

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 87 of 2004

Friday....., this the 15th day of December, 2006

C O R A M :

**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE MR. N. RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

A.P. Moldeen Kutty,
S/o. Ahmed Kutty Haji,
Senior Tax Assistant,
Office of the Assistant Commissioner,
Customs Preventive Division, Kozhikode,
residing at Appurathupoyil, Puthuppady (P.O.),
Thamarassery (via), Kozhikode.

... Applicant.

(By Advocate Mr. Shafik M.A.)

v e r s u s

1. Union of India, represented by
Secretary, Department of Revenue,
Ministry of Finance, North Block,
New Delhi.
2. The Chairman,
Central Board of Excise & Customs,
North Block, New Delhi.
3. The Chief Commissioner of Customs &
Central Excise, Kerala Zone,
Central Revenue Building, I.S. Press Road,
Cochin - 682 018.
4. The Commissioner of Customs & Central Excise,
Cochin Commissionerate, I.S. Press Road, Cochin
5. The Secretary to the Government of India,
Ministry of Social Justice and Empowerment,
Shastri Bhawan, New Delhi.

... Respondents.

(By Advocate Mr. P. Parameśwaran Nair, ACGSC)

(This application having been heard on 4.12.06, the Tribunal
on 15.12.2006 delivered the following) :

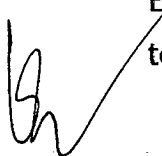


O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The applicant, an aspirant for promotion to the post of inspector has approached this tribunal on the ground that he has been illegally declared as not passed the cycling test conducted in 2004 in respect of 2003 vacancies. According to him, though he has certain physical impairment in his right hand, he could cycle well and he has been in possession since 1995 of driving licence for driving motor cycle with gear and light motor vehicles. Respondents' contention is that in the test he had not only failed but had also appended his signature in the statement of result, while the applicant disputes his knowledge of the same as his signature was obtained well before holding the test. The relief sought for by the applicant is to the extent of a declaration that he is eligible to take the interview and further process for promotion (under restructuring) to the post of inspector of customs/excise and consequential benefits.

2. A thumb-nail-sketch of the facts of the case is as under:-


(a) The applicant is presently working as a Senior Tax Assistant in Customs (Preventive) Division, Calicut. He is suffering from moderate disability of 40% of upper right limb vide proceedings of the Medical Board dated 17.8.92 (Annexure A/2). In the year 1996, he qualified in the departmental test for consideration for promotion to the post of Inspector of Central Excise. Though he was invited for attending the interview/physical test for consideration for promotion to the post of Inspector by



letter dated 20.1.97, subsequently call letter was withdrawn in view of the instructions of Board's letter dated 19.4.96 that executive posts of the Inspector of Central Excise, Preventive Officer and Examiner have been identified as not suitable for the appointment of physically handicapped persons. The applicant was invited by letter dated 10.10.2003 (Annex. A/6) for taking part in the physical standard / endurance test prescribed for the post of Inspector of Central Excise. On 15.10.2003, the applicant was also subjected to the physical endurance test of walking, cycling, etc. The applicant came to know that the DPC was held on 30.10.2003. The balance interviews and fresh inspection of other candidates were also conducted on the same day. The applicant was not intimated about the same at all. It appears that the department has considered the applicant in his capacity as a physically challenged candidate only and then rejected his candidature because his case will not come within the particular functional classification pertaining to the post of Inspector of Central Excise & Customs. The department ought to have considered the applicant against the general quota since he had undergone the prescribed physical endurance tests and he also satisfies the physical measurements prescribed for the post. In the said circumstances, the applicant submitted a representation (Annex. A/7) on 31.10.2003 to the third respondent requesting him to pass appropriate orders directing completion of the applicant's selection proceedings by interviewing him also and to promote him as Inspector at the earliest. Applicant has now received Annexure A1 reply to Annexure A7 rejecting his request.

