

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

OA No. 186 of 1994
OA No. 1192 of 1994
OA No. 771 of 1995
and
OA No. 961 of 1995

Friday, this the 22nd day of September, 1995

CORAM:

HON'BLE MR JUSTICE CHETTUR SANKARAN NAIR, VICE CHAIRMAN
HON'BLE MR SP BISWAS, ADMINISTRATIVE MEMBER

OA No. 186 of 1994

1. CC Jacob,
S/o Late CC Chacko,
Preventive Officer,
Custom House, Cochin-9
2. Halli Itty Iype,
S/o AI Itty Iype,
Preventive Officer,
Custom House, Cochin-9 .. Applicants

By Advocate Mr. MR Rajendran Nair

Versus

1. The Collector of Customs,
Custom House, Cochin-9
2. Union of India represented by
Secretary to Government of India,
Ministry of Finance,
Secretariat, New Delhi.
3. Baburam,
Air Customs Officer,
International Airport, Trivandrum.
4. PV Bhaskaran,
Preventive Officer,
Customs House, Cochin.
5. PK Devaki,
Preventive Officer,
Customs House, Cochin. .. Respondents

By Advocates Mr.C Kochunni Nair (R1-2), Mr.KA Abdul
Gafoor (R3), Mr.NN Sugunapalan (R4) and
Mrs. Sumathi Dandapani (R5)

OA No. 1192 of 1994

SAS Navaz,
S/o SA Shakur,
Preventive Officer, Air Customs,
Trivandrum ("YASAKA" 26/907-A,
Konthuruthy Road, Cochin-13). .. Applicant

By Advocate Mr. MR Rajendran Nair



Versus

1. The Collector of Customs,
Custom House, Cochin-9
2. The Union of India represented by
Secretary to Government of India,
Ministry of Finance,
Secretariat, New Delhi.
3. PV Bhaskaran,
Preventive Officer,
Customs House, Kochi-9 .. Respondents

By Advocates Mr. C Kochunni Nair (R1-2) and
Mr. NN Sugunapalan (R3)

OA No. 771 of 1995

1. PV Bhaskaran,
Preventive Officer,
Custom House, Kochi-9 .. Applicant

By Advocate Mr. NN Sugunapalan

Versus

1. Collector of Customs,
Custom House, Kochi-682 009
2. Union of India represented by
its Secretary to Government of India,
Ministry of Finance,
New Delhi. .. Respondents

By Advocate Mr. PR Ramachandra Menon, ACGSC (R1-2)

OA No. 961 of 1995

1. T Sebastian, S/o V Thomas,
Preventive Officer, Custom House,
Cochin-9 (Now on deputation to
International Airport, Trivandrum),
residing at 'Saravanam',
Manakkad, Trivandrum.
2. TM Viswanathan, S/o M Krishnan Nair,
Preventive Officer, Custom House,
Kochi-9 (Now on deputation to
Cochin Export Processing Zone, Ernakulam),
residing at 'Darsana', 28/1053-A,
Indira Nagar, Kochi-20 .. Applicants

By Advocate M/s MR Rajendran Nair & PV Asha

Versus

1. The Collector of Customs,
Custom House, Cochin-9
2. Union of India represented by
Secretary to Government,
Ministry of Finance,
Secretariat, New Delhi.



3. Shri Baburam,
Air Customs Officer,
International Airport,
Trivandrum. .. Respondents

By Advocate Mr.PR Ramachandra Menon, ACGSC (R1-2)

The application having been heard on 14-9-1995,
the Tribunal delivered the following on 22-9-1995.

O R D E R

SP BISWAS, ADMINISTRATIVE MEMBER

The questions of law arising, contentions raised and reliefs claimed in these applications are similar, and so they are disposed of by a common order. The facts in OA 186/94 are referred for the sake of convenience.

