



CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.Nos. 100/2003 AND 128/2003

Friday, this the 1st day of April, 2005

C O R A M:

HON'BLE MR K.V.SACHIDANANDAN, JUDICIAL MEMBER
HON'BLE MR H.P. DAS, ADMINISTRATIVE MEMBER

O.A. NO. 100 OF 2003

M. Subramanian
Lab. Attender,
Custom House,
Kochi - 9

(By Adv. Vellayani Sundara Raju)

... Applicant.

versus

1. Union of India, represented
by Secretary to Government,
Ministry of Finance,
Department of Revenue,
New Delhi.
2. The Central Board of Excise and Customs,
Represented by its Chairman,
New Delhi.
3. The Commissioner of Customs,
Custom House,
Kochi - 9.

(By Adv. George Joseph, ACGSC)

... Respondents.

O.A. NO. 128 OF 2003

1. D.Muraleedharan,
Laboratory Attender,
Customs House, Kochi -
Residing at "Anuraga Sudha",
Meenathucherry, Poovanpuzha,
Kavanadu P.O, Kollam.

2. M.S. Sasi,
Laboratory Attender,
Customs House, Kochi - 9
Residing at : Ayyampilli,
Kuzhuppilly P.O., Vypeen,
Ernakulam District.

(By Adv. TCG Swamy)

... Applicants.

versus

1. Union of India, represented by
The Secretary to Government of India,
Ministry of Finance (Department of Revenue),
New Delhi.
2. The Commissioner of Customs,
Customs House, Kochi - 9.
3. The Chief Commissioner of Customs,
Bangalore.
4. The Assistant Commissioner of Customs,
Office of the Commissioner of Customs,
Custom House, Kochi - 9

(By Adv. TPM Ibrahim Khan, SCGSC)

... Respondents.

ORDER

HON'BLE MR. K.V.SACHIDANANDAN, JUDICIAL MEMBER

The claim/dispute involved in both these O.As is on the common point and all the applicants being similarly placed, these O.As are being disposed by this common order as agreed upon by the parties.

2. O.A. No. 100/2003 : The applicant in this O.A. is presently working as Lab Attender in the office of the Commissioner of Customs, Custom House, Kochi. He is a member of the Scheduled Caste community. The applicant completed ten years of service in Group 'D' post. He also passed S.S.L.C examination. As per A/3 Recruitment Rules, 10% quota of LDC vacancies are to be filled up from Group 'D' staff including Lab Attenders who rendered 5 years regular service as Group 'D' and had passed matriculation. Out of these 10% vacancies, 5% is to be filled up on the basis of seniority-cum-fitness and the other 5% through departmental qualifying examination. The applicant claims that he fulfills the

above condition and is eligible and entitled to be promoted as LDC after completion of five years service in Group 'D'. The last promotion from the post of Lab Attender to LDC was done in the year 1992. The sanctioned strength of LDC under the third respondent is 57 and the working strength as on 1.5.2001 was only 42. Vide Circular No. 15/98, willingness were invited from Group 'D' staff to fill up certain LDC posts diverted from direct recruitment quota to promotion and the applicant preferred his willingness on 6.4.1998. But no promotion was made. The applicant made a representation to the third respondent requesting him to consider the applicant for promotion to LDC. The applicant was informed vide A/6 memo that his case for promotion to LDC would be considered as and when vacancy arises. There are 15 substantive posts of LDCs remain unfilled which have to be filled up by promotion. As per A8 order dated 19.7.2001, all the then existed posts in various categories/departments in the Customs and Central Excise Departments would be filled through promotion as a one time measure for the year 2001-2002. Besides, all ad hoc UDCs were regularised. Two LDCs were resigned from service. Two backlog vacancies each meant for SC/ST fell vacant. The 1st and 2nd respondents took initiation to restructure various posts and cadres of Customs Department, but the category of Lab Attender was left untouched from restructuring. The respondents are bound to fill up all the substantive vacancies of LDC as per the then existed Recruitment Rules since those posts have arisen prior to commencement of A2 Recruitment Rules. The applicant and two others approached this Tribunal earlier through O.A.No. 453/2002 which was disposed of vide order dated 27.6.2002 directing the third respondent to consider the claim of the applicants in the light of the submissions made by the counsel on either side. It was agreed that the applicant case would be considered if any vacancy exists. But the applicant himself and other similarly situated persons were not selected. Thereafter A/1 order was issued stating that there was no vacancy. It was done due to the pressure from the Sepoy and their Unions stating that as per Annexure A2 all the sanctioned posts of LDCs were to be filled up from amongst Sepoys and Havildars. According to the applicant A2 has no applicability in the case of the applicant since it will not regulate the vacancies which arose prior to its commencement. Since no action was taken for promoting the applicant, he has filed this O.A. praying for the reliefs as under:

