

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O.A. No. 153/90 100
~~XXXXX~~

DATE OF DECISION 12.11.1990

G. Viswanathan Applicant (s)

M/s K.K.Usha, N.D.Premach- Advocate for the Applicant (s)
andran, V.P.Seemanthini, P.K.Shakeela
Versus and Bhargavi.V.

The Collector of Central Respondent (s)
Excise, Cochin and another

Mr.V.V.Sidharthan, ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. S.P.Mukerji, Vice Chairman

The Hon'ble Mr. A.V. Haridasan, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *Yes*
4. To be circulated to all Benches of the Tribunal? *Yes*

JUDGEMENT

(Hon'ble Shri S.P.Mukerji, Vice Chairman)

In this application dated 10th February, 1990 filed under Section 19 of the Administrative Tribunals Act, the applicant who has been working as U.D.C. in the office of Collector of Central Excise, Cochin has prayed that the respondents be directed to give him retrospective promotion as U.D.C. against the first vacancy which arose in the department after 20.1.1979 in compliance of the Judgment of this Tribunal dated 22.6.1989 (Annexure-C) read with the Central Board of Excise and Customs letter of 5.2.79 at Annexure-H, with all consequential benefits. He has also

prayed that the impugned orders at Annexures-E and G promoting him as U.D.C. with effect from 22.8.85 and rejecting his representation by the order at Annexure-G should be set aside. His further prayer/^{is}that he should be declared to be entitled to be promoted as Inspector/Tax Assistant on the basis of the examination held in December, 1989.

2. The material facts of the case are as follows. The applicant who was working in the group 'D' cadre as Sepoy appeared in the written test for promotion against 10 percent vacancies in the cadre of L.D.C. in 1975. He scored ^{the} highest marks but in the panel to be prepared on the basis of seniority he was at the fifth position including a Scheduled Caste candidate. Since there were four vacancies he could not be promoted as L.D.C. His juniors were ^{also} promoted on the basis of the panels prepared for subsequent years. Ultimately by passing the test in 1983 again he was promoted as L.D.C. on 30.9.83. He moved the Hon'ble High Court of Kerala in a Writ Petition which was disposed of on transfer to the Tribunal by the order dated 22.6.89 (Annexure-C) with the following directions:

"In the facts and circumstances of the case, the impugned letter dated 12.11.1976 whereby the respondents informed the applicant that the validity period of the panel prepared in June, 1975 expired in June, 1976, is quashed. The applicant should be considered for appointment as L.D.Clerk

in the vacancies which arose in subsequent years when his juniors were appointed as L.D.Clerks. He would also be entitled to seniority on the basis of his inclusion in the panel of successful candidates at the examination held in 1975. He would rank senior to respondents Nos. 3 to 7, who were promoted on the basis of the results of the examinations held in 1979 and 1981. The names of respondents Nos. 3 to 7 did not figure in the select list of 1975. The applicant would also be entitled to further promotion to the post of U.D.C. on the basis of his seniority to be refixed in the manner indicated above and if he is found otherwise eligible and suitable for promotion to the post of UDC under the rules, he should be considered for such promotion. The respondents are directed to comply with the above directions within a period of three months from the date of communication of this order. The parties will bear their own costs." (Emphasis added).

In compliance with the aforesaid directions, the applicant was deemed to have been promoted as L.D.C. with effect from 20.1.76 by the order dated 15.11.89. In the meantime having been promoted as L.D.C. in the normal course on 30.9.83 he applied to appear in the Departmental test for promotion as U.D.C. in 1984 but since he had not completed two years of service by then, he was not allowed to appear in the test. However, next year in 1985 he was allowed to appear and he passed with ^{the} highest marks. By the order dated 22.9.89 (Annexure-E) in compliance with the aforesaid Judgment of the Tribunal he was given deemed promotion as U.D.C with effect from 22.8.85 and his seniority in the cadre of U.D.C. was fixed accordingly. The applicant's grievance is that on the basis of his deemed promotion as L.D.C. with effect from 20.1.76 he became eligible for promotion as U.D.C. on 20.1.79 and accordingly he is entitled to promotion as U.D.C. against the first vacancy of U.D.C. which arose after 20.1.79.