2. Applicants, belonging to the unreserved general category are at present working as Preventive Officers, Customs House, Cochin. They submit that they are aggrieved on account of their juniors being promoted as "Superintendents of Customs" on the basis of reservation far in excess of the quota ignoring their claims for promotion (Emphasis supplied). They seek to restrain further promotions being granted to those in the reserved categories, exceeding the quota.

3. Learned Counsel for applicants (except Counsel in OA 771/95) contended that there are 18 sanctioned posts forming the cadre strength in the category of Superintendents of Customs (Preventive) at Cochin, and 6 deputation posts, thus making a total of 24 posts. Out of these, 7 posts were manned by members of SC/ST categories on 1.1.95. Since one



of them retired on 1.1.95, there are five officers belonging to Scheduled Caste and one belonging to Scheduled Tribe on 1.6.95 in position. If the sanctioned strength alone (18 in number) is taken into consideration, more than 33.3% of the cadre strength is manned by SC/ST employees on 1.6.95. If the total strength (24 in number) is taken into account, as against 22.5% of reserved posts, more than 25% posts are held by SC/ST officers. Any further promotion of SC/ST officers on the basis of reservation will be violative of the quota/rule and unconstitutional, submits counsel.

4. Applicants would submit that respondents 1 and 2 by following the 40 point Roster in an unscientific manner is perpetuating the injustice of excessive reservation. It is argued further that the Government of India has issued orders on 7.4.89 specifying the methods of applying reservation in promotional posts, and these are also violated.

5. Counsel for applicants allege that steps are being taken by respondents to fill up the two vacancies that arose on 1.2.94 and 1.3.94 by promoting juniors of applicants on the basis that the vacancies are at reservation points, while vacancies arising on 1.2.94 and 1.3.94 are at points 10 and 11 and are not reserved points. In any case, as there is already 25% representation for members of Scheduled Castes and Scheduled Tribes against the maximum permissible limit of 22.5%, there cannot be any further promotion, argues Counsel.

6. Respondents 1 and 2 deny excess reservation. Under the Government of India OM No. 10/52/73/Estt.(SCT) dated 24-5-74, reservations have to be made against vacancies and not against posts in the cadre, and since vacancies are already earmarked for Scheduled Caste and Tribe officials, respondents would submit that they have followed the instructions of the Government of India under OM No. 1/11/69-Est.(SCT) dated 22-4-70, and that the 40 point Roster indicating reserved points for Scheduled Caste/Tribe officials has been adhered to correctly.

7. Counsel for the third respondent submitted that the Departmental Promotion Committee (DPC for short) estimated four vacancies for 1993-94, against roster points 7 to 10, that the third respondent was the seniormost amongst the Scheduled Caste candidates in the feeder category and that the DPC considered the case of 3rd respondent and prepared the panel. Four officials belonging to the general category were also empanelled, according to him. When the DPC had assessed and found the third respondent suitable, there is no question of violation of any constitutional guarantee, submits Counsel. Excess representation of Scheduled Caste candidates as alleged is denied. Counsel for third respondent would submit that strength of Superintendent of Customs is 28 and that there are only 3 candidates in the reserved quota. Representation of the SC community is short by two, according to him.

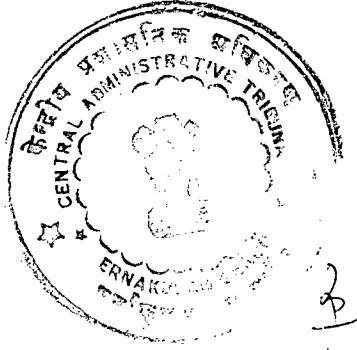


8. On merits also applicants have no case, promotion to the grade of Superintendent of Customs (Preventive) being on the basis of seniority-cum-merit, states Counsel for 4th respondent. According to him, applicants were found unsuitable by the DPC.

9. Sri Baburam, third respondent belonging to a Scheduled Caste, was promoted against Roster point No.8 against the vacancy that arose on 1.6.94, and he is eligible to be promoted in the reserved category according to Counsel for 4th respondent.

