

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No.535/2003

Dated Tuesday this the 30th day of September, 2003.

C O R A M

HON'BLE MR.A.V.HARIDASAN, VICE CHAIRMAN
HON'BLE MR.T.N.T.NAYAR, ADMINISTRATIVE MEMBER

J.C.Bose
U.D.C.
Customs House
Cochin-9.

Applicant

(By advocate Mr.K.V.Kumaran)

Versus

1. Commissioner of Customs
Customs House
Cochin.
2. Union of India represented by
Secretary
Ministry of Finance
New Delhi.

Respondents.


(By advocate Mr.C.Rajendran, SCGSC)

The application having been heard on 30th September, 2003, the Tribunal on the same day delivered the following:

O R D E R

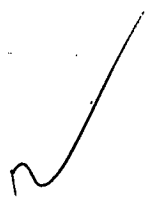
HON'BLE MR.A.V.HARIDASAN, VICE CHAIRMAN

The applicant, a member of the Scheduled Caste, was appointed as a Sepoy under the first respondent on adhoc basis with effect from 16.6.1987. While so, by Annexure A-1 order dated 25.11.1987, the first respondent appointed the applicant by adhoc promotion to officiate as LDC with effect from 25.11.1987. Although there had been intermittent reversions for a day after every 3 months creating artificial break of service as LDC, he continued in service with such intermittent breaks. In OA No.1381/1992, this Tribunal held that the applicant was entitled to count his adhoc service as LDC ignoring the artificial breaks for the purpose of service benefits legally due to him. The applicant was promoted as UDC with effect from 29.9.1998 by office order dated 29.9.1998 (Annexure A-2). The applicant made



representation to the first respondent claiming promotion as UDC with effect from 28.10.1994, the date on which his alleged junior Smt.U.Indira was promoted. The respondents turned down the claim. Although the applicant filed OA No.955/2000 challenging the order, the Tribunal dismissed the OA by order dated 2.1.2002. Thereafter, coming to know that by letter dated 16.8.2990 (Annexure A-3), the second respondent informed the first respondent that the qualifying service of LDC for promotion as UDC had been reduced from 7 years to 4 years, the applicant submitted a representation dated 24.1.2003 (Annexure A-4) to the second respondent for considering his promotion as UDC with effect from 24.11.1991, on expiry of the period of 4 years of service as LDC. Apprehending that the representation would not be considered and disposed of, he filed OA No.159/2003 for a direction to the first respondent to consider and dispose of the representation. However, by order dated 3.3.2003, that application was rejected under Section 19 (3) of the Administrative Tribunals Act. By Annexure A-5 memo dated 9.5.2003 the first respondent rejected the applicant's claim for promotion as UDC with effect from 24.11.1991. Aggrieved by that, the applicant has filed this application seeking to set aside Annexure A-5 and for a declaration that he is entitled to ante-dated promotion as UDC with effect from 24.11.1991 with all service benefits.


2. The impugned order is assailed mainly on the ground that the contention that the applicant's service as LDC for the purpose of promotion as UDC should be regular service is arbitrary, irrational and is not based on any rules and that since the first respondent has conceded the applicant's



contention in A-4 representation that the Customs Department Group-C Recruitment Rules 1979 do not exclude the provisional service for purposes of promotion of LDC as UDC and do not insist upon the passing of promotion examination as a necessary condition for promotion and as the service of the applicant as LDC with effect from 25.11.1987 should have been treated as service for the purpose of eligibility for promotion, the impugned order is wholly unsustainable.

3. The respondents in the reply statement contend that the applicant was by A-1 order promoted as LDC purely on adhoc basis and as a stop gap arrangement till the regular nominee of the Staff Selection Commission would become available. The applicant having been promoted as LDC against the 10% quota for promotion on his becoming eligible and on a vacancy arising in the year 1994, his claim for promotion as UDC with effect from 24.11.1991 is absolutely baseless and since the claim of the applicant for being treated as a regular LDC with effect from 25.11.1987 and for promotion as UDC with effect from 28.10.1994 having been rejected by the Tribunal after elaborate consideration, in its order in OA No.955/2000, the present application is without merit and is not maintainable, contend the respondents.


4. The applicant in the rejoinder has reiterated the contentions raised by him the OA and has also adverted to the fact that in A-8 Recruitment Rules, no distinction is seen made between regular service and adhoc service for eligibility for promotion as U.D.C. He has also referred to a ruling of the Apex Court in Santhosh Kumar Vs. State of Andhra Pradesh & Ors. reported in 2003(1) SCC 497 decided on 25.6.2003 wherein relying



on an earlier ruling of the Apex Court in Direct Recruit Class II(Engineering Officers' Association Vs. State of Maharashtra and Others), it was held that "if the initial appointment is not made by following the procedure laid down by the Rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the Rules, the period of officiating service will be counted" and argued that this principle should govern the case of the applicant.


5. We have very carefully perused the entire pleadings and considered the documents brought on record and have heard the arguments of Shri K.V.Kumaran, the learned counsel appearing for the applicant as also of Shri C.Rajendran, the learned SCGSC.

