

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.NO. 6/2004

FRIDAY THIS THE 12th DAY OF AUGUST 2005.

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. K.V. SACHIDANANDAN, JUDICIAL MEMBER**

**S.P. Rajendran S/o M. Kuttikrishnan
Assistant, Office of the Development Commissioner
Cochin Special Economic Zone
Residing at Sauparnika, Darshan Nagar
CSEZ P.O. Kakkanad, Cochin-37**

**N.T. Balachandran S/o late Kunhikrishnan Nair
Assistant, Office of the Development Commissioner
Cochin Special Economic Zone
CSEZ PO, Kakkanad, Cochin-37
residing at Abhilasham, Darshan Nagar,
CSEZ PO, Kakkanad, Cochin-37**

**Vijayalakshmi Nair w/o late PS Madhusudanan Nair
Assistant, Office of the Development Commissioner
Cochin Special Economic Zone
CSEZ P.O., Kakkanad, Cochin-37
Residing at C-19, Block-9
CPWD Quarters, Kakkanad, Cochin-30.....Applicants**

By Advocate Mr. TCG Swamy

Vs.

- 1. The Union of India represented by the
Secretary to Govt. of India
Ministry of Commerce and Industry
Department of Commerce
New Delhi.**
- 2. The Development Commissioner
Ministry of Commerce and Industry
Cochin Special Economic Zone
Kochi-37**
- 3. The Joint Secretary
Department of Commerce (Special Economic Zone)
Ministry of Commerce and Industry
New Delhi-11**
- 4. The Secretary
Department of Personnel & Training
Government of India, New Delhi.**Respondents

By Advocate Mr. TPM Ibrahim Khan, SCGSC

The Application having been heard on 4.7.2005 this Tribunal on
-12.8.2005- delivered the following

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicants in this O.A. are presently working as Assistants under the second respondent and are aggrieved by the order of the Government of India, Department of Personnel & Training directing amendment of Recruitment Rules so as to enable determination of different quotas for recruitment. The applicants are also aggrieved by the Recruitment Rules so amended for filling up the posts in the cadre of Assistant Development Commissioners (ADC for short) by applying the method of recruitment by 'post based' roster instead of 'vacancy based' roster. They have prayed for the following reliefs:

- (a) Call for the records leading to the issue of para 2 of Annexure A1 and quash the same
 - (b) Call for the records leading to the issue of para (iii) of Annexure A3 and quash the same to the extent it permanently apportions only 2 posts in the cadre of ADC for promotion.
 - © Call for the records leading to the issue of Annexure A2 and quash the same to the extent the title of the column 11 of its schedule reads percentage of the post'as against..... percentage of the vacancies..."
 - (d) Declare that the vacancies in the cadre of ADC are to be filled from different sources (i.e. promotions and deputation) by applying a vacancy based roster and not post based roster.
 - (e) Direct the respondents to consider the applicants for promotion against the existing vacancy of ADC in accordance with law and to grant the applicants all the consequential benefits thereof.
 - (f) Award costs of and incidental to this Application.
 - (g) Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case.
2. According to the facts submitted by the applicants the vacancies in the cadre of ADC were initially filled up by promotion/deputation from among persons holding analogous posts. There was only one post of ADC under the

second respondent. Subsequently, the number of posts was enhanced to 3 and the filling up of the vacancies was by promotion and also by deputation. In 2003, the Recruitment Rules were amended after considering various representations by the employees in the Assistants' cadre including the applicants. In the amended rules (Annexure A2) the method of recruitment has been prescribed in column. 11 as 33.33% by promotion failing which by deputation and 66.66% by deputation. The total number of posts in the cadre was enhanced to 6. The applicants are aggrieved by the title to column. 11 of the Schedule of Annexure A2 which would give the impression that the modes/methods for recruitment are to be operated by applying 'post based' recruitment roster instead of 'vacancy based' roster. If that were to be so, only two posts in the cadre of ADC will be considered for promotees and the remaining vacancies would not be available to them despite their long service in the feeder cadre. A representation submitted on the above grounds has been rejected by the respondents by Annexure A5. Applicants also contend that the action of the respondents is opposed to the dictum laid down by the Hon'ble Supreme Court in All India Federation of Central Excise Vs. Union of India & Others reported in 2000 (1)SLJ 24(SC) and also State of Punjab Vs. Dr. R.N. Bhatnagar reported in 1999 SCC (L&S) 513. In Annexure A1 which is a memorandum of Department of Personnel and Training dated 25.5.1998 the Ministries/Departments were directed to amend the Recruitment Rules in para 2 thereof with reference to the judgment of the Hon'ble Supreme Court in R.K. Sabharwal's case which ruled in favour of the change over from the existing 'vacancy based roster' to 'post based roster'. The Department of Personnel & Training have directed that on the basis of the dictum laid down in R.K. Sabharwal's case is to be applied even to the quota rota rule and it is on the basis of these directions of the Department of Personnel & Training that the respondents herein have amended the Recruitment Rules which is also evident

