

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 284 of 2006

Tuesday, this the 8th day of July, 2008

CORAM:

**HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE DR. K.S. SUGATHAN ADMINISTRATIVE MEMBER**

**K.R.Prakasan,
S/o Raghavan, Skipper-in-Charge,
Central Institute of Fisheries,
Nautical and Engineering Training,
Visakhapatnam.
Permanent Address: Kadayil House,
Nandathu Kunnam, North Parur,
Ernakulam.**

....Applicant

(By Advocate Shri TC Govindaswamy)

versus

- 1. Union of India, represented by
the Secretary to Government of India,
Ministry of Agriculture
(Department of Animal Husbandry,
Diarying and Fisheries), New Delhi.**
- 2. The Director,
Central Institute of Fisheries,
Nautical and Engineering Training,
Foreshore Rod, Cochin-16.**
- 3. The Chief Instructor (Crafts and Gear),
Central Institute of Fisheries,
Nautical and Engineering Training,
Foreshore Rod, Cochin-16.**

....Respondents

(By Advocate Mrs.K.Girija, ACGSC)

**The application having been heard on 2.7.2008 the Tribunal
on 8.7.08 delivered the following:**

ORDER
HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER

The applicant joined the respondent's organization on 13-01-1981 as a Bosun and as on 09-08-1999, he was afforded the first financial upgradation under the ACP Scheme, in the pay scale of Rs 7,450 -11,500, which is the scale of Mate, the promotional post of Bosun. Later on, he was also afforded regular promotion w.e.f. 27-11-2002. The next promotional post is Skipper. Prior to 2003 the qualification for promotion to the said post is holder of competency certificate to be a Skipper in a fishing vessel as provided for in the Merchant Shipping Act, 1958 and the applicant is in possession of the same. However, by G.S.R. No. 84 dated 11-02-2003, an amendment to the qualification part for promotion to the post of Skipper was introduced and according to the said amendment, the qualification is certificate of competency as Skipper Grade I for fishing vessels by the Mercantile Marine Department or equivalent. This requirement is not fulfilled by the applicant.

2. The applicant completed 24 years of service on 13-01-2005 and thus, subject to fulfillment of the attendant conditions, he would be entitled to the grant of second financial upgradation. Of course, that was not afforded to him. However, by Annexure A-2 order dated 18-10-2005, the applicant was directed to function as Skipper-in-charge of MV Skipper III and the said order further stated that formal order of appointment as Skipper will be issued by Competent Authority for the periods of sailing of the vessel MV Skipper III as and when required. The applicant took up the higher responsibility and has been continuing as Skipper in charge. However, he has not been afforded the pay scale as of a skipper and has been kept in the pay scale as for a Mate only.



3. The applicant made Annexure A-5 representation dated 30-01-2006 stating that he and another individual by name Maxy having been appointed at the same time, ^{The latter} had been afforded the second ACP while the applicant has not been granted the same and thus, he has requested for grant of second ACP. The applicant was informed vide impugned Annexure A-1 order dated 23.03.2006 stating that as per the existing Recruitment Rules, the applicant is not eligible for 2nd ACP as one of the essential qualifications for the post of Skipper at CIFNET is Certificate of Competency as Skipper Grade I for fishing vessels issued by MMD, which the applicant is not possessing as per official records and by clarification No. 53 on ACP Scheme, only those employees who fulfill all promotional norms are eligible to be considered for benefit of Act.

4. The applicant has challenged the order of rejection of his claim for 2nd ACP on the following grounds:-

- (a) Annexure A-1 is illegal and not by a competent authority.
- (b) The certificate possessed by the applicant is equivalent to Certificate of competency as Skipper Grade I, but for which the applicant would not have been permitted to function as in-charge as skipper of the vessel.
- (c) Others having identical qualification have been afforded the second financial upgradation in the scale of Rs 10,000 – 15,200/-.

5. The applicant thus prayed for the following relief:-

- (a) For a declaration that the applicant is entitled to the benefit of the second financial upgradation w.e.f. 13-01-2005 in the pay scale of Rs 10000 – 15,200/- with all consequential benefits.
- (b) Award costs.

(c) For passing such other orders or directions as deemed just, fit and necessary in the facts of the case.