6. The facts which are not disputed are that the applicant commenced his service as a Sepoy on 16.6.1987, that he was, within a period of less than six months of the commencement of service, promoted on adhoc basis as LDC by A-1 order dated 25.11.1987 purely as a temporary officiating measure, the appointment being tenable till a regular nominee of the Staff Selection Commission would become available, that with intermittent breaks, he continued to officiate on adhoc basis, that the Tribunal in its order in OA No.1381/1992 declared that the intermittent breaks of officiating service could not be sustained and the applicant would be entitled to his due benefits under the law for the officiating service, that the applicant claimed promotion as UDC in OA No.955/2000 with effect from 28.10.1994, the date on which a direct recruit by name U.Indira was promoted and that that OA 955/2000 was dismissed by the Tribunal holding that the applicant who was appointed as LDC only



in the year 1994 on regular basis was not entitled to the reliefs. The claim in this OA is based on A-4 representation made by the applicant, allegedly coming to know of a letter written to the first respondent by the second respondent on 16th August, 1990 reducing the period of qualifying service for LDC to be promoted as UDC from 7 years to 4 years and limiting the relaxation in force upto 31.12.1991, for the reason that LDCs with 7 years of service were not available and it was not advisable to keep the post of UDCs unfilled for a long time. The applicant had claimed that he had completed 4 years service as LDC on 24.11.1991 and therefore was entitled to be promoted as UDC with effect from that date despite the fact that he was not regularly appointed as the Recruitment Rules did not prescribe regular service nor does it insist on passing of promotion examination. His representation was considered by the first respondent and it was turned down informing the applicant that the reduction of qualifying service from 7 years to 4 years for promotion to U.D.C. applied only in the case of regular LDCs and since the applicant was promoted as L.D.C. in 1994 only, he was not entitled to be promoted as UDC as claimed by him.

7. It is not disputed that a Lower Division Clerk only after acquiring the eligibility criteria under the Recruitment Rules can be promoted as UDC. In the year 1991, the applicant was not holding the post of LDC substantively. Although he was appointed as a Sepoy only in the month of June 1987, he was by A-1 order promoted on adhoc basis as LDC with effect from 25.11.1987 with a specific stipulation that the above appointment by promotion was purely temporary and officiating arrangement without conferring any preferential claim for regularization of the adhoc service




and that the appointment would be tenable till the regular nominee of the SSC would become available. In fact, though the arrangement was with intermittent breaks, he continued for a fairly long time. It is evident from A-1 order itself that the appointment was only a stop gap arrangement to tide over the administrative exigency till the nominee of the SSC would become available. The applicant was not fitted against one of the vacancies in the 10% quota earmarked for promotion from Group-D officials who had rendered 5 years of service. Since the applicant acquired the eligibility for being considered for promotion as LDC only on 17.6.1992 after putting in 5 years of service as Sepoy and as the seniors of the applicant were waiting for promotion, the applicant could be promoted as LDC on accrual of the vacancy in the quota in the year 1994 only. The applicant had in his earlier OA No.955/2000 claimed a declaration that he was entitled to be regularized with effect from 25.11.1987 as LDC and a direction to the respondents to promote him as UDC with effect from 28.10.1994 and TA etc. on par with Smt.U.Indira, the 3rd respondent in that case. The official respondents in that OA raised the contention that the applicant was promoted rightly in the year 1994 as LDC on his acquiring the eligibility criteria on accrual of a vacancy and therefore, he was not entitled to the reliefs sought. The entire rival contentions of the parties were examined threadbare and it was observed in paragraphs 8 and 9 of the order in OA No.955/2000 as follows:


"8. The claim of the applicant for regularization which was required to be considered in terms of para 4 of the judgement was in fact considered by the competent authority more than once. By A2 order dated 25.3.1994, the applicant was told that he would become eligible for promotion as L.D.C. in the 10% quota only in the year 1992 and that the vacancy of L.D.C. which was in existence in 1987 got lapsed as there was no eligible candidate for such promotion. The applicant was appointed as L.D.C. on regular basis w.e.f. 28.10.1994.

