very recently, it has been held by the Calcutta Bench of this Tribunal that an ED agent is a worker in Asoke Kumar Sinha V. Union of India, (1989 Lab IC 670). That Bench in Birendra Chandra Behera V. Union of India (1988)7 ATC 796, rejected the contention of the learned counsel for the Govt. that an ED Agent is only a temporary servant and hence Article 311(2) of the Constitution of India will not be attracted, following the well-known case of Purushotham Lal Dhingra V. Union of India (AIR 1958 SC 36). The Tribunal has virtually taken the view that when an ED

agent is given the full benefits of an employee or a civil servant working under P & T Department why should he be deprived of the statutory or constitutional protection ?

14. We are fully aware of the modern changing situations and the developments in the industrial jurisprudence and also the expanding trend. In the light of the latest decisions, there is nothing wrong in taking the view that a substitute who was allowed to work in the Post Office continuously as stated in Ground A of the Original Application for more than 3 years as an employee having all benefits available for a full member is a workman coming within the purview of the Act..." (emphasis supplied)

21. In the instant case the position of the applicant is similar to a Badli workman as indicated in the Explanation to Sec.25-C of the I.D. Act and it can also be dealt with in the same manner. The applicant's name was included by the 3rd respondent in the list of approved departmental candidates to work as substitutes to be posted in leave vacancies as Stamp Vendor, Group-D Chowkidar etc. He had been appointed in the vacancies and admittedly he had completed 240 days. If he completed 240 days, in a calendar year in that capacity and he is otherwise qualified for Group-D post, he is entitled to be posted as Group-D employee after being considered for regularisation in accordance with law, particularly when some of his juniors were already regularised with effect from 16-3-1991.

22. In view of the above, I am inclined to allow the application as observed by my learned Brother. ^{I do so.} / There will be no order as to costs


29.8.91
(N. Dharmadan)
Member (Judicial)