

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 14 OF 2009

Wednesday, this the 16th day of December, 2009.

CORAM:

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

HON'BLE Mr.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

V.J. Xavier, Bosun,
Central Institute of Fisheries Nautical
and Engineering Training Unit, Chennai,
Residing at Velivil House, BTS Road,
Devankulangara, Edappally, Kochi-24.

... Applicant

(By Advocate Mr. T.A. Rajan)

versus

1. Union of India represented by
Secretary, Government of India,
Ministry of Agriculture, Department
of Animal Husbandry, Dairying and
Fisheries, New Delhi.

2. The Director,
Central Institute of Fisheries Nautical
and Engineering Training, Foreshore
Road, Kochi - 16.

... Respondents

(By Advocate Mr. S. Abhilash, ACGSC)

The application having been heard on 14.12.2009, the Tribunal
on 16-12-2009 delivered the following:

ORDER

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

The applicant's grievance is two-fold. (a) When his entitlement to first ACP riped as on 09.08.1999 itself, he was granted the first ACP only in 2003 on the ground that he did not secure the bench mark prescribed during the previous years consequent to which his first ACP had to be deferred. This according to him is illegal, as no communication about the non-fulfillment of the benchmark had been made to him. (b) As regards second ACP, the

respondents admit such an entitlement to the same only after 12 years of his first ACP, i.e. in 2008 only whereas, his entitlement is independent of his first ACP but dependent only upon the completion of twenty four years of service. Here again, there is a further legal lacuna that the respondents rely upon a later recruitment rule to non-suit the applicant from claiming the 2nd ACP.

2. Briefly, the applicant was appointed as Fishing Second Hand under the second respondent's office w.e.f. 06.06.1980. Later on, the said designation was changed as Bosun though the pay scale, duties and functional responsibilities remained the same. The next higher post is Skipper, for which the applicant was to have a particular benchmark. The applicant had put in 12 years of service as of 1992 and ACP scheme was introduced on 09.08.1999. When the case of the applicant was considered for ACP from the aforesaid date of 09.08.1999, he was not afforded the first ACP purportedly as his reports were not upto the prescribed benchmark. This requirement he could fulfill only as on 01.04.2003. Accordingly he was granted that benefit only from that date. The applicant had preferred a representation for consideration of his case for first ACP from 09.08.1999 and also for consideration of his second ACP w.e.f. 2004, when he had completed 24 years, with all consequential benefits. As per the respondents, there being no provision of review of the first ACP granted, his request for advancing his first ACP was rejected and as regards second ACP, the respondents had stated that since his first ACP was granted on 01.04.2003, it would be only after completion of 12 years thereof that the applicant would be considered for grant of second ACP which would be only w.e.f. 2008, provided he fulfills other requisite qualifications for the higher post as per the revised recruitment rules.

3. The applicant has challenged the above two decisions of the respondents.

4. Respondents have contested the O.A.

5. Applicant has filed his rejoinder and rebutted all the contentions of the respondents.

6. Counsel for the applicant submitted that as regards deferment of first ACP, he having not been put to notice in advance about his alleged non-meeting of the prescribed benchmark. As regards the second ACP, his stand is that irrespective of the date of his first ACP, the second ACP shall be only with reference to his completion of 24 years of service, which in his case is as of 2004, he having joined the service in 1980. Further, according to him, his case for second ACP is analogous to the one decided by this Tribunal in the case of one Shri. K.R. Prakasan, vide order dated 8th July 2008 in OA No. 284/2006. As such he should be made entitled to the second ACP w.e.f. 2004 itself.

7. Counsel for the respondents has relied upon the reply filed.

8. Arguments were heard and documents perused. The law in regard to non communication of prescribed Benchmark was not crystallized till the judgment of the Apex Court in the case of Dev Dutt vs. Union of India (2008) 8 SCC 725 was pronounced. In that case, the Apex Court has held as under:-



"9. In the present case the benchmark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have "very good" entry for the last five years. Thus in this situation the "good" entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a "good" entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

10. Hence, in our opinion, the "good" entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-1994 should be upgraded from "good" to "very good". Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the "good" entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the "good" entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the "good" entry was arbitrary and hence illegal, ..." (emphasis supplied).