10. The vital issues for consideration in these applications are; (i) whether reservation is to be made with reference to vacancies arising from time to time, or on the total cadre strength; (ii) whether promotions granted on the basis of reservation are in excess of the quota or not? (iii) whether deputation or ex-cadre posts would form part of the cadre and principles of reservation be applicable to such posts or not? and (iv) whether "quota" or "roster" will prevail in case there is a conflict between both.

11. In this context, we would refer to the relevant provisions of the Constitution, and the orders of the Government of India in force. Article 335 of the Constitution read with Article 16(4) enables reservation to be made in favour of members of Scheduled Caste/Tribe in appointments to services and posts. Orders pursuant to these provisions have been issued by Government of India vide OM.No.10/41/73 Estt(SCT) dated 20.7.74 amended by



OM.No. 36021/7/75-Est. dated 25.2.76 - Paras 1&2 thereof are relevant for our purpose. Important portions are extracted below:

"....that there will be reservations at 15% and 7½% of the vacancies for Scheduled Castes and Scheduled Tribes respectively in promotions made by selection from Class III to Class II, within Class II and from Class II to the lowest rung or category in Class I in grades or services in which the element of direct recruitment, if any, does not exceed 66-2/3%.

2. The following instructions will apply to filling up of vacancies reserved for Scheduled Castes and Scheduled Tribes in terms of the instructions contained in this Office Memorandum:

- i) Selection against vacancies reserved for Scheduled Castes and Scheduled Tribes will be made only from among those Scheduled Castes/Scheduled Tribes officers who are within the normal zone of consideration.
- ii) If candidates from Scheduled Castes and Scheduled Tribes obtain on the basis of merit with due regard to seniority, on same basis as others, less number of vacancies than that reserved for them, the difference should be made up by selecting candidates of these communities who are in the zone of consideration irrespective of merit but who are considered fit for promotion.
- iii) A Select List should then be prepared in which the names of all the selected officers, general as well as those belonging to Scheduled Castes and Scheduled Tribes, are arranged in the order of merit and seniority according to the general principles for promotion to selection posts laid down in the Ministry of Home Affairs OM.No. 1/4/55-RPS dated 16th May, 1957"

These orders were reiterated and expanded by making them applicable to "all grades or services in which the element of direct recruitment, if any, does not exceed 75%" vide OM.NO. 36012/17/88-Est(SCT) dated 25-4-89 (Emphasis added).

It was also decided that promotions in future will be made strictly in accordance with the judgment

of the Allahabad High Court in Civil Writ Petition No. 1809/72 - JC Malik and Others Vs. Union of India and Others (1978 SLJ 401 - Allahabad 1978 (1) SLR 844). The Supreme Court directed that:

"reservation for SC/ST for appointments in services should be with reference to the posts and not vacancies which may occur in the cadre".

(Emphasis added)

The judgment also quashed the selection made on the basis of vacancies in excess of the prescribed percentage quota of posts being not in accordance with law.

The judgment of the Allahabad High Court contemplates:

- i) application of reservation with reference to the total number of posts in the cadre and total number of SC/ST officials already in position;
- ii) that if there is any shortfall in percentage of representation then only there could be reservation in the next recruitment/promotion to the extent of shortfall;
- iii) that if the requisite percentage stands met or exceeded there would be no further reservation in the next recruitment/promotion.

(Emphasis added)

12. Another important order relates to maintenance of and adherence to the Roster. Under the Government of India OMs. No.10/52/73-Estt(SCT) of 24-5-74, 1-9-74 and 29-4-75, a separate Roster (known as the 40 Point Roster) has to be maintained for filling up posts, promotion to which reservation applies. Such a Roster (in which points at 1, 8, 14, 22, 28 & 36 are reserved for SCs and points 4, 17 & 31 are for STs) has been prescribed to give effect to

reservations and is intended for determining the number of vacancies to be reserved for SCs/STs in a Select List. This Roster is not for determining the seniority.