- (a) To quash Annexures A1 and A2,
- (b) to declare that the applicant is eligible and entitled to get promotion to the post of LDC in any existing posts in that category against the 10% quota meant for Group 'D' staff including Lab Attenders as per A3 Recruitment Rules and to declare that the third respondent is bound to fill up all the existing LDC posts in the Custom House, Kochi, as per Annexure A-3;
- (c) to issue necessary order or direction to 3rd respondent to consider the applicant for promotion against 10% quota vacancies in the LDC cadre by effecting promotions as per A10 circular as there are as many as 15 substantive posts available in the department as per A4 and A7;
- (d) to issue necessary order or direction declaring that the 3rd respondent has not properly considered A9 order of this Tribunal and not taken into consideration Annex.A/10 circular while issuing Annex.A/1.
- (e) to issue necessary order or direction declaring that no category/ cadre of civil posts in Central Government departments has have double channels of promotion given to Sepoys as Havaldars and LDCs are highly illegal and untenable."

3. O.A. No. 128/2003 : The two applicants namely, S/Shri D. Muraleedharan and M.S. Sasi, in this O.A. were appointed on 22.1.1992 and 21.1.1992 respectively as Laboratory Attender. Both the applicants belong to Scheduled Caste community. The case of these two applicants are almost identical to that of the applicant in O.A. No. 100/2003. The grievance of the applicants is that their promotion as Lower Division Clerk was rejected vide A2 order on the ground that they did not have five years service in the grade of Lab. Attender as on 1.10.1996. After issuing A/2, willingness of eligible Group 'D' was called for to be considered for promotion as Lower Division Clerk. The first applicant submitted his willingness vide A/4 letter. Since nothing was heard thereafter, he submitted A/5 representation dated 17.2.2000. In reply to A/5, the respondents informed the applicant that his case for promotion as Lower Division Clerk would be considered as and when vacancy arises in the cadre. Again, there was no action on the part of the respondents. The first applicant subsequently filed A/7 and A/8 representations. Aggrieved by the non-action on the part of the respondents, the applicants and another have filed O.A. No. 453/02 which came to

be disposed of on 27.6.2002 (A/9) on the basis of the submission made by the learned counsel for the respondents that their cases would be considered as and when the vacancy would arise. As per direction, the first applicant submitted A/10 representation to the second respondent. Thereafter, the respondents invited applications from all Group 'D' staff, Record Keepers and Laboratory Attenders for filling up the existing vacancies of LDC vide A/11 and A/12 circulars. No further action was taken on A/11 and A/12. But finally, the applicant received a memo (A/13) stating that since the 12 vacancies in existence ought to be filled up from the Sepoy cadre alone, therefore, their claim was rejected. Nothing was stated against the circulars A/11 and A/12. The applicants vide A/14 submitted their objections against A/13 memo. Later, the respondents have issued A/15 circular inviting applications from Sepoys and Havalgars only to be considered for promotion to the post of LDCs meant for Group 'D' employees, Record Keepers and laboratory Attenders. According to the applicants, this action of the respondents is totally arbitrary, unreasonable and unconstitutional. Hence, the applicants have filed this application praying for the following reliefs:

a) Call for the records leading to the issue of Annexures A/13 and A/15 and quash the same.

(b) direct the respondents to finalise the proceedings for promotion initiated in terms of Annexure A11, duly considering the applicants and direct the respondents further to grant the applicants all the consequential benefits emanating therefrom. Aggrieved by A/13 memo and A/15 circular, the applicants have filed this O.A. seeking the following main reliefs:

(a) Call for the records leading to the issue of Annexures A/13 and A/15 and quash the same;

(b) direct the respondents to finalise the proceedings for promotion initiated in terms of Annexure A11, duly considering the applicants and direct the respondents further to grant the applicants all the consequential benefits emanating therefrom.