9. Thus, in so far as non grant of first ACP from 09.08.1999, on the ground that the applicant was not meeting the benchmark is concerned, the stand taken by the respondents has to be termed as violative of the law laid down by the Apex court in the above said Dev Dutt case. They have, therefore, to put the applicant to notice of the same and consider his representation and arrive at a judicious conclusion on receipt of such representation, if filed by the applicant. The decision of the respondents would decide about the entitlement or otherwise of the applicant of the first ACP from 09.08.1999.



10. Independent of the above, in so far as the second ACP is concerned, the clarification issued by the DOPT is as under:-

"14. An employee gets first promotion after 20 years of regular service. In terms of relevant Recruitment/Service Rules, required eligibility service is 8 years for the next promotion, whether upgradation under ACPS is to be allowed on completion of 24 years of service from direct recruitment, i.e., four years after the first promotion or on completion of 8 years of regular service after first promotion as per the Recruitment Rules.

Upgradations under the scheme are to be allowed on completion of 12/24 years of service counted from direct entry in the Government employment. If an employee gets first regular promotion on completion of 20 years of service, he will be entitled to second financial upgradation under ACPS on completion of 4 years of service after such first regular promotion, though the Recruitment/Service Rules prescribe higher length of regular service in the grade for next promotion.

25. An employee may be given second upgradation under ACPS as soon as he completes 12 years of regular service from the date of his earlier promotion or as soon as he completes 24 years of regular service, whichever is earlier.

The periodicity of 12/24 years of regular service for grant of upgradations under ACPS cannot be relaxed. Grant of the first regular promotion prior to completion of 12 years of regular service from the direct entry grade shall have no bearing on the periodicity of the second upgradation under ACPS, which shall be granted only after completion of 24 years of regular service and only if the second regular promotion has not been earned in between."

11. What applies to promotion case equally applies to the ACP case as well. Hence, the stand taken by the respondents that second ACP ripens only after completion of 12 years from the date of first ACP has to be rejected.

12. In addition, the respondents have brought in the requirement of the fulfillment of the conditions as per the revised recruitment rules. This requirement is totally misplaced in the instant case as the second ACP



admissible even from the stand point of the respondents is from January, 2008 while the revised recruitment rules are effective from May 2008 as they clearly declare so, vide para 1(2) of the Rules. Thus, this contention of the respondent has also to be rejected.

13. The applicant claims that his case is analogous to that of one Shri. K.R. Prakasan. In that case, the decision to allow the O.A. was taken giving the reasons as under vide para 11 to 19 of the order dated 8th July 2008 in O.A. No. 284 of 2006:-

"11. Arguments were heard and documents perused. The admitted facts are that:

- (a) the applicant possesses that qualification, which is the one prescribed for the post of Skipper as per the unamended Recruitment Rules.
- (b) The applicant has been asked to function as Skipper-in-charge since 18th October, 2005 by a formal order.
- (c) The applicant has been performing his duties as a skipper since then.

12. ACP is a scheme which is provided when an individual has been stagnating in a post without any promotion. The spirit behind the scheme is that persons not being promoted even after a substantial years of service should be suitably fixed at the next pay scale as for the promotional posts and where the post held is isolated, to a pay scale as scheduled in the very Scheme itself. While affording the benefit, the Government pays higher pay scale but extracts work of a lower post. Here, the situation is entirely different. The individual has been asked to perform the duties of a higher post and despite his having put in 24 years of service, he is not granted the 2nd ACP on the ground that the applicant does not possess the requisite qualification of as per the amended rules. We are told that today, no institution is providing such a certificate of competency as Skipper Grade I. As such, the qualification prescribed is one which is incapable of being fulfilled. Under the circumstances, the best way would be to amend the Recruitment Rules, which the respondents are at. However, though the proposal has been initiated sometimes in 2004, till it has not seen the light of the day! If so, to render justice, at least the Respondents should have thought of invoking the power to relax which is available in the Recruitment Rules, vide Rule 5, which reads as under:-



"Where the Central 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."

