

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 103 OF 2011

Monday, this the 31st day of October, 2011

CORAM:

**HON'BLE Mr. JUSTICE P.R. RAMAN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

Binu S. Panicker
S/o. C.K. Sadanandan
Lower Division Clerk
C- Section, Headquarters
Southern Naval Command
Naval Base, Cochin – 682 004.
Residing at : Quarters Type I
No. B-6, Dawson Vihar
Thycoodam, Vyttila, Cochin 19.

- Applicant

(By Advocate Mr. T.C. Govindaswamy)

Versus

1. Union of India, Represented by
Secretary to the Government of India
Ministry of Defence, New Delhi – 110 011.
2. The Chief of Naval Staff
Headquarters Naval Command
Ministry of Defence, New Delhi – 110 011.
3. The Flag Officer Commanding-in-Chief
Southern Naval Command
Cochin – 682 004.
4. The Staff Officer (PNA)
Headquarters, Southern Naval Command
Cochin – 682 004.
5. All India Naval Clerks Association
Represented by its General Secretary
Mr. T.M. Mathew, S/o. Late T.J. Mathai
Naval Base, Cochin – 682 004.

6. T. Prameela, L.D.C
W/o. N. Peethambaran
Material Organisation (Kochi)
Naval Base, Cochin – 682 004.
7. Mini Haridas, L.D.C.
W/o. L. Haridas
Material Organisation (Kochi)
Naval Base, Cochin – 682 004.
8. K.P. Radha, L.D.C
W/o. K.B. Krishnan
Material Organisation (Kochi)
Naval Base, Cochin – 682 004.
9. T.P. Nandaraj, L.D.C
S/o. K.P. Pankajakshan Pillai
NAQAS(K), Naval Base
Cochin – 682 004.

- Respondents

(By Advocate Mr. Sunil Jacob Jose, SCGSC for R1-4)

(By Advocate Mr. S. Radhakrishnan for R 5-9)

The application having been heard on 31.10.2011, the Tribunal on the same day delivered the following:

ORDER

HON'BLE Mr. JUSTICE P.R. RAMAN, JUDICIAL MEMBER

Though there are two applicants in this case, the first applicant sought to withdraw her case. She obtained some other promotion and as per the order dated 13.07.2011, the first applicant's name was deleted from the party array. Thus, there is only one applicant remaining, whose case is to be considered in the following background.

2. The applicant, is a Lower Division Clerk, is aggrieved by the denial of promotion to the post of Upper Division Clerk. He was initially recruited as



Lower Division Clerk on 23.06.1997 in the Air Force and later transferred to Southern Naval Command on compassionate ground and he joined there on 16.12.2006. He is an Arts graduate. According to the applicant, going by the relevant Recruitment Rules relating to the post of Upper Division Clerk, posts are to be filled up 75% by promotion of LDC and 25% through Limited Departmental Competitive Examination (LDCE). Annexure A-1 is the copy of the Recruitment Rules produced in this case. Annexure A-2 is the guidelines for conducting Limited Departmental Competitive Examination for filling up 25% of vacancies in the grade of UDC published by the 2nd respondent. It is the contention of the applicant that in terms of Annexure A-1, 25% LDCE quota for promotion to the post of UDC should be based on the number of posts and not the number of vacancies. In this connection, the applicant sought to rely Col. 9 of the Recruitment Rules Annexure A-1, wherein the method of recruitment, whether by direct recruitment or by absorption or by promotion and percentage of the posts to be filled by various methods etc. are prescribed. In Col. 9, it merely says that 75% by promotion and 25% by Limited Departmental Competitive Examination. However, stress is made on the left hand side Col. 9 to contend that each of the vacancy should be worked out by each of the post and not based on the vacancies. We may extract Col. 9 as follows:-

"9 Method of rectt: Whether by direct rectt. or by absorption or by promotion and percentage of the posts to be filled by various methods }	75% by promotion.
	25% through Limited Departmental Competitive Examination"

It is contended that, if it is filled up based on the post available then the applicant has the case whereas the vacancies has to be filled up by seeing



the number of vacancies available, then admittedly he will have no chance of being appointed. Thus, based on the admitted position, the only question that arises for consideration is under 25% quota, which is earmarked for LDCE, should it be based on number of posts or should be based on the number of vacancies available. It is contended by the applicant that Annexure A-1 being the Recruitment Rules framed under Article 309 of the Constitution of India, the same cannot be amended or altered by any executive order, as the case may be. It is contended that based on R.K. Sabharwal's case, the vacancy has to be filled up based on the post available and not based on the vacancies available. According to the applicant, the O.M issued vide Annexure R-5 (a) as per which the earlier OM has been rescinded and on the basis of the subsequent decision of the Supreme Court, 25% of the recruitment to the post of LDC should be filled up based on the number of vacancies for which necessary Recruitment Rules can be amended. But, no such amendment was made. So, according to the applicant, the filling up the posts is to be based on the Recruitment Rules and cannot be made based on the instruction issued.