4. The respondents have filed detailed reply statements in both the O.As contending that as per the new Recruitment Rules, the 50% of the vacancies are to be filled by promotion amongst Havalgars on the basis of seniority-cum-fitness who possesses Matriculation or an equivalent qualification as per recognised Board of University and have rendered five years regular service in the grade

without any age limit and 50% of vacancies shall be filled up by promotion from amongst Sepoys and Havalgars who possesses Matriculation or an equivalent qualification as per recognised Board or University and have rendered five years of service in the grade of Sepoy, Havalgar and feeder cadres thereto on the basis of a departmental qualifying examination with typing test with minimum speed of 30 words per minute in English typing or 25 words per minute in Hindi typing. Lab. Attender is not a feeder cadre for appointment as LDC as per the new Recruitment Rules and, therefore, the applicants are not eligible for promotion. Willingness was called for and the vacancies were reported to the Board for consideration and promotion as LDC by possible diversion of vacancies in the grade of LDCs from DR quota to the promotion quota. However, there was no approval for the proposal for diversion has been received from the Board. Therefore, no promotions could be effected. Recruitment Rules, 1979 were subsequently amended vide notification dated 19.10.1991 and the quota reserved for promotion to the grade of LDC from Group 'D' staff split into two, i.e., 5% on the basis of the Departmental qualifying examination with typing test and the remaining 5% from the Group 'D' employees, Lab Attenders and Record Keepers on seniority-cum-fitness basis without age limit from among those who have rendered 5 years regular service in Group 'D' or in Group 'D' Lab Attender or Record Keeper taken together as the case may be. Since the applicants were not eligible, their request for promotion was not considered at that time. It is further contended that there is no separate vacancy earmarked for Lab Attenders and they were part of the panel along with other Group 'D' officers and Record Keepers. In the appointment made during the year 1997, the quotas for SC/ST were duly filled in. In O.A. No. 453/2002 filed by the applicants & Anr., this Tribunal while disposing of the said O.A. specifically mentioned that their cases would be considered when orders are received for implementation of cadre restructuring subject to instructions/rules made in this regard. Since the vacancies are proposed to be filled up by the panel recommended by the DPC met in the year 1996-97 taking the crucial date for determining the eligibility condition as 1.10.1996, the applicants were found ineligible for consideration as they have not completed the prescribed qualifying service of five years service as on 1.10.1996. Their request was rejected accordingly. Though the six vacancies were reported to the Board for considering diversion of the same to the promotion quota, no approval has been received. Consequent on the implementation of cadre-

restructuring, as per the new Recruitment Rules, Lab. Attender does not figure in the list of feeder cadre to be considered for appointment as LDC. Therefore, their request could not be considered.

5. Applicants in both the O.As have filed rejoinder. In the rejoinder filed by the applicant in OA No. 100/2003, it was contended that as per Annexure A7 two posts each meant for SC/ST were left vacant as backlog and that posts are to be filled up by appointing SC/ST as he is eligible and entitled to get reservation in the 10% quota of LDC. It was contended that due to illegal pressure exerted on 3rd respondent by the office bearers of Sepoys for not filling up the posts earmarked for Group 'D' employees, including Lab Attenders, the 3rd respondent did not fill up the existed posts of LDC and waited for R/1 notification (same as Annexure A/2). Annexure R/5 shows not to hold any DPC which was against the Central Cabinet approval and sanction of filling up all vacancies in all categories through promotion as a one time measure. Once the decision of the Cabinet was approved and accepted by the 2nd respondent, it shall not be kept in abeyance through an executive order. Annexure A-10 was issued by lifting the R5 order by the competent authority.

6. Respondents have also filed additional reply statement contending that there were no vacancies as contended by the applicants and there would not have any problem to consider the applicants if the vacancies were really in existence.

7. We have heard Shri Vellayani Sundararaju and Shri TCG Swamy, learned counsel for applicants in respective O.As and Mr. George Joseph, ACGSC and Shri TPM Ibrahimkhan, SCGSC for respondents.

8. Learned counsel for the applicants argued that the short question involved in this case is the rules regarding promotion to the post of LDC. They submitted that since the vacancies arose prior to 23rd September, 2002, the respondents are bound to fill up those vacancies in terms of Annexure A1 Recruitment Rules and in that process the applicants case may also be considered. According to the applicants, the impugned orders were issued without due application of mind. They are eligible and entitled to be promoted to the post of

LDC. Learned counsel for the respondents on the other hand persuasively argued that though sincere efforts were made to promote the applicants it could not be materialised since the approval for the same has not been received from the Board. In the meantime, new Recruitment Rules were published on 21.9.2002 which supersedes all the provisions contained in the previous Recruitment Rules. In these circumstances, the case of the applicants was rejected. The vacancies alleged to be in existence were not actually in existence. Therefore, the O.A. is devoid of any merit and deserves to be dismissed.