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from their contentions in para (iii) of Annexure A3. These directions therefore according to the applicants are *prima facie* based on erroneous premise and against the decision of the Hon'ble Supreme Court referred to above. It was also submitted that the applicants are seniormost in the cadre of Assistants and therefore are entitled to be considered for promotion and that at present there is only one vacancy and being the first vacancy it must be for promotion quota.

3. In the reply statement the respondents averred that the Cochin Special Economic Zone was set up in the year 1984 when one post of Assistant Development Commissioner was sanctioned and this was subsequently increased to 3 posts in June, 1987. The Recruitment Rules were amended in October, 1997 and the method of recruitment prescribed therein was by 'Promotion/Deputation'. Subsequently the one post of ADC was filled up by promotion in 1999 through UPSC from the post of Office Superintendent. The post of Office Superintendent in all the Special Economic Zones was downgraded to Assistant in September 2001 and the feeder grade to the post of ADC was also downgraded to Assistant and the number of posts were also increased from 3 to 6 by restructuring. The Recruitment Rules for ADC was suitably amended in July, 2003 as in Annexure A2 taking into account the strength of feeder cadre i.e. Assistant and prescribing 33.33% by promotion and 66.66% by deputation. According to them Annexure A3 is only a clarification issued on the various representations made by the applicants and others. It only states that as no direct recruitment is involved for filling up the posts, maintaining a running account of rotation of vacancies is not required and that post based reservation as prescribed by DOPT's OM dated 2.7.1997 will apply to the post of ADC which are filled by promotion. The amendment to col. 11 of the Recruitment Rules is carried out in accordance with the DOPT guidelines dated 25.5.1998. The amendments so carried out and also para 2 of Annexure A1 were not violative of either articles 14 or 16 of the Constitution of India nor



arbitrary or discriminatory. Further they have submitted that the applicants are entitled to promotion as ADC against 33.33% of posts earmarked for them in the said cadre and that one vacancy was also filled up by promotion in February, 1999 as per earlier rules and one post of ADC was filled in December, 2003 in accordance with the rules therefore the percentage of posts specified for promotion quota in the Recruitment Rules has been filled up and there is no vacancy.

4. The applicants filed a rejoinder reiterating the earlier arguments and that the alleged promotion ordered in February 1999 cannot be adjusted against promotions falling due after Annexure A2 became operational.

5. The respondents also have filed additional reply statement maintaining their original stand.

6. Firstly we shall deal with the contentions of the applicants on the illegality of the circular of the Department of Personnel dated 25.5.1998 and the consequential amendment made in the Recruitment Rules. The learned counsel for the applicants relied mainly on the two judgments of the Hon'ble Supreme Court in State of Punjab Vs. Dr. R.K. Bhatnagar and All India Federation of Central Excise Vs. Union of India & Others to buttress their argument, that the amendment to the Recruitment Rules is based on an erroneous interpretation of the application of the judgment in R.K. Sabharwal case which was applicable even in cases where the vacancies are to be filled up by applying the quota/rota rule from different sources. The decision rendered by the Constitution Bench in R.K. Sabharwal case was in connection with Article 16(4) and the operation of the roster for achieving reservation for SC/STs as per the scheme of reservation. According to that judgment the reservation for the categories SC/ST in employment has to be achieved by earmarking the requisite percentage of posts for reserved category and by fixing these points on a roster and when such a roster cycle is followed for the posts earmarked for reservation it would enable

the requisite reserved category of candidates to fill up these posts. When that is done the roster would be treated to have served its purpose for whenever a reserved candidate vacates a reserved post the said post was liable to be filled only by a candidate belonging to the reserved category. If after the roster is first operated and again it is operated on future vacancy a situation would arise where the permitted quota of reservation would be exceeded. It was to avoid that contingency that the Hon'ble Supreme Court laid down the principle in R.K. Sabharwal case. The operation of the quota rule and the roster cycles between direct recruits and promotees is on a different footing and the position has been distinguished clearly in the judgment in Dr. R.N. Bhatnagar by the Hon'ble Supreme Court in the following manner:

"It has therefore, to be appreciated that when posts in a cadre are to be filled in from two sources, whether the candidate comes from the source of departmental promotees or by way of direct recruitment, once both of them enter a common cadre their birthmarks disappear and they get completely integrated in the common cadre. This would be in consonance with the thrust of Article 16(1) of the Constitution of India. No question of exception to the said general thrust of the constitutional provision would survive as Article 16(4) would be out of the picture in such a case. Consequently, the decision rendered by the Constitution Bench in R.K. Sabharwal case in connection with Article 16(4) and the operation of roster for achieving the reservation of posts for SCs, STs and BCs as per the scheme of reservation cannot be pressed into service for the present scheme of Rule 9(1) is not as per Article 16(4) but is governed by the general sweep of Article 16(1). The attempt of learned counsel for the respondent to treat a quota rule as a reservation rule would result in requiring the State authorities to continue the birthmarks of direct recruits and promotees even after they enter the common cadre through two separate entry points regulating their induction to the cadre. Therefore, the roster for 3 promotees and one direct recruit is to be continued every time a vacancy arises and there is no question of filling up a vacancy arising out of a retirement of a direct recruit by a direct recruit or on the retirement vacancy of a promotee by a promotee. Consequently, the question of rotating the vacancies as posts or for treating the posts mentioned in the rules of recruitment as necessarily referable to total posts in the cadre at a given point of time in the light of R.K Sabharwal judgment, therefore, cannot survive for the case of a quota rule between direct recruits and promotees, the same is to be judged on the touchstone of Article 16(1) and the statutory rules governing the recruitment to the posts of Professor constituting the Punjab Medical Education Service (Class-I) and not on the basis of article 16(4). The Division Bench in the impugned judgment with respect wrongly applied the ratio of R.K. Sabharwal case governing Article 16(4) to the facts of the present case which are governed by Article 16(1)."

7. It is evident from the above observations of the Apex Court that they have made a clear distinction between the reservation under Article 16(4) and the scope of Article 16(1) of the Constitution which guarantees equality of opportunity in the matter of appointment in Government service to all citizens of India. This position was further confirmed in the second judgment referred to by the applicants i.e. All India Federation of Central Excise Vs. Union of India & Others in which the Indian Customs and Central Excise Service Group-A (Amendment) Rules, 1998 providing for 6:1:2 quota for promotion to Group-A from Supdts Excise, Supdts. Customs and Appraisers came up for interpretation before the Court. Here again the petitioners had relied upon R.K. Sabharwal case and the observation therein that such reservation has to be on the principle of 'post based' in order to ensure the special provision of Article 335 of the Constitution relating to adequate number of SC/ST in the services. On the other hand the Court observed that so far as the normal quota-rota rule between two feeder channels of recruitment for their promotion between direct recruitment and promotees or promotion quota between different feeder cadres, the relevant portion of the decision in Paranjit Singh Sandhu and Others Vs. Ram Ragha and others, State of Punjab Vs. Dr. R.N. Bhatnagar would apply. They pointed out the observations in Paranjit Singh's case as follows:

"What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre it meant that quota should be co-related to the vacancies which are to be filled in. Who retired and from what source he was recruited may not be very relevant because retirement from service may not follow the quota rule."

8. The sum and substance of the above observations of the Apex Court is that there is a clear distinction between the scheme of reservation as enunciated in Sabharwal case and the system of quota between two feeder channels and whenever vacancies occur, the appointing authority should go on recruiting according to the quota and it was not permissible to treat any vacancy as a vacancy earmarked to the category to which the retiree belonged before

being promoted to the post. Hence the ratio of the judgment is that once a recruitment is made from two channels the identity of the person get merged and the posts cannot be treated as reserved for any category.

