

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A NO. 102/2004

MONDAY THIS THE 19th DAY OF JUNE, 2006.

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR GEORGE PARACKEN, JUDICIAL MEMBER**

K.C. Omana D/o late Cheeraman KM
Assistant Engineer (Civil)
O/o the Chief Engineer, Naval Works
Military Engineering Service,
Naval Base, Kochi-4
residing at Chaitram, Mavelipuram
Kakkanad, Ernakulam District.

Applicant

By Senior Advocate Mr. O.V. Radhakrishnan

Vs.

- 1 Engineer-in-Chief
 Director General (Personnel)EI(DPC)
 Military Engineering Services
 Engineer-in-Chief's Branch
 Kashmir House, DHQ PO
 New Delhi.
- 2 Command Chief Engineer
 Head Quarters, Southern Command
 Pune-411 001
- 3 Chief Engineer, Naval Works
 Military Engineering Services,
 Naval Base, Kochi-4
- 4 Union of India represented by its Secretary
 Ministry of Defence
 New Delhi.

Respondents

By Advocate Mr.TPM Ibrahim Khan, SCGSC

ORDER**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN**

The applicant is working as an Assistant Engineer (Civil) under the administrative control of the third respondent. The applicant who possessed a Degree in Civil Engineering was directly recruited and appointed as Superintendent B/R Grade-I against 12½ % of the vacancies earmarked for direct recruitment and the question that arises for consideration in this OA is whether a Degree holder like the applicant is required to pass the MES Service Procedure Examination for promotion as Assistant Engineer.

2 The background of the case can be narrated as follows. The post of Superintendent (Buildings and Roads) Grade-I was re-designated as Junior Engineer (Civil) and recruitment to the said posts was governed by MES Superintendent (Building and Roads) Grade-I and Grade-II Recruitment Rules 1983. According to Column 11 to the Schedule to the above Recruitment Rules 1983, the method of recruitment to the post of Superintendent (Buildings and Roads) Grade-I is by promotion against 87½% of the vacancies. The educational qualification and other qualifications required for direct recruitment is provided under Column 8 of the Schedule, which reads as under:

“(a) Degree in Civil Engineering of a recognised University or equivalent

(b) Diploma in Civil Engineering from a recognised Institution in the case of released emergency Commissioned Officers and Short Service

Commissioned Officers of the Corps of Engineers with three years Commissioned Service.

In the case of recruitment by promotion

(a) Superintendents B/R II who are Engineering Graduates in Civil Engineering or equivalent and have a minimum of 3 years regular service in the grade

or

(b) Superintendents B/R II who hold a recognised Diploma in Civil Engineering with a minimum of a five years regular service Superintendents (B/R and E/M) Grade-I after 1951 or had passed a school of Military Engineering/Colleges of Military Engineering course accepted by Engineer-in-Chief for the purpose upto 1951 in lieu of Procedure Examination.

Or

© A person appointed in the grade of Superintendent B/R Grade-II, with minimum of 10 years of service in the grade, in whose case educational and technical qualification have been relaxed by the government and have passed the procedure examination or have passed School of Military Engineering/CME Course accepted by Engineer in Chief for the purpose upto 1951 in lieu of Procedure Examination.

3 On a reading of the rules it is clear that the passing the Service Procedure Examination is prescribed for Diploma Holders only. The next higher post is that of Assistant Engineer (B&R) and the Recruitment to the above post is governed by MES Assistant Engineer B/R and Assistant Engineer E/M Recruitment Rules, 1978. Column 11 of the Schedule of the above Recruitment Rules is as follows.

“Promotion:

Superintendent (B/R) Grade-I with three years' regular service in the grade in the case of degree holder in Civil Engineering and 7 years' regular service in the grade in the case of diploma holders in Civil Engineering having passed the Military Engineering Service Procedure Examination.”