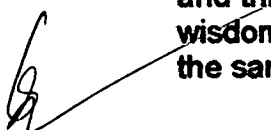
13. Now the question is whether the case in hand is such that such a power to relax the rules is warranted. The Apex Court in the case of **J.C. Yadav v. State of Haryana, (1990) 2 SCC 189**, held as under:-

"The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the government has power to relax requirement of rules. The State Government may in exercise of its powers issue a general order relaxing any particular rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers".

14. Again, in the case of **Ashok Kumar Uppal v. State of J&K, (1998) 4 SCC 179**, the Apex Court has held as under:-

"26. Power to relax the Recruitment Rules or any other Rule made by the State Government, under Article 309 of the Constitution of which the corresponding provision is contained in Section 124 of the Constitution of Jammu and Kashmir, is conferred upon the Government to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the Rule might have become impossible. Under service jurisprudence as also the Administrative Law, such a power has necessarily to be conceded to the employer particularly the State Government or the Central Government who have to deal with hundreds of employees working under them in different departments including the Central or the State Secretariat."

15. The above dictum of the Apex Court provides for pressing into service the provisions of relaxation of the rules where requisite qualified persons are not available, or such a qualification cannot be obtained and this is fully applicable to this case. However, in their wisdom the respondents have not chosen to consider the same.



16. As regards moulding of relief, the same too is possible as held by the Apex Court in the case of **Public Services Tribunal Bar Assn. v. State of U.P., (2003) 4 SCC 104**, wherein the Apex Court has held as under:-

"In case any public servant is finally ordered to be reinstated after quashing the order of termination, removal, dismissal, suspension etc., he can be compensated by the courts by appropriately moulding the relief".

Thus, the contention of the counsel for the respondents that there is no scope for moulding the relief is not correct.

17. The counsel for the respondents argued that when the rules relating to grant of ACP stipulate certain conditions and the same are not being fulfilled, there is no question of grant of ACP. As stated earlier, the spirit behind the scheme is to alleviate the hardship faced by the government servants in the event of promotions not being available to them. While interpreting the rules or regulations, the spirit behind the rules should go as undercurrent. It has been held by the Apex Court in the case of **Tirath Singh v. Bachittar Singh, (1955) 2 SCR 457**, as under:-

"But it is a rule of interpretation well-established that, "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." (Maxwell's Interpretation of Statutes, 10th Edn., p. 229). Reading the proviso along with clause (b) thereto, and construing it in its setting in the section, we are of opinion that notwithstanding the wideness of the language used, the proviso contemplates notice only to persons who are not parties to the petition."

18. The applicant has, admittedly been functioning as skipper in charge under a formal order vide Annexure A-2. He is not paid the pay scale of Rs. 10,000 – 13,500 despite his actually carrying out the functions of the post of Skipper, and denial of the benefit of ACP scheme is on the technical ground that he does not possess the requisite certificate of competency as Skipper Grade I, a qualification introduced as late as in 2003, while Shri Maxy, who is working only as Bosun (one grade below the applicant) and performing the duties of Bosun only, has been afforded two financial upgradations and he is placed in a scale higher than the



applicant. The contention of the respondents is that the said Maxy has the requisite certificate of competence as Skipper Grade I. The anomaly is explicit. Keeping in view the spirit behind the ACP Scheme and the fact that the applicant has been functioning actually as Skipper since October, 2005, and that the qualification for the regular promotion to the post of Skipper being one which cannot be obtained as no such certificate is issued by any institutions, we are of the considered view that the applicant is entitled to the claim of grant of ACP from the date he has completed 24 years of service. In any event, denying the applicant the pay scale attached to the post of Skipper when actually he has been so functioning is thoroughly illegal. The Apex Court in the following cases have held as under:-

" (a) **Jaswant Singh v. Punjab Poultry Field Staff Assn., (2002) 1 SCC 261,**

"....while the appellant's promotion to the post of Chick Sexer cannot be upheld, given the fact that the appellant had discharged the duties of a Chick Sexer, he was at least entitled to the pay and other allowances attributable to that post during the period he carried out such duties."

