

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 11 of 2006

Friday, this the 28th day of July, 2006

C O R A M :

HON'BLE MR. KBS RAJAN, JUDICIAL MEMBER

HON'BLE MR. N. RAMAKRISHNAN, ADMINISTRATIVE MEMBER

Manikandan Kakkirikkan,
Peon, CSEZ, Kochi,
Residing at b-29, Block 12,
GPRA Quarters, Kunnumpuram,
Kakkanad.

..... Applicant.

(By Advocate Mr. T.C. Krishna)

v e r s u s

1. Union of India represented by
The Secretary,
Ministry of Commerce & Industry,
Department of Commerce,
New Delhi.
2. The Secretary,
Department of Personnel & Training,
North Block, New Delhi.
3. The Development Commissioner,
Cochin Special Economic Zone,
Kochi - 30

... Respondents.

(By Advocate Mr. Sunil Jose, ACGSC)

This application having been heard on 21.7.06, the Tribunal on 28-7-06 delivered the following:

ORDER

HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER

This case relates to the extent of Direct Recruitment and promotion in respect of LDCs in the Respondent No. 3, where the applicant has been

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serving as a group D employee.

2. Brief facts of the case as culled out from the OA are as under:-

- (a) The applicant, a physically challenged person, is working as a Peon in the Cochin Special Economic Zone since 9.10.95.
- (b) The next promotional post from the category of Peon is Lower Division Clerk (LDC, for short). As per the Recruitment Rules, 80% of the vacancies are earmarked for direct recruitment and 20% by promotion. There are five posts of Lower Division Clerks available and presently, there are three vacancies available. As per the rotation roster, the next vacancy has to be filled up by way of promotion and the applicant is the senior most Peon. Applicant has passed pre-degree examination and has completed his course in degree. He has all the qualifications prescribed under the Recruitment Rules.
- (c) In spite of the vacancies being available, the applicant was not given promotion to the post of LDC. He had submitted several representations. Respondents are under the misconception that the vacancies are to be filled up post wise instead of vacancy wise vide communication dated 17.2.04 of the third respondent. Respondents are taking hasty steps to fill up one vacancy in the cadre of LDC by way of compassionate appointment and it is understood that 2 other vacancies available in the cadre of LDC is being abolished.



3. The respondents have contested the OA and their version as contained in their reply and additional reply is as under:

(a) Out of the total five posts of LDC available, one post is earmarked for promotion and 4 posts earmarked for direct recruitment. The one post earmarked for promotion has already been filled up. As the promotion quota of 20% had exhausted and the applicant was also over aged, the case was referred to the Department of Commerce, New Delhi seeking relaxation in Recruitment Rules to the following extent.

- (i) Relaxing the age limit of 40 years prescribed for promotees through Departmental Examination;
- (ii) Exceeding the 20% quota by promotion.

Department of Commerce, after careful consideration of the case, did not agree to the same.

(b) Screening Committee has not accorded approval for filling up the three post of LDCs and the same are being considered for abolition. There are no vacant posts earmarked against the promotion quota and therefore, the respondents are not in a position to consider the claim of the applicant.

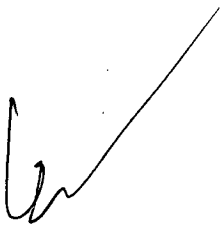
(c) Request~~r~~ from one Smt. Ammini Simon, wife of late K.C. Simon, Head Security Guard, for compassionate appointment of her son, Shri Sreeba Simon was received. Compassionate appointment could not be offered earlier on account of 5% ceiling. This Tribunal in O.A. No. 101/2003 filed by Smt. Ammini Simon has directed this respondent to make sincere attempts to find out the



possibility of getting an employment as per the Scheme in other Ministries also within 4 months. Compassionate appointments do not come under the purview of ADRP or any other ban instructions. This respondent is exploring the possibility of giving employment to the said Shri Sreeba Simon, which is not at the cost of excluding the applicant who is already gainfully employed. In case of Shri Sreeba Simon, request is made for an appointment on compassionate grounds whereas in the case of the applicant, the request is for consideration to a post earmarked against the promotion quota, which is not at present vacant.