4 It is further stated that the scheme for pay promotion to the pre-revised scale of Rs. 2000-3500 on personal basis to the

Superintendents (B&R)/Superintendents (E&M) was extended by Government of India letter at Annexure A-5 dated 31.7.1998. The applicant was not given the benefit of such pay promotion on completion of 10 years regular service in the pre-revised scale of Rs. 1640-2900. Aggrieved by the non-consideration of her representation for grant of pay promotion, the applicant and one Smt. T.N. Jaya filed O.A. 1234/2000 before this Bench of the Tribunal seeking a direction to the respondents to grant them pay promotion in terms of Annexure A-5 and place them in the scale of Rs. 6500-10500 (revised) w.e.f. 9.11.1997 with all consequential benefits. The OA was allowed by directing the respondents to consider the applicant for placement without insisting on a pass in the MES Service Procedure Examination holding that the view taken by the respondents that passing of MES (Procedure) Examination is required for promotion for Engineering Graduates directly recruited to the post of Superintendents (BR) Grade-I in the scale of Rs. 1640-2900, is totally misconceived. The order of the Tribunal was implemented by the respondents after the applicant filed a Contempt Petition No. 8/2002 in O.A. 1234/2000. The applicant however, appeared later in the MES Examination and was declared to have passed the said examination as per part-II order dated 21.7.2003. Thereafter the applicant was promoted and posted as Assistant Engineer (Civil) w.e.f. 24.11.2003 on regular basis in the pay scale of Rs. 6500-10500 by order at Annexures A-12 and A-13. Thereafter, to the shock and surprise of the applicant the

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respondents have served a notice on 13.1.2004 stating that it came to the notice that the applicant appeared and passed the MES Examination only on 30.6.2003 whereas the crucial date of eligibility for promotion to the vacancy arising in the year 2003-04 is 1st January, 2003 and therefore her promotion is erroneous and the error is to be rectified. The applicant had been called upon to represent the matter if so desired within 10 days of the receipt of the said letter. The applicant has assailed this notice on the ground that it is passed on an erroneous presumption of facts and ignoring the earlier order of the Tribunal in Annexure A-8 which had already determined the eligibility of the applicant for such promotion and that the first respondent has no power or jurisdiction to enter upon a further enquiry in regard to the eligibility.

5 The respondents have filed a statement contending that the applicant is confusing the Recruitment Rules pertaining to the grade of Superintendent (B/R) Grade-I with the Recruitment Rules for promotion from Superintendent (B/R) Grade-I to Assistant Engineer. According to the respondents, passing the MES Service Procedure Examination is mandatory for both Degree holders as well as Diploma holders for promotion to the post of Assistant Engineer and the last line of column 11 of Annexure A-3 Recruitment Rules is regarding requirement of passing the examination applicable in the case of Degree holders and Diploma holders and the difference is only in the years of service under the experience criterion. O.A.

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1234/2000 was allowed relying on the Government orders dated 31.7.1998 which directed placement of the directly recruited Superintendents Grade-I in the scale of Rs. 2000-3500 and there was no condition stipulated therein that directly recruited Graduate Engineers should have passed the MES (Procedure) Examination for grant of financial up-gradation. It has also been submitted that special dispensation for grant of financial up-gradation under the MES scheme was given to the applicant without passing the MES Examination in compliance of the direction of this Tribunal in O.A. 1234/2000 and that it was in no way related to the eligibility criterion for promotion to the grade of Assistant Engineer which is governed by statutory rules. They have also contended that if the passing of such examination was not a pre-requisite, there was no need for the applicant to appear for the examination.

6 Rejoinder has been filed by the applicant pointing out that the relief granted to the applicants in O.A. 1234/2000 was not as a special dispensation but on the basis of declaration of law on proper consideration of the Recruitment Rules. The fact that the applicant appeared for the examination which was not required cannot be held against the applicant.