13. Reservation for appointment can be only in respect of a cadre. Vacancy per se has no relevance. Hence, the percentage of reservation has to be worked out with reference to total number of posts which form the cadre strength (Emphasis added). Vacancies are not determinative in working out the quota. The law laid down by the Supreme Court in the case of RK Sabarwali & Others Vs. State of Punjab & Others (1995 (2) SCC 745) lays down so.

14. In a statement dated 30.6.95 filed by respondents 1 and 2, the category-wise position for the last three years has been shown as under:

	As on 1-1-94	As on 1-1-95	As on 1-6-95
<u>Sanctioned Strength</u>			
i) Regular sanction	18	18	18
iii) Deputation posts	4	7	6
iiii) Cost recovery posts in Cochin Ship Yards, Tyre & Rubber Company etc.	2	2	4
 Total posts	24	27	28
Actual working strength	23	26	24
<u>Category-wise position:</u>			
General	..	17	19
SC	..	4 (17.39%)	5 (19.23%)
ST	..	2 (8.69%)	2 (7.69%)
 Total	23 (26.18%)	26 (26.92%)	24 (25%)



The table above would show that reservation granted for SC/ST candidates are in excess of the quota and that this happened because of applying reservation to 'vacancies' and not to the cadre. Respondents thus erred in law while maintaining that "reservations have to be provided against vacancies and not posts in the cadre" (Statement of respondents 1&2 in March, 1994). In the instant case, the total number of posts of Superintendents of Customs is 24 including 6 posts on deputation. If all the posts in a cadre are filled up by filling the vacancies occurring in a year with due weightage to SC/ST officials and if 22.5% of the vacancies arising in subsequent years are filled up by promotion of SC/STs, the result would be that the percentage of reserved category in the cadre, would exceed the limit and number justified by the percentage provided. Such excess would be in violation of Clause (i) to Article 16 of the Constitution and can lead to the situation visualised by the Supreme Court in Devadasan's case (AIR 1964 SC 179), namely:

"if the reservation is so excessive that it practically denies a reasonable opportunity for employment to members of other communities the position may well be different and it would be open then for a member of a more advanced class to complain that he has been denied equality by the State".

Excess is evident from the category-wise staff position on 1-1-95 and 1-6-95. Excess of quota for one has resulted in denial of the rights for the other. As on 1-1-93, the cadre strength of 24 posts were full with 4 SC and 2 ST officers. And yet two vacancies arising in February-March 1994, following the retirement of two general category officials,

were being filled up by reserved candidates. But for this OA and subsequent stay orders on 30-9-94 by this Tribunal, the present excess would have been possibly further aggravated.

15. As per the instructions in OM.No.36012/7/77-Est(SCT) of 21-1-78, no reservation need be made for members of the SC/ST, in posts filled by deputation or transfer. However, the same order mentions that efforts be made by borrowing/lending Ministries/Departments to consider eligible reserved candidates against deputation/transfer posts. Preventive Officers are seen working in organisations like Cochin Ship Yard, National Tyre/Rubber and Shawallace Companies Ltd. etc. in tax recovery posts. All are agreed that tax recovery posts are not cadre posts and that while working in such organisations for a specific period these Preventive Officers hold lien in their parent cadre. Reservation orders do not apply to ex-cadre posts. Cadre strength would therefore, include deputation posts and exclude ex-cadre posts. All sides are agreed in this also.

16. Reserved category candidates can compete for non-reserved posts. In case of their appointments/promotions to such posts, their number can't be taken into consideration for the purpose of working out the percentage of reservation. In case sufficient number of SC/ST officials have been promoted or appointed against general quota, the competent authorities may review the question of continuing with the reservation for the said communities. However, so long as the instructions providing certain percentage of reservation to members of SC/ST or other disadvantaged groups are operative, the prescribed percentage can't be varied or changed just because some of the members of the backward communities have been promoted against general seats.