9. We have given due consideration to arguments advanced by the counsel for respective parties and also perused the material placed on record.

10. The applicants have been working as Lab Attender under the respondents since 1992. They passed the SSLC examination. In the existing Recruitment Rules of Group 'C' in Custom Department, 10% quota of LDC vacancies to be filled up from Group 'D' staff including Lab Attenders who rendered 5 years regular service as Group 'D' and had passed Matriculation. Out of the above mentioned 10% vacancies 5% to be filled up on the basis of seniority-cum-fitness and the other 5% through a departmental qualifying examination. The amended Recruitment Rules were notified in the Gazette of India dated 19.10.1991 (A/3), in which in para 2(a)(ii) Note 2 and 2(a)(iii), it has been mentioned as follows:

"Note:2: Educationally qualified Laboratory Attenders who have initially been recruited through Employment Exchange can also compete for the post of Lower Division Clerk against 5% vacancies reserved for Group 'D' employees by allowing them to deduct the period of service rendered as Laboratory Attender in including service, if any, in Group 'D' earlier, from their actual age for the purpose of reckoning age limit. Laboratory Attenders promoted from Group 'D' posts will also be eligible;

(iii) 5% from amongst Group 'D' employees, Laboratory Attender and Record Keepers who,

(a) have passed Matriculation or equivalent examination and (b) have rendered five years regular service in Group 'D' or in Group 'D' Laboratory Attender and Record Keeper taken together, as the case may be on seniority cum fitness basis. There shall be no age limit."

11. Further, in Annexure A4 statement, the vacancy position in the Custom House, Cochin as on 1.5.2001 has been shown and in the bottom, the following note was given:

"23 posts which has been proposed for surrender to provide match savings for creation of posts for computerisation project during 1987 vide the above cited letter is also not included in the Sanctioned Strength. At present 15 posts are lying vacant of which 7 LDCs have been promoted to the cadre of UDCs on ad hoc basis and, therefore, the resultant vacancies cannot be filled up. 6 posts are kept vacant for diversion of direct recruitment quota to promotee quota vide letter No.S.11/I/84-Estt Cus dated 19.8.1998 in response to Ministry's letter F.No.A-12034/64/97-Ad.III B dated 22.1.98 and rest two posts have been reported to SSC."

12. A/5 in O.A. No. 100/2003 is the seniority list of Laboratory Attenders of the Custom House, Cochin, as on 1.3.2002 wherein the applicants figured at Sl.Nos. 1, 2 and 3. Learned counsel for the applicant submitted that the applicants are not pressing into service the Recruitment Rules, 1979 for the purpose of this O.A. since that does not help to anyone since it has become obsolete. The contention that the applicants were appointed in 1992 and the amendment in the Rules made in 1991 would definitely be applicable to them. Admittedly, the applicants passed the Matriculation and have rendered 5 years service in Group 'D' as Laboratory Attender. The arguments advanced by the learned counsel for the respondents in the case of applicant in O.A. No. 100/2003 (M.Subramanian) is that though the applicant applied for the post of LDC during 1997 his case could not be considered since he has not completed the qualifying service as also the quota of SC/ST has already been considered, it cannot be carried forward. This argument cannot be accepted since no material has been placed before us to show that the SC/ST quota has been exhausted. On the other hand, clinching evidence as shown by the applicant shows that there were vacancies earmarked for SC/ST wherein the applicants could have been considered. The reasons for rejecting the claim of the applicants is based on A/8 circular dated 19.7.2001 issued by the Ministry of Finance, Department of Revenue, Central Board of Excise & Customs. For better appreciation, A/8 Notification No. F.No.A-11019/72/99 Ad.IV dated 19.7.2001 reads as under:-

"Sub: Restructuring of Customs and Central Excise Departments

Sir,

I am directed to say that the Central Government has approved the restructuring of Customs and Central Excise Department. As a result of restructuring, there has been a change in the number and nomenclature of the various grades/posts. The revised number and designation of the various posts at different levels in Customs and Central Excise Department has been indicated in Annexure - 'I'.

2. All the posts of different levels as per Annexure 'I' stand sanctioned with immediate effect. Wherever there is a reduction in the number of posts at any level, such reduction will be effective after the existing incumbents of the posts are promoted to the higher level or the posts fall vacant on account of retirement etc. The number of categories of the posts other than those referred to in Annexure 'I' have been kept in their existing strength and in their existing pay scales only.

3. No direct recruitment may be made in the various grades for the year 2001-2002 without approval of Ministry/ Department as the Cabinet has approved one time relaxation for filling of all vacancies by promotion in all cadres.