3. Respondents have resisted the OA and their contention as contained in the counter is as under:-

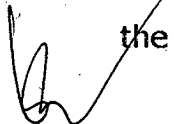
(a) The post of Inspector of Central Excise is one of the promotional avenues for individuals in the Ministerial cadre for career advancement. This does not imply that all the individuals in the Ministerial cadre will be promoted as Inspectors of Central Excise, rather, the process of promotion is on the basis of selection and is open only to those individuals who qualify in the required departmental examination for promotion and conform to the specified physical standards and also pass the physical endurance test. It is submitted that the applicant did not qualify in the cycling test, which is one of the two items in physical endurance test, conducted for promotion to the post of Inspector of Central Excise on 15.10.2003. As the job of an Inspector of Central Excise involves arduous field duties, able bodied men and women alone are considered for the post of Inspector of Central Excise. All officers who fell within the zone of consideration were called for the physical test. It was specifically stated in Annexure A6 that reservation for physically handicapped persons would be applicable only to those persons having disabilities as mentioned in the appendix to the Notification No 16-25/99-NI-I dated 31.5.2001. This order would not confer any right on the applicant to stake a claim for the post of Inspector of Central Excise. As the applicant did not qualify in the cycling test, he was not called for the interview held on 30.10.2003. The applicant is attempting to canvas his case for appointment in the general category for the sole reason that reservation has now been provided for a specified category of physically handicapped person in a job that involves arduous field duties. With regard to the averment that one Santhosh Kumar P.V. Has been promoted as an Inspector in physically handicapped quota, it is submitted



that the disability of the said person falls within the specified category and the promotion order in respect of the said person has specifically stated that he would be assigned to perform only those jobs that are identified as suitable for physically handicapped persons as mentioned in the appendix.

4. The applicant has filed rejoinder and additional rejoinder reiterating the contentions made in the O.A. and further stating that the applicant has affixed his signature in a piece of paper which the Inspector was holding after completing the walking and cycling. The result of the test was not recorded at that point of time. After cycling for two rounds and returning with the others, the respondents cannot now state that he has failed the test.

5. The counsel for the applicant has argued that the applicant has been driving cycle from his younger days and in his native place which is in a hilly area, he still rides bi-cycle. He has been holding the driving licence since 1995 and the respondents were under the mistaken impression that he claims his promotion under the physically handicapped quota, while the applicant can be considered under the general quota. He has also submitted that in the past, in such circumstances, the Tribunal ordered for an on the spot test of cycling by detailing an officer from the Tribunal itself and the same procedure could well be followed in this case as well. And, according to the applicant, in case the applicant qualifies in the cycling test, he should be

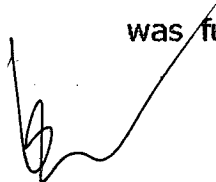


permitted to appear in the viva and once he clears the same, his date of promotion to the post of Inspector should be dating back to 2003-2004 in which batch he had participated in the test but illegally declared unsuccessful. Though the applicant has challenged Annexure A-1 order dated 19.01.2004, he had, at the time of arguments confined his claim only for participation as a general candidate and passing in the cycling test, without demanding any concession as a physically challenged candidate. As such, his relief as claimed in the OA is restricted to the extent as claimed in para 8(ii) and 8(iii) of the OA which is as under:-

"(ii) To declare that the applicant is also fully entitled for consideration for promotion to the post of Inspectors of Central Excise in the General quota, if his category of disabled are not included in the reserved categories, so as to further the avowed object of cadre restructuring by reducing stagnation and boosting employee morale;

(iii) To direct the respondents to subject the applicant to the interview and all further proceedings for promotion to the post of Inspector of Central Excise in continuance of the process of physical measurement and physical endurance tests undergone by him on 15.10.2003 and to promote him as Inspector of Central Excise with effect from the date of promotion of those promoted as per selection conducted on 15.10.2003."

6. Per contra, the counsel for the respondents submitsthat the applicant was fully aware of his failure in the cycling test as he had appended his

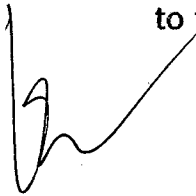


signature in the statement of result of the test. He has, therefore not been called for the future physical endurance test as he had once failed.