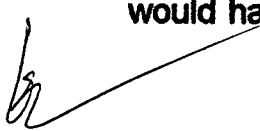
(b) **Selvaraj v. Lt. Governor of Island, Port Blair, (1998) 4 SCC 291,**

"Fact remains that the appellant has worked on the higher post though temporarily and in an officiating capacity pursuant to the aforesaid order and his salary was to be drawn during that time against the post of Secretary (Scouts). It is also not in dispute that the salary attached to the post of Secretary (Scouts) was in the pay scale of 1640-2900. Consequently, on the principle of quantum meruit the respondents authorities should have paid the appellant as per the emoluments available in the aforesaid higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promotee. This limited relief is required to be given to the appellant only on this ground."

19. In view of the above the O.A. is allowed. It is declared that the applicant is entitled to be considered for the grant of 2nd ACP w.e.f. 13-01-2005 on the basis of the present qualification which he has and on the basis of which he has been directed to perform the duties as Skipper. Respondents are directed to take suitable action in this regard and on being afforded the second ACP, the arrears of pay and allowances, arising out of the same be also made available to the applicant. This drill shall be performed within a period of three months from the date of communication of this order."

14. If the case of the applicant is identical to that of the above, there is no reason to deny the second ACP to the applicant on account of non-fulfillment of the requirement of possession of competency. As such, on the ground of parity as well with identically situated individuals, the applicant is entitled to be considered for second ACP at par with the applicant in the other O.A. Of course, the respondents are at liberty to verify the contention of the applicant that his case is identical to that of K.R. Prakasan. However, his entitlement for second ACP is not entirely dependent upon the identical nature of his position with that of K.R. Prakasan. Even if the two cases are not identical on the ground specified in the preceding para the applicant is entitled to be considered for second ACP w.e.f. 2004.

15. In view of the above, the O.A. is allowed. It is declared that non grant of ACP w.e.f. 09.08.1999 on the ground of not meeting the benchmark is illegal as the applicant was not communicated the grade lower than the benchmark at the material point of time as held by the Apex Court in the case of *Devi Dutt (supra)*. Respondents are at their liberty to either grant the ACP as on 09.08.1999 without following the drill (because of the time distance involved), or communicate the grading to the applicant and invite his representations, which, when received, should be considered by the Appropriate Authority and if the same is accepted, the applicant may be granted the first ACP from 09.08.1999; instead, if the respondents are not satisfied with the representations, the applicant shall be suitably informed by a speaking order. The respondents shall keep in mind one factor that the matter pertaining to pre 1999, the extent of human memory plays a major role in recollecting events, if any, on the basis of which the report in the ACR would have been recorded and grading arrived at on the basis of such report.



Sufficient cushion should be given to the applicant in this regard.

16. As regards the second ACP, the applicant is entitled to be considered w.e.f. 2004 on completion of 24 years of service. Respondents are directed to act accordingly and while so acting the decision in O.A. No. 284/06 be also kept in mind. In the event of grant of first financial upgradation w.e.f. 09.08.1999 being granted, the same may have a telescopic effect in the fixation of pay of the applicant while granting the second financial upgradation in the higher pay scale. That should also follow as and when the decision on the first financial upgradation takes place. The issue of both the ACPs could be considered simultaneously, without awaiting the result of the case in first ACP.

17. Time limit for compliance of this order is four months in all both in respect of first and second ACP. No costs.

(Dated, the 16th December, 2009.)



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER

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Dr. K.B.S. RAJAN
JUDICIAL MEMBER