17. The concept of 'Quota' and 'Roster-points' and the methodology to achieve the percentage of reservation have been highlighted by the Apex Court, in the case of RK Sabarwal & Others Vs. State of Punjab & Others (1995 (2) SCC 745). Their Lordships held:

"The reservation provided under the impugned Government instructions are to be operated in accordance with the Roster to be maintained in each Department. The Roster is implemented in the form of 'running account' from year to year. The purpose of running account is to make sure that Scheduled Castes/Scheduled Tribes and Backward Classes get their percentage of reserved posts. The concept of 'running account' in the impugned instructions has to be so interpreted that it does not result in excessive reservation.

....When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for reserved categories is achieved. We see no justification to operate the 'roster' thereafter. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class, neither a SC/ST category candidate can occupy a slot in the roster earmarked for a general category. The 'running account' is to operate only till the quota provided under the impugned instructions is reached and not thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive.....

....the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the 'running account' must come to an end thereafter. The vacancies arising in the cadre after the initial posts are filled, will pose no difficulty. As and when there is a vacancy the same has to be filled from amongst the category to



which the post belonged in the roster. For example, the Scheduled Caste persons holding the posts at roster points 1, 7 & 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the posts at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure, there shall neither be shortfall nor excess in the percentage of reservation...."

The law laid down in the judgment cited will be applied whenever a vacancy arises after 10-2-95. It is now clear that 'quota' is the law and 'Roster point' is the mechanism/guideline to achieve the quota. Quota refer to the limit in law, whereas Roster indicates the points through which it is to be attained. For 'quota' to be achieved, 'roster' refers to a reserved point in the 'running register' and acts as a day to day watch dog. Hence, in case any conflict between the two, the former has to prevail over the latter. The cadre under discussion here had all the 24 points with justifiable number (4 SC + 2 ST) of reserved category officials on 1-1-93 and 1-1-94. Thereafter, the quota was not adhered to and was overshot by a wrong application of the roster point in favour of a Scheduled Caste candidate. As a result, the cadre had 7 reserved category employees (one extra) immediately before 1-1-95. With the retirement of an official belonging to a Scheduled Tribe on 1-1-95, the quota got evened out, but the roster-point placements continued uncorrected till today. As on 1-6-95, there is excessive reservation, by one for SC and shortfall of one for ST.



18. A contention was raised regarding the 'point of time' when the principle of reservation is to be applied. All, except Counsel for 4th respondent, agreed that it is the time of appointment. But, Mr. Sugunapalan, Counsel for 4th respondent contended that principle of reservation will have to be applied at the time the Departmental Promotion Committee is held. We are unable to agree with this view as DPC only assesses employees for promotion and does not itself make promotions. According to him, his client had been selected by the DPC, prior to the decision in Sabarwal's case and hence the principle cannot apply retrospectively. This contention is not sound. There is no retrospective operation and the DPC does not make an appointment. Percentage of reservation in higher grades will materialise only when promotions are made.

19. In view of the above discussion, we hold that there has been an erroneous application of the principles of reservation, resulting in appointment of Scheduled Caste candidate/candidates in excess of the 15% quota earmarked for them. This excess is in violation of law and denies the guarantee of Equality under Article 16 of the Constitution. Respondents will re-calculate entitlements of different categories and take further actions, applying the quota rule to the cadre and not vacancies, as they arise. Till the quota is correctly maintained, no appointment will be made



: 15 :

from the groups, which have exceeded the quota for them.

20. In the result, we allow OA 186/94, OA 1192/94 & OA 961/95 and dismiss OA 771/95. Parties will suffer their costs.

Dated the 22nd day of September, 1995

Sd/-
SP BISWAS
ADMINISTRATIVE MEMBER

Sd/-
CHETTUR SANKARAN NAIR (J)
VICE CHAIRMAN



CERTIFIED TRUE COPY

Date 26. 9. 95

Deputy Registrar