4. The formation wise distribution of posts at different levels will be notified separately.

5. The details of other posts that have been included in the Restructuring proposal but have not been proposed to be altered on the scale or strength are included in Annexure-II.

6. The Cadres/Post which have not been included in the Restructuring proposal are stated in Annexure-III.

This issues in pursuance to the approval conveyed vide Cabinet Secretariat Notification No. 28/CM/2001(i) dated 16.7.2001."

13. From the said notification, it is clear that the Ministry has approved one time relaxation for filling of all vacancies by promotion in all cadres. The direct recruitment was kept in abeyance for that period of time in order to avoid imbalances in promotion prospects. Therefore, the averment that there is no vacancy, cannot be accepted. In para 4 of the reply statement in O.A. No. 100/2003, it is stated that 19 vacancies were present as on 19.8.1998. Out of which 10 vacancies were already reported to the Chief Commissioner for considering the inter-commissionerate transfer and 3 vacancies reported to the Staff Selection Commission. The remaining 6 vacancies were reported to the Board for considering diversion of the same to the promotion quota for which no approval has been received. Besides, in paras 2 & 3 of Annexure R/5 letter No. F.No.A.32021/45/2201-Ad.IIIA dated 10.9.2001 issued by the Ministry of Finance,

Department of Revenue, Central Board of Excise and Customs, it has been stated as follows:-

"2. It is felt that if the DPCs for Group 'B' and 'C' are conducted by the cadre authorities it may lead to widening of imbalances in promotion prospects or create imbalances. The Board have, therefore, decided that the holding of DPC of Group 'B' and 'C' post may be frozen and no DPC may be held for Group 'B' and 'C' post till the distribution of posts under various level is completed and instructions are issued by the Board in this regard,

3. As you are aware that Board have already imposed a ban for filling up of post of LDCs and Sepoys vide their letter No. F.No.A-11012/27/2000-Ad.IV dated 10.4.2001. It is reiterated that these instructions may be strictly adhered to and it is further stated that no direct recruitment may be made to any grade till further orders of the Board/Department of Revenue."

14. From the aforesaid instruction, it is clear that the DPC of Group 'B' and 'C' were frozen till completion of the distribution of posts under various level and the Board had imposed a ban for filling up of LDCs and Sepoys under direct recruitment quota. It is pertinent to note that when the applicants have filed O.A. No. 453/02, the learned counsel appearing for the respondents therein submitted before this Tribunal that "since the department's stand was that as and when vacancy would arise, the claim of the applicants would be considered there would be no problem to consider the applicants' case if vacancy as stated by learned counsel for applicant really existed. In that case, the department would consider the applicants' case expeditiously, the learned ACGSC has pointed out." Further, in para 8 of the circular (R/6 in OA 100/03) No. A-11013/4/2002-Ad.IV dated 5.6.2002, the Ministry has clarified that the detailed instructions/ orders/Recruitment Rules governing the manner of filling up of the vacancies at all levels will be issued separately. No vacancy in respect of the posts included in the cadre restructuring should be filled up till such time as further orders are issued. R6(3) also indicates that there are total 19 vacancies in LDC cadre. The factual position being so, we are of the considered view that having called for the willingness of the applicants as back as in 1998 and keeping the proposal/process in the cold storage, the respondents are not justified in denying the case of the applicants on the ground of non-availability of vacancy and introduction of new Recruitment Rules, which has nothing to do with the consideration of the applicants for promotion at that point of time.

15. A bare perusal of the material placed on record, we are convinced that there were vacancies under SC/ST quota at the relevant point of time and there was willful delay on the part of the respondents in not promoting the applicants as per the then existing Recruitment Rules. If the right things have done at the right time, the Applicants could have received their promotion. The reasons that have been shown in the impugned orders in both the O.As are not convincing and are not sustainable and deserve to be quashed.

16. In the conspectus of the facts and circumstances, we set aside the impugned orders A/1 and A/2 in OA No. 100/2003 and A/13 and A/15 in OA No. 128/2003 so far as it denies promotion to the applicants and direct the respondents to consider the case of the applicants for promotion to the post of LDC as expeditiously as possible, but not later than three months.

17. The O.As are allowed as indicated above with no order as to costs.

(Dated, the 1st April, 2005)

Sd/-
H.P. DAS
ADMINISTRATIVE MEMBER

Sd/-
K.V. SACHIDANANDAN
JUDICIAL MEMBER

CVI.