7. In rejoinder, the applicant's counsel asserted that in so far as signature on the result statement is concerned, the same was obtained from him well before the conducting of the test.

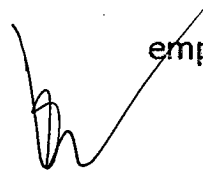
8. Arguments were heard and documents perused. The applicant fulfils all other requirements in so far as physical endurance test is concerned, save, according to the respondents that he could not clear cycling test. The rules providing for pass in cycling test, the same cannot be waived. At the same time, opportunity shall have to be given to the applicant to participate in the cycling test to show that he is capable of riding the bi-cycle with that standard of performance, which the authorities prescribe for every one. That the applicant is capable of driving automobiles cannot be a substitute for cycling as the purpose for the cycling test is not just covering certain distances but as a part of "physical endurance". Thus, passing in the cycling test is a must and the applicant is entitled to further chances.

9. The question is as to how to conduct the test and if the applicant passes the test, what would be the consequential result that has to follow. If he qualifies in the viva as well, whether his inclusion in the list of promotees to the post of inspector should be with retrospective effect or prospective?



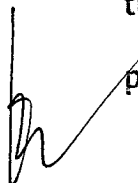
10. In so far conducting of the test is concerned, the respondents can again hold such a cycling test, either by reference to a medical board or by themselves, and if it is the latter, the authorities who conduct the test shall be from some other Commissionerate (not familiar with the applicant) and of the rank of Assistant Commissioner. The applicant could well be deputed to such other Commissionerate for undergoing the test, in which event, he would be entitled to TA/DA for a day. The result of the test conducted by a minimum of three officers, say, One Asst. Commissioner, one Superintendent and one Inspector may be obtained by the respondents and the same acted upon. If the applicant is declared passed in the cycling, the respondents shall proceed ahead with the further process of promotion i.e. viva and if the applicant succeeds in the viva, he should be entitled to promotion to the post of inspector.

11. As regards the question whether his promotion should be prospective or retrospective, though the applicant claims that he did pass the test but the authorities have illegally declared him as having not passed, unless concrete evidence could be shown it cannot be taken that the respondents are wrong in their assessment. Thus, in the test that may be conducted now, if he has passed, it should be construed that the applicant has practised and improved in his cycling capacity and thus, he could on his passing the test ~~shall~~ be empanelled in the very next batch after that batch in which the applicant had



participated earlier in October, 2003. Reason why the very next batch and not prospective is that the applicant had, without wasting any time, approached the Court on receipt of communication of rejection of his claim. Had there been delay in his filing the OA, the applicant would not have been entitled to retrospective effect of his promotion, subject to his qualifying in the physical endurance test and viva voce. At the same time, retrospectivity cannot date back to the period of October, 2003 as at that material point of time he did not qualify in the test. Here again, in the next panel, the place at which the applicant could be fitted is yet another small question. Though no rule exists in this regard, one can borrow the provisions available in the order dated 3rd July, 1987 which deals with inter se seniority of direct recruits and promotees and in the event of non availability of adequate number of direct recruits in the previous year, the vacancies are carried forward to the next year and those who qualify for recruitment would find place at the end of the next year's list. Like-wise, in the event of the applicant qualifying the tests, he shall rank at the bottom of the next batch.

12. The OA is disposed of with the direction to the respondents that necessary cycling test should be conducted in respect of the applicant as aforesaid and if the applicant passes the same, he shall be permitted to appear for viva (either with the next batch or separately, as convenient to the respondents) and in the event of his passing the viva voce too, his promotion shall date back as the last candidate in the next batch after that



batch (of October, 2003) in which the applicant had earlier participated. This drill shall be performed within a period of four months from the date of communication of this order.

13. No costs.

(Dated, the 15th December, 2006)



N. RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K B S RAJAN
JUDICIAL MEMBER

CVR.