7 The respondents have filed an additional reply statement contending that the MES Service (Procedure) Examination has nothing to do with Diploma or Degree and procedures have to be

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learned during the service and it is an express condition for promotion for both Degree holders as well as Diploma holders who are required to be conversant with the procedures.

8 The Senior Counsel Shri O.V. Radhakrishnan appearing on behalf of the applicant contended in terms of the Recruitment Rules for promotion to the cadre of Assistant Engineers when compared to the Recruitment Rules for Superintendent Grade-I do not impose any additional qualification required for the directly recruited Superintendent (BR) Grade-I who are Degree holders. The earlier order of this Tribunal in O.A. 1234/2000 has already decided that the condition of passing the MES Service Procedure examination is not applicable in the case of grade promotion since it is not an eligibility condition for promotion or grade promotion. The same has to be applicable in the case of a regular promotion as well. The order of this Tribunal in Annexure A-8 has become final and binding on the respondents and the first respondent who was also party to the above OA is now estopped from contending that the applicant was not eligible in accordance with the Recruitment Rules is not a legally tenable argument. Therefore, the contention that the applicant was not eligible in accordance with the Recruitment Rules. He relied on the judgments reported in AIR 1977 SC 1680, on the principle of 'estoppel' and 'constructive res judicata' which prohibits reassertion of the cause of action and reopening of a finally settled decision. On the question of legitimacy of prescribing different conditions for

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Degree and Diploma holders he relied on the judgment of Roop Chand Adlakha and Others etc. Vs. Delhi Development Authority and Others (AIR 1989 SC 307), N.Suresh Nathan and another Vs. Union of India and Others (1992 Suppl. SCC 584), State of Rajasthan Vs. Prakash Chand and Others (1998) SCC 1) and State of Uttar Pradesh Vs. Shri Brahm Datt Sharma and another (AIR 1987 SC 943). The learned counsel for the respondents on the other hand drew our attention to the difference in the provision in the Recruitment Rules for promotion to the post of Superintendent (B/R) Grade-II to Superintendent (B/R) Grade-I and that for promotion to the grade of Assistant Engineer contained in the orders NO. 304 (SRO) dated 6.10.1978 and argued that the Recruitment Rules are sacrosanct and the applicant cannot take undue advantage of them in a way that suits her.

9 We have heard the arguments of the learned counsel on both sides and perused the pleadings and judgments referred to. The provisions of the Recruitment Rules have already been extracted. First of all, the contention of the respondents that the applicant in the pleadings has confused the provisions of the Recruitment Rules for the post of Superintendent (B/R) Grade-I and that of Assistant Engineer, has to be refuted as the attempt of the applicant to draw attention to the rules governing the post of Superintendent (B/R) Grade-I is only to point out the position that she is a direct recruit to the grade and at that stage passing the Procedure Examination was

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not an essential qualification for Degree holders in Civil Engineering and that such a condition was insisted upon only for promotion for Superintendent (B/R)/Grade-II who were Diploma holders. Thus the distinction that the passing of the procedure examination was prescribed only for those who held a Diploma in Civil Engineering only and to those cases wherein the educational qualification may be relaxed by the Government was highlighted in order to prove the point that the prescription of passing the examination had a nexus with the qualification. The applicant's case is not built on that premise alone.

10 We are concerned in this OA with the consideration of the applicant for promotion to the post of Assistant Engineer. These posts are to be filled 100% by promotion from Superintendent (B/R) Grade-I and a plain reading of column 11 of SRO 304 dated 6.10.1978 extracted supra would show that here also the Superintendent Grade-I who are degree holders have been differentiated from Diploma holders as they are required to possess only 3 years regular service whereas in the case of Diploma holders in the same grade 7 years regular service has been prescribed in addition to passing the MES (Service Procedure) examination. The construction of the rule should point to the intention of the rule makers. The intention of the Rule makers appear to be all along to draw a distinction between Degree and Diploma holders. If it were the intention to enforce passing of the MES Service Procedure

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examination applicable to all, the rule should have been worded differently- either by showing this condition separately or repeating the requirement of passing the examination under both the categories. The respondents contend forcefully that a pass in the procedure examination is mandatory for both the Degree holders and Diploma holders whereas a reading of the rule creates some doubt about this contention. It is settled law that statutory enactments must ordinarily be construed according to their plain meaning.