3. The first respondent and the respondent No. 5 to 9 have filed separate reply statement. In the reply statement filed by R 5-9, the point as raised by the applicant has been met. It is contended that in Annexure A-1 Recruitment Rules, it is stated that 75% of the posts are to be filled up by promotion and 25% should be filled up from LDCE. Annexure A-2 dated 19.10.2009 by which the Integrated Headquarters of Ministry of Defence (Navy) (DCP) has informed all concerned that as per the revised guidelines

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for conducting the Limited Departmental Competitive Examination for promotion to the grade of Upper Division Clerk in the Commands against 25% vacancies, it is clarified that LDCE for selection of LD Clerks for promotion to the grade of UD Clerks against 25% quota of year-wise vacancies should be held by the respective Command Headquarters. They have produced the relevant O.M dated 19.01.2007 as Annexure R-5(a), which is an Office Memorandum. Reference is made to both in R.K. Sabharwal's case (1995) 2 SCC 745 and also to Dr. R.N. Bhatnagar's case; (1999) 2 SCC 330. Para 5 and 6 of the O.M reads as follows:-

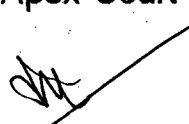
"5 It has, therefore, been decided to rescind the instructions contained in Para 2 of this Department's OM dated 25.05.1998, reproduced in paragraph 1 of this OM. The column 11 of the Annexure 1, appended to this Department's OM No. AB-14017/12/87-Estt. (RR) dated 18.03.1988 would continue in its form that existed before the issuance of OM dated 25.05.1998. For the sake of clarity, the column 11 of Annexure 1 would be as follows:-

Method of recruitment;

Whether by direct recruitment or by promotion or by deputation/absorption & percentage of the vacancies to be filled by various methods.

6. In case column 11 of the Annexure-1 in regard to Recruitment Rules for posts has been amended by the ministries/departments in accordance with the instructions contained in the OM of 25.05.1998, the same may be amended / notified again, as indicated in paragraph No. 5, in consultation with the Legislative Department. This may be done without making reference to the Department of Personnel & Training / Union Public Service Commission."

4. According to them, the direction was issued in the light of the ratio laid down by the Supreme Court reported in (1999) 2 SCC 330; State of Punjab and Others v. Dr. R.N. Bhatnagar, wherein the Apex Court clarified



that the law laid down in Sabharwal's case regarding reservation has to be worked out on the basis of roster points taking into consideration vacancies that fall due at a given point of time. The concept of 'vacancy' has no relevance in operating the percentage of reservation. The number of posts in the particular category are to be filled up from Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage or reserved posts. It is their further contention that Annexure A-2 letter was issued based on Annexure R-5(a) and the respondents conducted the selection in tune with Government of India instructions and the confusion created by them being clarified by Bhatnagar's case, even if Annexure A-1 uses the word "post" it has to be understood as vacancy only as otherwise it will become unconstitutional and contrary to Article 16(1) of the Constitution of India. The same stand is taken by the first respondent.

5. We have heard the parties. No doubt, the argument of the learned counsel for the applicant, Mr. T.C. Govindaswamy that a Recruitment Rules cannot be amended by any executive order in the form of instruction or memorandum issued, legally hold as valid. But, how Annexure A-1 Recruitment Rules should be understood in the light of the Apex Court decision arise for consideration. The relevant rule namely Punjab Medical College Education Service Class -I Rules, which came up for interpretation in **(1999) 2 SCC as follows:-**

" (9) Method of appointment-

(d) In the case of Professors:

(i) 75 per cent posts by promotion from amongst the Additional Professors, or where Additional

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Professors are not available, from amongst the Associate Professors, or, where Associate Professors are not available, from amongst the Assistant Professors, or by transfer of officials already in the service of the Government of India, or the State Government;

(ii) 25 per cent posts by direct recruitment"
[Emphasis given by us]

Thus, exactly the same position emerged under Rule 9 as quoted above for consideration. The Hon'ble Supreme Court held that though the word "post" is used in Rule 9 of the Rules, it cannot be said that it must necessarily refer to total posts in the cadre and not to vacancies. It is obvious that recruitment to fill up the vacancies as may be existing from time to time in the cadre is controlled by the quota or percentage of posts earmarked for promotees as compared to direct recruits. If we understand the present rule also in the same manner as laid by them, it cannot be necessary that it refers to the total cadre and not the vacancies. There is another reason why the recruitment should be based on number of vacancies. It is clearly clarified in Bhatnagar's case in para 11, page 342 the Apex Court held as follows:-