9. Identical situation exists in this case. Though the Recruitment Rules do not prescribe direct recruitment, there is a quota between two feeder categories i.e. one by promotion and the other by deputation. Hence the same principle would have to be applied. In the light of this well settled position of law, para 2 of the instructions in Annexure A1 and the consequent amendment made in col. 11 to the schedule to the Recruitment Rules in the Appendix replacing the word 'vacancies' by the word 'posts' are irrelevant and have to be held to be arbitrary and discriminatory and violative of Article 16(1) of the Constitution of India. It appears to us that the instructions in Annexure A1 have been issued in 1998 mainly in pursuance of the Vth Pay Commission Recommendations and not in the light of the judgment in R.K. Sabharwal case. The Deptt. Of Personnel and Training themselves as evidenced from the OM issued at Annexure A6 enclosed along with the rejoinder filed by the applicants stipulating that all promotions should be vacancy based, seem to have reconsidered the matter. However, it also requires to be mentioned here that even if the word 'posts' occurs in the Recruitment Rule the dictum laid down by the Hon'ble Supreme Court would still be applicable as evidenced from the judgment in Dr. R.L. Bhatnagar case wherein the Recruitment Rules under challenge namely the Punjab Medical College Education Service (Class-I) Rules, 1978 the word 'posts' was used and the Supreme Court clarified that though the word 'posts' is used in Article 9 of the Rules it refers to 'vacancies' and not to the total posts in the cadre. Therefore, whether the word 'posts' or 'vacancies' is used the method of filling up will have to be necessarily following the procedure as enunciated in the judgment and according to the principles upheld by the Supreme Court. Therefore the contradiction lies not in the adoption of the words in the

Recruitment Rules but in the interpretation given to it by the respondents and the consequent confusion created in the mind of those implementing the Recruitment Rules by mixing up the reservation roster with the vacancy roster which is required to be maintained to ensure the quota rota rule. The Department of Personnel have issued instructions regarding the principles of determining the seniority of direct recruits vis-a-vis. promotees whereas rotation vacancies/posts according to quota have been prescribed in service rules. It is only in this context that the appointing authorities are required to maintain vacancy roster showing the total number of vacancies which arose and the number of vacancies filled up following the quota roster. This Register is not to be confused with the 'posts- based roster' which is maintained only to achieve the required per centage of reservation quota for SC/STs etc. This register/roster merely serves to identify separate entry points for the cadre and does not deal with reserved posts or any special class or category. Therefore any attempt to change a quota rule into a reservation rule has to be declared as illegal in the light of the above judgments.

10. The second contention of the applicants is regarding their claim for the existing vacancy based on the method of recruitment prescribed in the new amended recruitment rules. The respondents have contended that the new rules are only an amended version of the earlier Recruitment Rules. Earlier there was only one promotion post in the category of Office Superintendent. This post was down graded in September, 2001 in order to facilitate promotional prospects of the Assistants to the post of ADC. Accordingly in the new rule the Assistants are entitled to promotion to the post of ADC and there is no material change in the Rules. This contention is not acceptable as in the earlier rules the Assistants were not part of the feeder category at all. The post of ADC was to be filled up by promotion of Office Superintendent only. The Assistants have been made the feeder category only after the amendment to the rules was issued in July, 2003.

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The quota of promotion/deputation was also introduced in the recruitment rules considering that the post of ADC were 6 in number and , the feeder cadre consisted of only 8 posts. Therefore for all purposes the Assistants have come to be the feeder cadre in the zone of consideration only after the amended rules. Therefore the quota cycle should become operative only for the vacancies which arose after 2003. The submission of the respondents that one post filled in 1999 should be counted against the promotion quota is not acceptable. The only one post of ADC filled up by promotion in December, 2003 would be deemed to have been according to the new cycle of vacancies after the amendment and since two posts are earmarked for promotees, the next vacancy that has arisen should also be against the quota given for promotee in keeping with the 33.33% prescribed. The Hon'ble Supreme Court had also occasion to consider a similar situation in the same judgment in Dr. R.N. Bhatnagar Vs. State of Punjab and it was held that:

" The statutory rotational cycle envisaged under the rules would come into force only after the rules came into force and the decision under the earlier rotational system cannot be taken into account for computing the quota. Para 7(b) of the above judgement refers."

11. In the light of the above legal position we hold that para 2 of the amendment dated 25.5.1998 is against the dictum laid down by the Hon'ble Supreme Court in these two judgments referred to above and that it was not necessary to amend col. 11 of the Recruitment Rules to replace the word 'vacancy' by 'posts'. Accordingly we direct the respondents to replace the word in col. 11 of Annexure A2 by the word 'vacancy' as existed before in order to avoid any misinterpretation, based on the judgment in R.K. Sabharwal's case. The respondents are also directed to fill up the vacancies in the cadre of ADC, based on the vacancy and the quota prescribed in the Recruitment Rules and the quota in accordance with the observations made supra will now start operating w.e.f. the date by which the new Recruitment Rules came into force

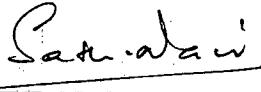
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and the earlier vacancies would not be counted against the same.

12. The OA is allowed as above but in the circumstances no order as to costs.

Dated 12.8.2005.


K.V. SACHIDANANDAN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

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