4. Arguments advanced by the respective counsel were heard and the documents perused. The following legal issues are involved in this case:-

- (a) *when the total number of posts of LDC are five in number, and the ratio of Direct Recruitment and promotion as per the Recruitment Rules is 80% and 20% respectively, whether the said percentage applies for posts or vacancies and whether the post based roster system is applicable in this case where the total number of posts is only 5?*
- (b) *Whether the age prescription for promotion to the post of LDC is arbitrary and hence illegal?*
- (c) *Whether the percentage of reservation for the physically handicapped as per the provisions of Persons with disability (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 applicable for promotion?*



Re: Question (a):

5. Right from the beginning, at least from 1940, ratio between direct recruits and promotees is based only on the number of vacancies. In this regard, reference could be made to the Constitution Bench Judgment in the case of Mervyn Continho v. Collector of Customs, (1966) 3 SCR 600 which refers to a circular of the Government of India. The said portion reads as under:-

In 1940, the Government of India issued a circular for the determination of relative seniority of candidates appointed by direct recruitment and by promotion. In that circular it was stated that "where in a department two permanent or quasi permanent vacancies occur, even simultaneously, and the first vacancy is in accordance with the rotation meant for a direct recruit, the direct recruit will rank in seniority above the promotee even though he joined his post after the promotee had been promoted and confirmed".

6. In a recent decision of the Apex Court reported in . Ganesh Rao Patnaik vs State of Jharkand (2005) 8 SCC 454 also, the principle adopted was that the ratio between direct recruits and the promotees is based on vacancies. As such, in respect of the posts of LDC in the respondent No. 3 organization, the quota of 80% and 20% shall be based on the vacancies arising and NOT with reference to the total number of posts. Thus, the contention that out of 5 posts of LDC one has already been occupied by a promotee prohibits further promotion of Group D to LDC cannot be accepted. The roster shall be that every fifth vacancy shall go to the promotee. The respondent shall thus work out the vacancies after last promotion of a group D and if the vacancies now



available falls under 5th position, the same should be filled up by promotion. If such a fifth vacancy already stood consumed by a direct recruit, then the vacancy available now should go to promotee. As regards the post based roster, in fact, the same is meant for working out the reserved points, both in matters of promotion as well as of direct recruitment. Two separate tables were designed to explain the reserved points. In that connection, if amongst the Group D employees there are a few reserved candidates, in that case the table meant for promotion as given in the appendix to order dated 02-07-1997 of the DOPT may be applicable. How to apply the provisions of the said OM in respect of a cadre consisting of a lone post came up for consideration of the Apex Court in the case of Post Graduate Institute of Medical Education & Research v. Faculty Assn., (1998) 4 SCC 1 as the subject matter therein too revolved round as to how to fill up a lone post. The Apex Court had discussed the notification of the Ministry of Personnel and observed as under:-

"Office Memorandum No. 36012/2/96-Estt. (Res) issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) of the Government of India in respect of reservation roster for implementation of the Supreme Court judgment in R.K. Sabharwal v. State of Punjab. After indicating in short the purport of the decision of this Court in the said case, it has been indicated in the said office memorandum that:

"with a view to bringing the policy of reservation in line with the law laid down by the Supreme Court, it has been decided that the existing 200-point, 40-point and 120-point vacancy-based rosters shall be replaced by post-based rosters. All the ministries/departments and concerned authorities are requested to prepare the respective rosters based on the principles elaborated in the Explanatory Notes given in Annexure I to this OM and illustrated in the model rosters annexed to this OM as Annexures II, III and IV. Similarly, the concerned authorities may prepare rosters to replace the existing 100-point rosters in respect of local

recruitment to Groups C and D posts on the basis of the same principles".