11 The more relevant issue that has been raised in the OA and in the arguments of the learned Senior Counsel is whether a fresh decision is required now on the construction of the rule when already in O.A. 1234/200 this Tribunal has decided the matter regarding the eligibility of the applicants promotion to the higher scale of Assistant Engineer (pre-revised scale of Rs. 2000-3500 revised scale of Rs. 6500-10500). In the above OA the Tribunal was concerned with the question of eligibility in the context of grade promotion which was extended to the applicants on a personal basis by the Government of India letter dated 31.7.1988. The respondents have contended that this was a special dispensation and therefore they had complied with the Tribunal's orders. But the eligibility for financial upgradation and functional promotion is governed by the same statutory rules and this argument is not tenable. It is not disputed that the rule position in the case of financial upgradation under the ACP scheme or under

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similar schemes is also subject to fitness on the basis of evaluation of character rolls and other prescriptions in the Recruitment Rules. The conditions prescribed in the Government of India letter for grant of grade promotion will further make it clear as it stipulates "(a) Promotion to the pre-revised scale of Rs. 2000-3500 (revised scale of Rs. 6500-10500) shall be given on fitment basis after completion of regular service in the pre-revised scale or equivalent revised scale (ii) the benefit of FR 22 1(a)(1) shall be admissible in the case." There is no dispute as far as the rule position in respect of functional promotion and regular promotions ^{is} concerned. It was already held by this Tribunal in O.A. 1234/2000 that the eligibility condition for grade promotion did not entail a pass in the Procedure examination and the same ratio should hold good in the context of regular promotion also.

12 Since the fitness of the applicant had already been assessed before giving the grade promotion and the applicant had been placed on the revised scale of Rs. 6500-10500 by order dated 27.6.2003 there is no need again to assess the fitness for regular promotion for placing against the regular vacancy in the post of Assistant Engineer on the basis of Recruitment Rules, reopening the entire issue which is the basis for issuing the impugned notice at Annexure A-14. Just because the applicant had appeared in the examination and passed it in 2003, it cannot be taken to negate the order of this Tribunal which had declared that a pass in the procedure

examination was not a mandatory requirement for promotion. The action of the respondents is therefore barred by principle of estoppel and constructive res judicata as alleged by the learned counsel for the applicant. The ratio determined in the above judgment in State of Uttar Pradesh Vs. Nawab Hussain (AIR 1977 SC 1680) that there can be no reassertion of the cause of action and reopening of a finally settled decision is applicable in this case.

13 The learned counsel for the applicant cited several other judgments based on the doctrine of qualification and also that it is perfectly legitimate to prescribe differential qualifications. We do not want to enter into the merit of this question as it is not the Recruitment Rules which is under challenge here. Without going into the merit of prescription of differential conditions under the Recruitment Rules, the question to be decided here is whether the decision already rendered can be reopened on reassertion of the same facts which were considered before taking the earlier view. in the light of the orders of the Hon'ble Supreme Court in the judgment cited above we hold that it is not legal to embark upon a fresh enquiry and investigation into a fact which was already settled and the respondents cannot be permitted to revert to their original stand which was not accepted and ^{was} rejected by this Tribunal.

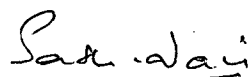
14 In this view of the matter we allow the OA. Annexure A-14 is set aside. The respondents are directed not to revert the applicant

from the post of Assistant Engineer (Civil) or disturb her promotion to the cadre of Assistant Engineer which has already been settled by Annexure A-8 order. No costs.

Dated 19.6.2006.



GEORGE PARACKEN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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