Aggrieved by that the applicant made a representation seeking review of the A9 order. By order A11 dated 4.1.1996, the applicant was clearly told that he would become eligible for consideration for promotion as L.D.C. only in the year 1992 and that rgw benefit accrued to the applicant by the order of the Tribunal in OA 1381/92 for counting the service as continuous for the purpose of fixation of pay and drawal of increments and that his claim for regularization w.e.f. 25.11.1987 as L.D.C. could not be acceded to. This order also was not challenged by the applicant. About 4 years thereafter, the applicant made a representation A12 again seeking regularization w.e.f. 25.11.1987 and parity in promotion with 3rd respondent, which has now been rejected by the impugned order. The learned counsel of the applicant to buttress the applicant's claim for a declaration that applicant stand regularized as L.D.C. w.e.f. 25.11.1987 argued that the appointment of the applicant w.e.f. 25.11.1987 as L.D.C. was made granting him relaxation and therefore the appointment has to be treated as regular and further relaxation if required should have been made and that if no vacancy was available, a supernumerary post should have been created to give effect to the directions of the Tribunal in OA 1381/92. We do not find any force at all in this argument. Relaxation cannot be claimed as of right. The claim of the applicant that he was appointed as L.D.C. w.e.f. 25.11.1987, granting him regularization is not correct. It was only an adhoc appointment to meet the administrative need, as it was made clear that adhoc promotion would be tenable only till a person nominated by the Staff Selection Commission would report. The learned counsel further argued that as per the settled position of law, seniority should count from the date from which an official continues to officiate. Adhoc service if regularized without break and if before making the adhoc appointment all those who are eligible in the feeder cadre for promotion had been considered, then it has been held that adhoc service should count for regularization. The facts of the case on hand do not fit in with the above proposition of law. At the time when the applicant was appointed as L.D.C. by promotion against 10% quota from Group-D staff, the applicant did not attain the eligibility criteria in the recruitment rules. The applicant was holding the post of Sepoy substantively and was only officiated on adhoc basis as L.D.C. Various orders A2, A9 and A11 turning down the claim of the applicant for regularization as L.D.C. w.e.f. 25.11.1987 was not challenged by the applicant and his right to challenge these orders have already become barred by limitation. Although the applicant was told by A11 orders dated 4.1.1996 that his claim for regularization w.e.f. 2.11.1987 could not be acceded to, for 4 years the applicant did not agitate the issue at all. He made a representation thereafter only on 15.12.1999 (A13) long after a right to challenge A11 was barred by limitation. The impugned order the respondents A14 gives cogent reasons for turning down the claim of the applicant which was not based on any legal right. Therefore, we do not find any infirmity with the impugned order or any reason for judicial intervention.

9. In the light of what is stated above, the application is dismissed. No costs."



8. It is evident from what is quoted above that the claim of the applicant for being treated as a regular LDC with effect from 25.11.1987 and his claim for promotion as U.D.C. with effect from 28.10.1994 was rejected by the Tribunal. Since the claim of the applicant for promotion as U.D.C. with effect from 28.10.1994 itself was rejected by the Tribunal for the reasons recorded in paragraph 8 of the order quoted above, we fail to understand how the applicant can now claim promotion with effect from 24.11.1991. The learned counsel of the applicant stated that the claim for promotion as U.D.C. with effect from 24.11.1991 is based on the relaxation mentioned in A-3 order dated 16th August, 1990 whereby the the 7 years of service as LDC for promotion as UDC had been reduced to 4 years. However, it is necessary, according to the relaxed qualification, that a person to be promoted as UDC should belong to the clerical cadre. The applicant by A-1 order although was appointed as LDC on adhoc basis was not borne in the clerical cadre but was holding the post of Sepoy substantively. The learned counsel of the applicant invited our attention to the observations of the Apex Court in Santhosh Kumar Vs. State of Andhra Pradesh & Others reported in 2003 (1) SCC 497 at paragraph 11 of the judgement relying on paragraph 47 of the judgement of the Apex Court in Direct Recruit Class II Engineering Officers' Association case (1990 (2) SCC 715) and argued that even officiating service continued till regularization in cases where the appointment is made not following the procedure laid down by the rules would count for seniority and that the appointment of the applicant as officiating LDC made by A-1 order not having been made in accordance with the rules and the same having been continued till



the applicant was regularized in the year 1994, according to the said paragraph 47 of the judgement of the Apex Court in Direct Recruit Class II Engineering Officers Association 's case, would apply to the applicant's case.

9. We are unable to agree with this argument of the learned counsel. It is profitable to extract paragraph 47 (A) & (B) of the judgement of the Apex Court in Direct Recruit Class II Engineering Officers Association's case, which reads as under:

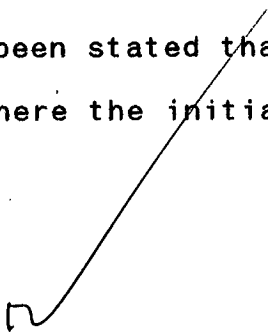
"47.To sum up, we hold that:

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

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

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

10. It is evident from the very perusal of A-1 that the appointment of the applicant as LDC within a period of six months from the date of his entry into the grade of Sepoy was purely adhoc and a temporary arrangement till the regular nominee of the Staff Selection Commission against the direct recruitment would become available and therefore was a stop gap arrangement. Under these circumstances, we hold that the case of the applicant is covered by sub paragraph (A) of paragraph 47 of the judgement quoted above, wherein it has been stated that the corollary of the above rule is that where the initial appointment is only

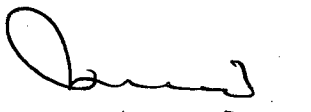


adhoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering seniority. This aspect has been taken note of by the Tribunal while deciding the OA No.955/2000.

11. In the light of what is stated above, we find that there is absolutely no basis for the claim of the applicant for the reliefs sought in the application.

12. In the result, the application fails and is dismissed, leaving the parties to bear their respective costs.

Dated 30th September, 2003.



T.N.T.NAYAR
ADMINISTRATIVE MEMBER



A.V.HARIDASAN
VICE CHAIRMAN

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