15. Para 4 of the said OM contains the principles for preparing the rosters elaborated in the Explanatory Notes. Clause (e) of the said para 4 indicating the principles for preparing the rosters is relevant for consideration in this case and the same is to the following effect:

"In small cadres of up to 13 posts, the method prescribed for preparation of rosters does not permit reservation to be made for all the three categories. In such cases, the administrative ministries/departments may consider grouping of posts in different cadres as prescribed in this Department's OM No. 42/21/49-NGS dated 28-1-1952 and subsequent orders reproduced at pp. 70 and 74 of the Brochure on Reservation for Scheduled Castes and Scheduled Tribes (Eighth Edn.) and prepare common rosters for such groups. In the event it is not possible to resort to such grouping, the enclosed rosters (Appendices to Annexures II, III and IV) for cadre strength up to 13 posts may be followed. The principles of operating these rosters are explained in the Explanatory Notes." 16. Appendix to Annexure III contains the model roster for promotion in the cadre strength up to 13 posts; whereas Appendix to Annexure IV contains the roster for direct recruitment otherwise than through open competition for cadre strength up to 13 posts. Charts indicating the Appendix to Annexure III and the Appendix to Annexure IV are set out as hereunder.

	Cadre	Initial	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th
1.	UR	UR	UR	OBC	UR	UR	SC	OBC	UR	UR	UR	OBC	SC	ST	
2.	UR	UR	OBC	UR	UR	SC	OBC	UR	UR	UR	OBC	SC	ST		
3.	UR	OBC	UR	UR	SC	OBC	UR	UR	UR	OBC	SC	ST			
4.	OBC	UR	UR	SC	OBC	UR	UR	UR	OBC	SC	ST				
5.	UR	UR	SC	OBC	UR	UR	UR	OBC	SC	ST					
6.	UR	SC	OBC	UR	UR	UR	OBC	SC	ST						
7.	SC	OBC	UR	UR	UR	OBC	SC	ST							
8.	OBC	UR	UR	UR	UR	OBC	SC	ST							
9.	UR	UR	UR	OBC	SC	ST									
10.	UR	UR	OBC	SC	ST										
11.	UR	OBC	SC	ST											
12.	OBC	SC	ST												
13.	SC	ST													

Note.—(1) For cadres of 2 to 13 posts the roster is to be read from Entry 1 under column cadre Strength till the last post and then horizontally till the last entry in the horizontal row, i.e., 'L'.

(2) All the posts of a cadre are to be earmarked for the categories shown under column Initial Appointment while initial filling up will be by the earmarked category, the replacement against any of the posts in the cadre shall be by rotation as shown horizontally against the last

post of the cadre.

(3) The relevant rotation by the indicated reserved category could be skipped over if it leads to more than 50% representation of reserved category.

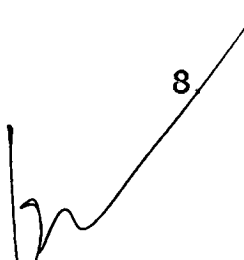
Roster for direct recruitment otherwise than through open competition for cadre strength up to 13 posts:

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17. Referring to such a model roster, the learned Solicitor General has submitted that in case of promotion in a single post cadre, for the initial recruitment, the post will remain "unreserved". Similarly, for the 1st, 2nd, 3rd, 4th, 5th subsequent vacancies in such single cadre post, such posts shall be treated as unreserved but for the 6th subsequent vacancy, the post will be reserved for Scheduled Castes. Again from 7th to 12th subsequent vacancies, the posts will be treated as unreserved but the 13th vacancy will be treated as reserved for Scheduled Tribes. So far as the roster for direct recruitment otherwise than through open competition, the Appendix to Annexure IV indicates that if the cadre strength is only one then the initial recruitment and the first and second successive recruitments will be made on the basis of open competition but the third successive vacancy will be reserved for members of the Backward Classes. The fourth successive vacancies will be treated as unreserved; sixth successive vacancy will be reserved for the members of Scheduled Castes; 7th successive vacancy shall be reserved for members of Other Backward Classes; 8th, 9th and 10th successive vacancies will be filled up by open competition but the 11th successive vacancy shall be reserved for OBCs, the 12th for Scheduled Castes and 13th for Scheduled Tribes."