3. The respondents have rejected his claim on the ground that in accordance with the directions of the Tribunal his promotion as U.D.C. was conditional upon if he is being 'otherwise eligible'. Since the applicant passed the Departmental examination only in August, 1985 he became eligible only then and on the basis of the findings of the D.P.C. which met on 22.8.85 he was given deemed promotion from that date. They have also argued that since the applicant started working as L.D.C. actually from 30.9.83 he became eligible for appearing in the qualifying test for promotion as U.D.C. only after completing two years of service in 1985.

4. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. On the basis of the Judgment of this Tribunal in T.A.K.231/87 the applicant was given deemed promotion as L.D.C. with effect from 20.1.76 and corresponding seniority. The applicant has no grievance about the same. His contention is that he became eligible to be considered for promotion as U.D.C. on 20.1.79 and therefore, he should get the next available vacancy. It is true that the applicant started actually working as L.D.C. with effect from 30.9.83 but he is not responsible for such delayed promotion. His ^{delayed} promotion was rectified and preponed to 20.1.76. Had he been promoted on this

date actually, he would have been eligible to appear in the Departmental test in 1978 and then eligible for promotion as U.D.C. from 20.1.79. When he was actually promoted as L.D.C. on 30.9.83 he immediately applied for appearing in the qualifying test for promotion as U.D.C. in 1984 but it is the respondents who did not allow him to appear as he had not completed two years of service. In the very first chance when he was allowed to appear in the test in 1985 he not only passed the test but obtained the highest marks. In such cases where one is entitled to get himself considered for promotion with retrospective effect, a review D.P.C. as on the date of one's eligibility is directed to be held. In the matter of promotion from L.D.C. to U.D.C. there are however two steps to be covered. Firstly one has to pass the qualifying test and secondly he has to be assessed after qualifying in the test by the D.P.C. So far as his being subjected to a qualifying test on completing two years as on 20.1.78 is concerned, it will be an infructuous exercise. He cannot be tested in 1990 as if he is being tested in 1978. But the fact remains that the applicant had passed the qualifying test for U.D.C. in the very first attempt and it will be futile to subject him to an 'impossible' test of 1978. We have to consider him to have qualified in 1978 itself. It is, however, possible for a review D.P.C. to be held

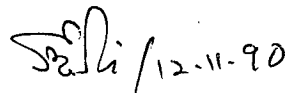
on the date his next junior in the L.D.C's grade was so considered after 20.1.79. The applicant's contention that he should be considered for the first vacancy which arose after 20.1.79 cannot be considered as there may be persons senior to him who might have had prior claim on such a vacancy. The maximum that he can claim is the vacancy which had been given to the L.D.C. who was immediately junior to the applicant.

5. In the facts and circumstances, we allow this application to the extent of directing ^{the respondent} that the applicant should be deemed to have qualified for promotion as U.D.C. in 1978 and that a review D.P.C. should be convened to assess him for promotion as U.D.C. on the date(s) when the L.D.C's immediately below him in the cadre of L.D.C. on the basis of his revised seniority in that cadre, was so considered. If the D.P.C. finds him suitable for such promotion he should be given notional promotion from the date his junior was promoted as Upper Division Clerk and his seniority in the grade of U.D.C. should be refixed based on that date. His pay as U.D.C. should be refixed based on the date of his notional promotion without arrears of pay. Arrears of pay are not being allowed because he not only did not discharge the duties of U.D.C. from the date of notional promotion but also because the benefit of his passing the qualifying

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test in 1985 has been given retro-active effect. The applicant also would be entitled to be considered for further promotion on the basis of his revised seniority in the U.D.C's cadre. We direct that action on the above lines should be completed within a period of three months from the date of communication of this order. There will be no order as to costs.


(A.V. Haridasan)
Judicial Member


(S.P. Mukerji)
Vice Chairman

12.11.1990

Ksn.