"11. On the other hand, the situation which has fallen for our consideration in the present case in the light of Article 16(1) is squarely covered by a decision of this Court in *Paramjit Singh* case as clarified by a latter decision in the very same case reported in *Paramjit Singh*. In the aforesaid main case, D.A. Desai, J., speaking for a Bench of two learned Judges of this Court, had to consider in para 11 of the Report a recruitment rule which permitted fixed percentage of posts to be filled up in the given cadre from two different sources, namely, promotees and direct recruits. Rule 6 of the Punjab Police Service Rules, 1959 which came up for consideration in that case provided for a method of recruitment from two different sources, i.e., 80% by promotion from the rank of Inspectors and 20% by direct recruitment. Examining the working of the aforesaid quota rule for recruitment in the light of the relevant rotational scheme of vacancies in the cadre to which such recruitment was to be made, the following pertinent observations were made in para 11 of the Report (SCC p. 485).



"11. Where recruitment to a cadre is from two sources and the Service Rules prescribe quota for recruitment for both sources a question would always arise whether the quota rule would apply at the initial stage of recruitment or also at the stage of confirmation. Ordinarily, if quota is prescribed for recruitment to a cadre, the quota rule will have to be observed at the recruitment stage. The quota would then be correlated to vacancies to be filled in by recruitment but after recruitment is made from two different sources they will have to be integrated into a common cadre and while so doing, the question of their inter se seniority would surface."

6. As a matter of fact, the Supreme Court has referred to an earlier decision reported in **Paramjit Singh case in 1983 AIR 314** and the relevant para from Paramjit Singh case is quoted in the judgment as above noticed. Subsequently, in the decision reported in **1999 SCC 384** para 13, it has been reiterated by Apex Court as follows:-

"13. Reliance by the petitioners is placed upon *R.K. Sabharwal* case. That case deals with the principle that the posts vacated by an officer recruited from the SC/ST category must be filled in only by the same reserved category. This is because of the special provision in Article 335 of the Constitution of India relating to adequate representation of the SCs/STs in the services. The birthmarks thee remain even on promotion in as much as a particular number of posts in the promotional category are reserved to be filled in only from among SCs/STs. On the other hand, so far as a normal quota rule between two feeder channels for recruitment or promotion is concerned, be it between direct recruits and promotees or promotion by a quota between different feeder groups (as in the case before us), the relevant precedents are *Paramjit Singh Sandu v. Ram Rakha Mal* and *State of Punjab v. Dr. R.N. Bhatnagar*. In Paramjit Singh case which related to recruitment from among promotees and direct recruits and promotees were treated as a rule of reservation, then because of the frequent retirements of the promotees who were generally closer to retirement, most vacancies in the promotional posts would repeatedly go to the aged promotees leaving little scope for direct recruitment. At p. 196, the learned Judge clarified as follows: (SCC para 6).



"What this Court meant while saying that when a quota rule is prescribed for recruitment to a cadre, it meant that quota should be correlated 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"

The learned Judge further pointed out : (SCC p. 196, para 6)

"Promotees who come to the service at an advanced age may retire early and direct recruits who enter the service at a comparatively young age may continue for a long time. If, therefore, in a given year larger number of promotees retire and every time the vacancy is filled in by referring to the source from which the retiring person was recruited, it would substantially disturb the quota rule itself. Therefore, while making recruitment quota rule is required to be strictly adhered to."

7. From the above discussion, it can be seen that if as contended by the learned counsel for the applicant, the word "post" is interpreted as number of posts available and not number of vacancies, then it will be opposed to constitutional scheme under Article 16(4) as held in Bhatnagar's case. Rule 9 will have to be interpreted, if possible, consistent with the constitutional scheme and save it from the vires of being violative of the Constitution. The Supreme Court in its judgment said that the word "post" cannot be understood to mean the number of posts available, but it has to be understood that the vacancies available and in the light of the same, we have no hesitation to hold for the purpose of recruitment to the post of Upper Division Clerk from the earmarked quota, the 25% from LDC is to be with reference to the number of vacancies to be filled up. This position has been clarified by the O.M at Annexure R-5(a). In the above facts and circumstances, it cannot be said that the Recruitment Rules to the post of UDC from against 25% quota available for the LDC based on number of vacancy is in any way arbitrary,

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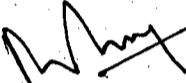
discriminatory and violative of the Constitutional guarantees under Article 16 of Constitution of India rather than it is as understood and clarified in 1999 (2) SCC 330.

8. In the result, we find no merit in this case. The O.A is dismissed as above. No costs.

(Dated, the 31st October, 2011.)



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER



JUSTICE P.R. RAMAN
JUDICIAL MEMBER

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