7. In the instant case since the question is not as to whether the post by promotion is to be filled up by a General Candidate or by a reserved candidate, the above serves an academic purpose only.

8. The decision of this Tribunal in OA 6/2004 vide order dated




12-08-2005, relied upon by the applicant also supports the case of the applicant.

9. In view of the above it is to be held that in so far as filling up of the post of LDC is concerned, the ratio of 80% and 20% shall apply to vacancies and not posts.

Re. Question (b) :

10. The applicant has challenged the fixation of age limit for promotion purposes. The rules prescribe for an age ceiling of 40 years and the applicant has crossed the said age. His contention is that prescription of age ceiling is arbitrary and illegal. The counsel for the applicant argued that there is no nexus to the object sought to be achieved by introducing the age restriction as regards promotion to the post of LDC from Group D. Respondents, in their additional reply contended that the prescription is one of the statutory provisions and a rule cannot be altered to suit a single individual. The counsel for the applicant submitted that the challenge is not with reference to a particular individual but since he is now affected, the challenge is made. A Group D employee's prospects of promotion by virtue of limited number of posts and a smaller ratio compared to Direct Recruitment, being bleak, he may have to slog for scores of years to have his promotion. And, if age limit is prescribed as in this case, the same would seal the fate of the individual in that he has to languish in the same



post for all time to come. This is the contention of the counsel for the applicant. We share his views. Admittedly, the post is one of L.D.C., and the recruitment rules do not prescribe any specified physical fitness to hold the post. And, there is no nexus between the object sought to be achieved and the restriction. In the case of Indravadan H. Shah v. State of Gujarat, 1986 Supp SCC 254 the Apex Court has held as under:-

10. *The posts of Assistant Judge as well as of District Judge are included in senior branch of Gujarat Judicial Service. It is incomprehensible how those two cadres of Assistant Judges and District Judges can be treated as two different classes altogether, thereby justifying the introduction of age restriction in regard to selection and appointment by promotion to the post of Assistant Judge while doing away with any such sort of age limit or restriction in respect of appointment to the post of a District Judge by promotion from amongst the members of the junior branch who have served as Assistant Judges. Articles 14 and 16 of the Constitution ensure that there should not be any discrimination in the matter of appointment in service, nor there will be any arbitrariness or unreasonableness in the Rules of recruitment providing for appointment to the service either by promotion or by direct recruitment. There is no nexus to the object sought to be achieved by introducing the age restriction as regards the promotion by appointment to the post of Assistant Judge from amongst the members of the Gujarat Judicial Service (Junior Branch), as provided in Rules 6(4)(i) and 6(4)(iii)(a) of the said Rules.*

11. On the basis of the above dictum of the Apex Court, it is to be held that fixation of age ceiling for promotion from Group D to Group C (LDC) vide recruitment rule being not in conformity with the aforesaid decision of the Apex Court, it is for the respondents to consider deletion of the same. (Had the applicant challenged the Recruitment Rules, a ruling would have been given by the Tribunal). Meanwhile, the provisions of Rule 6 (Power to relax) be invoked




in case the group D employees eligible for promotion have crossed 40 years of age on the date when the vacancy arose. Even if there be only one individual for whom the relaxation is needed, the same is permissible as even a single person can constitute a 'class' as held by the Apex court in the case of Sandeep Kumar Sharma v. State of Punjab, (1997) 10 SCC 298, wherein the Apex Court has held as under:-

9. Rule 14 contains the general power of Government to relax the rules. It reads thus:

"14. General power to relax rules.—Where the Government is of the opinion that it is necessary or expedient so to do, it may by order, for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class or category of persons."

10. It is clear that while Rule 14 permits relaxation for a class or a category of persons, Rule 7 preserves the Government's power to relax the physical standard in individual cases. In the present case Rule 7 is the appropriate rule and it was not necessary to embark on Rule 14 at all. But we have noticed that the Deputy Secretary of Home (Government of Punjab) who had sworn to the counter-affidavit before the High Court for the State Government has sought to justify the relaxation made by the Government by confining to Rule 14 of the Service Rules alone. Why did he adopt such a stand when there is a specific rule which empowered the Government to give relaxation of the physical standard, is something we cannot understand or appreciate. Why should the deponent have bypassed Rule 7 which is so explicit in the context? Anyway since the appellant has referred to Rule 7 as the relevant rule we are not disposed to consider the amplitude of Rule 14 in the case.

11. The High Court seems to have taken the view that the only beneficiary of the aforesaid relaxation is the appellant and hence considered it an act of favouritism shown to him. According to the learned Judges "the so-called policy was formulated after the result of the written test was announced with the sole object of securing selection and appointment of the aforesaid candidate because without clearing the standard of physical fitness he could not have been interviewed by the Commission. This, in our opinion, is nothing but an act of sheer favouritism".



12. The appellant cannot be blamed for being the only candidate available at present seeking relaxation of physical standards. The same benefit could also have enured to anyone else situated in the same position as the appellant had there been any.

Re. Question (c):

12. The applicant is a physically handicapped individual with 50% disabilities. 3% reservation is no doubt catered for in the order dated 29th December, 2005 but subject to the condition that the same is in respect of Direct Recruitment and that too when the element of direct recruitment is not more than 75%. The case of the applicant is not covered under the above notification. The applicant has not challenged the said notification. Hence, the applicant cannot derive any benefit on the ground of his physical handicap.

13. It has also been stated by the respondents that for one post, the respondents are considering appointment of a candidate on compassionate grounds, in pursuance of this Tribunal's direction for such a consideration for compassionate appointment. The claim of the applicant cannot come in the way of the same as such compassionate appointment is against only direct recruit vacancy. It has been submitted by the counsel for the applicants that there are in all three vacancies in the post of LDC as the borne strength on date is only two. If so, the other two would be thrown open for direct recruits in which event, compassionate appointment could be considered in respect of one of the two vacancies. It has been stated by the respondents that a proposal is under



consideration for abolition of three posts of LDC. That being a policy matter, the Tribunal would not be delving into the legality or otherwise of the proposal. Of course, till then, the post could be kept filled and the one who is promoted may be suitably warned of the possibility of the post being abolished and by getting an undertaking that in that event the individual would accept reversion to the post of Group D without any reservation or conditions.

14. The applicant has sought the relief to the extent of a direction to the respondents to promote him to the post of LDC. This being beyond the prescribed powers of the Tribunal, only direction to consider the case for promotion can be given.

15. In view of the above, the O.A is disposed of declaring that the the vacancies in the grade of LDCs shall be filled up by Direct Recruitment and promotion as contained in para 9 above. The respondents are directed to consider the case of the applicant by relaxing the existing rules relating to age restriction (in view of the fact that the prescription of age limit for promotion is not in consonance with the law laid down by the Apex Court in the case of *Indravadan (supra)*) and subject to his being found eligible and suitable, he may be appointed to the post of LDC and in case of any concrete proposal to abolish the posts of LDCs (as stated in the counter), with a view to safeguarding the interest of the organization as well as to avoid future litigation, necessary undertaking from the individual be obtained in respect of his reversion, should

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there be a contingency for the same.

16, As the case involves consideration of power to relax also, a period of six months is provided for complying with this order.

17. Under these circumstances, there shall be no order as to costs.

(Dated, 28th July, 2006)



N. RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K.B.S. RAJAN
JUDICIAL MEMBER

cvr.