6. Respondents have contested the O.A. Their contention as contained in paras 4 and 5 of the counter is as under:-

"4. The averment of the applicant is wrong. As per the existing Recruitment Rules one of the essential qualifications for promotional post of Skipper is Certificate of Competency as Skipper Grade I for fishing vessel by the Mercantile Marine Department. Admittedly, the applicant does not possess the Certificate of Competency as Skipper Grade - I and neither does Annexure A-4 provide any indication that he possesses such qualification. A true copy of the Recruitment Rules of 2003 is produced herewith and marked as Annexure R-1(e). In fact, as per the Merchant Shipping Act, 1958, if the vessel is of 24 meters or more in length or is operating beyond the contiguous zone, it shall be provided with a Certificated Skipper Grade I and a Certificated Mate of a Fishing Vessel. The vessel operating under the respondent is having an OAL (overall length) of more than 24 meters and are operating beyond the contiguous zone. It is in order to comply with the Merchant Shipping Act, 1958, that the competent authority has amended the RR making essential qualification for Skipper as Certificate of Competency as Skipper Grade I. It is a fact that the Recruitment Rules notified prior to the existing one was not having this requirement as only Certificate of Competency as Skipper was required. In the Recruitment Rules notified in 2003 only the requirement of "Skipper Gr.I" was insisted. Thus, the applicant statement that there is no amendment to the Recruitment Rules, as existed during 1999 and at any case no such rules are circulated so far for the information for the staff, is without any bonafide. Hence, the promotion given to Shri G. Ayyappa Prasad in 1995 cannot be taken advantage of by the applicant in view of Annexure R-1 (e). Even according to the applicant he has completed 24 years of regular service only on 13.01.2005. On that date, it is Annexure R-1(e) Recruitment Rules which governs the field.

5. The submission of the applicant that he is subjected to substantial prejudice, irreparable damages and recurring monthly loss is not due to any departmental fault. The department has proposed amendment of Recruitment Rules suiting promotional chances of feeder category officials including the applicant and the Recruitment Rules are likely to be notified relaxing the requirement of qualification for promotees of the department. The applicant also is likely to get the benefit of the same.

On

7. In addition to the above, the respondents have filed another statement which contains the following:-

"3. The respondents beg to submit that the process of amendment to Recruitment Rules is still in process and the same has not been carried out till date. The proposed amendments are being forwarded to the Union Public Service Commission for concurrence and the amendment has not yet been brought into force. As long as the amendment is not brought into force, it is Annexure R1(e) Recruitment Rules which govern the field and in terms of the same, the applicant cannot be granted the relief as sought for at this point of time. If at all an amendment is brought into the advantage of persons like the applicant, the same would be extended to the applicant also at the appropriate time."

8. An additional reply statement has also been filed annexing Annexure R1(f) to R1(l), many of which relate to correspondents exchanged between the field office and the Ministry in regard to amendment to the recruitment rules.

9. Counsel for the applicant submitted that as on date there is no such course in any institution which imparts certificate of competence as Skipper Gr. 1. Thus, the qualification as per 2003 amendment to the Recruitment Rules is impossible to obtain. The applicant has been directed to function as Skipper right from October, 2005 but he has been denied the benefit of pay scale attached to the post of skipper. The fact that amendments to the Recruitment Rules have been floated, it would only be appropriate that the applicant be afforded second financial upgradation pending finalization or else direction be given for early finalization of the Recruitment Rules. In fact there being a power to relax, this could also be pressed into service. It has further been argued that the certificate which the applicant has been holding should be construed to be

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equivalent to certificate of competency of Skipper Grade I, as otherwise, the respondents cannot have asked the applicant to carry out the functions of Skipper. This equation of the qualification, especially when the applicant has been asked to function as Skipper is essential, as the requirement of certificate of competency as Skipper Grade I in fact emanated from Ministry of Shipping as, according to their rules, no one save those holding the certificate of Skipper I, could run the vessel and violation of this condition would lead to avoidable civil/criminal cases.

10. Counsel for the respondents argued that –

- (a) there is absolutely no scope for a direction being given to the respondents to have the amendment to the Recruitment Rules as the same is beyond the pleadings. The Tribunal has no power to mould the relief. The grievance of the applicant and the relief claimed are purely restricted to grant of ACP. Nothing less; nothing else! Any direction beyond the area of prayer would be without jurisdiction.
- (b) As regards ACP, the Rules are specific that one becomes entitled to the higher grade if only the attendant conditions as for promotion to the higher post get fulfilled. And since from 2003, the qualification for promotion to the post of Skipper is certificate of competency as Skipper Grade I, the applicant is not entitled to the benefit of 2nd ACP.
- (c) Power to relax is a provision which is to be exercised by the Respondents at their discretion and not at the instance of a Court's direction and further, as per the latest judgment of the Apex Court, the Tribunals or courts cannot give direction for amendment of the Recruitment rules.



(d) That the applicant has been asked to perform the functions of Skipper-in-charge is purely on the ground of functional requirement. That alone cannot make him entitled to either grant of 2nd ACP or higher pay scale as for a skipper.

(e) As regards Maxy, the Bosun who has been granted the second ACP in January, 2005, he does possess the requisite qualification as for a skipper. He is the lone person to have this qualification.

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

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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

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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

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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.

20. No costs.

(Dated, the 8th July, 2008)



(Dr. K S SUGATHAN)
ADMINISTRATIVE MEMBER



(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVR.