

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 285 OF 2008

....., this the 24th day of August, 2009.

CORAM:

**HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Mr.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

Shri. K. Yoonis Haji,
Assistant Engineer (Civil),
Public Works Department, Amini Island,
Union Territory of Lakshadweep,
residing at Govt. Quarters, Amini Island,
Union Territory of Lakshadweep.

... **Applicant**

(By Advocate Mr. M.V. Thamban)

versus

1. Union of India, represented by the Secretary to the Government of India, Ministry of Urban Development and Employment, (Department of Urban Development), New Delhi.
2. The Administrator, Lakshadweep Administration, Kavaratti Island, Lakshadweep.
3. The Superintending Engineer, Public Works Department, Union Territory of Lakshadweep, Kavaratti.
4. The Secretary (Works), Union Territory of Lakshadweep, Kavaratti.
5. Union Public Service Commission, New Delhi, represented by its Secretary.
6. Arun Jadav, Executive Engineer (Civil), Public Works Department, Division Office, Kalpeni Island, Union Territory of Lakshadweep.

7. M.K. Abdul Salam,
 Executive Engineer (Adhoc),
 Lakshadweep Public Works Department,
 Amini Island, residing at Government
 Quarters, Amini Island,
 Union Territory of Lakshadweep. Respondents

(By Advocate Mr. TPM Ibrahim Khan, SCGSC (R1)
 Advocate Mr. S. Radhakrishnan (R2-4)
 Advocate Mr. Thomas Mathew Nellimoottil (R5)
 Advocate Mr. M.R. Hariraj (R7))

The application having been heard on 28.07.2009, the Tribunal
 on 24.08.09 delivered the following:

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

The applicant at the time of filing of this OA was working as Assistant Engineer(Civil) in Lakshadweep Administration and due for superannuation on 31.07.2009. He has at his credit a Diploma. The next hierarchical promotional post is Executive Engineer and initially there was only one post, later on the total number of sanctioned post was increased to three. As per the 1981 Recruitment Rules, only Graduate Assistant Engineers were eligible to be considered for promotion to the post of Executive Engineer. However, later on the Rules were modified effective from 3.03.2004 whereby the vacancies in the post of Executive Engineers shall be held in the following manner :-

"Promotion :

66 2/3% Assistant Engineer (Civil) with eight years' regular service in the grade and possessing a degree in Civil Engineering from the recognized University or Institute or equivalent.

33 1/3% Assistant Engineer (Civil) with ten years' regular service in the grade and possessing a Diploma in Civil Engineering from a



recognized University or Institute or equivalent.

Note: Where juniors who have completed their qualifying/eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less, and have successfully completed their period of probation promotion to the next higher grade alongwith their juniors who have already completed such qualifying or eligibility service."

2. As a matter of fact, the applicant initially approached this Tribunal for filing of O.A. No. 818/2003 when the Tribunal has passed the following order :-

"4. We have heard the learned counsel. Since it has now been submitted that the amended Recruitment Rules have been finally published in the Gazette the controversy raised by the non production of the Recruitment Rules by the respondents has been settled. However, we would like to observe that it is strange that the respondents have been making promotion to the post of Executive Engineers from the year 1981 on the basis of the Rules which they are unable to trace out though this O.A was filed in 2003. The respondents themselves had given relaxation to the Recruitment Rules by promoting a Diploma holder and had been convinced about the need for giving an opportunity to the Diploma Assistant Engineers which are evident from the letters written by them to the Government of India at Annexure A-1, Annexure R-2 etc. Since the draft amended Recruitment Rules were under consideration from 1998 onwards as admitted by the respondents, the respondents could have considered the applicant at least for temporary promotion under the draft Recruitment Rules considering the position that

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other officials who are very juniors to him had been promoted on the basis of the Degree qualification. However, this is not an issue to be adjudicated now. The applicant is now very much eligible to be considered in accordance with the amended Recruitment Rules dated 3.3.2004. Hence we allow the O.A directing the respondents to consider the applicant for promotion according to the existing vacancies of Executive Engineers on a regular basis and to grant him the consequential benefits thereof. The O.A is allowed. No order as to costs."

3. One Shri. Arun Jadav (who is impleaded as respondent No.6 in this O.A.) filed O.A. No. 361/2005 claiming that though the Recruitment Rules were amended w.e.f. 03.03.2004, since the vacancies pertained to the period anterior to the revised Recruitment Rules, the post should be held only by Graduate Engineers. The said O.A. was disposed of in the following terms :-

"Now that a decision has already been taken by the respondents to convene a meeting of the D.P.C., the relief sought for by the applicant to direct the respondents to consider his representation does not require any consideration as it has already been communicated to the Administration by the U.P.S.C. We hope that the D.P.C. which is to be convened shortly will consider his case keeping in view the legal position as submitted by the counsel. The O.A. is disposed of accordingly. No order as to costs."

This order was sought to be reviewed by the applicant in R.A. No.14/2005 in O.A. No. 361/2005 which was however rejected by order dated 10th November, 2005. Lastly, the applicant filed O.A. No.689/2006 for a direction to the respondents to consider the cases of Diploma holders only as already 2 vacancies were filled up by Assistant Engineers holding Degree. This Tribunal holding that none of the Assistant Engineers with Degree were

having requisite experience and the applicant being the senior among the Diploma holders should be considered for promotion. One of the private respondents (Respondent No.7) filed W.P.(C). No.23816/2007 against the aforesaid order of this Tribunal and the High Court on the basis of the fact that the said private respondent (Writ Petitioner before the High Court) having acquired the requisite experience sometimes in July 2003 itself, the Tribunal was in error in holding that none of the Graduate Assistant Engineers was qualified when the vacancy occurred. The High Court therefore passed the following order :-

"10. Going by the well settled principle concerning the relevant date for considering the claims, we are of the view that since the petitioner became qualified on 8.7.2003, his claim is liable to be considered in preference to the first respondent. The Tribunal committed a serious error by proceeding on the footing that the petitioner became not qualified before the promulgation of the new rules. The same vitiates Ext. P27 and takes that order outside the jurisdiction of the Tribunal. Accordingly, Ext.P27 is quashed. O.A. No.689/2006 is dismissed. The competent authority among the official respondents will consider in accordance with law the claim of the petitioner for promotion to the post of Assistant Engineer in the light of Ext.P1 rules, having regard to the date of acquisition of qualification by him and also other relevant orders. This shall be done within three months from the date of production of a copy of this judgment. This judgment will not affect the claim of the first respondent for the first vacancy that may arise after the introduction of the new recruitment rules, as admittedly there is dearth of diploma holders in the cadre of Executive Engineer.

The writ petition is allowed as above."

4. Subsequently, Annexure A10 & A11 orders came to be passed.

The 6th respondent by Annexure A10 order was appointed on deputation basis

for a period of 1 year. He was made an Executive Engineer on ad-hoc basis by order dated 06.02.2008.

5. The grievance of the applicant is that the ad-hoc appointment of the 6th respondent arose by virtue of transfer of one Shri. S. Attakoya and since this vacancy had arisen subsequent to the passing of the judgment dated 24.09.2007 in W.P.(C). No.23816/2007, the said vacancy should have gone to the applicant as the judgment of the High Court is specific that the said judgment will not effect the claim of the 1st respondent for the first vacancy that may arise after the introduction of the new Rules as admittedly there is dearth of Diploma holders in the cadre of Executive Engineers.

6. Respondents have filed their reply. They have stated that the last vacancy of the Executive Engineer arose on 01.07.2002 and it was to be filled based on the pre-revised Rules and that there is no regular vacancy of Executive Engineer. They have further stated that as per the High Court's judgment, the competent authority will consider in accordance with law the claim of the petitioner (M.K. Abdul Salam) for promotion to the post of Executive Engineer in the light of pre-revised Rules having regard to the date of acquisition of qualification by him and also other relevant orders. The High Court has further observed in the judgment that the judgment will not effect the claim of the applicant for the first vacancy that may arise after introduction of the new Recruitment Rules. As on date, the three posts of Executive Engineers available in the Department are filled on regular basis. Out of this, one Shri. S. Attakoya was transferred and posted as Executive Engineer, LBDB on deputation basis. Accordingly, Arun Jadav (Respondent No.6) was appointed as Executive Engineer on ad-hoc basis and adjusted in the existing



vacancy. Now Arun Jadav has been appointed on regular basis by the U.P.S.C. The 7th respondent, M.K. Abdul Salam has been appointed on ad-hoc basis and by virtue of the judgment by the High Court, the said vacancy has to be filled up by considering the case of the applicant. The respondents have further stated that there has been a separate dispute between 6th and 7th respondents who are Degree holders in respect of a vacancy wherein Arun Jadav, 6th respondent has been appointed on regular basis. Thus according to the Official respondents, while Arun Jadav's appointment cannot be disturbed the ad-hoc appointment held by the 7th respondent may have to be reviewed and adjusted with Diploma holding Asst. Engineers as directed by Hon'ble Court. The 7th respondent, Abdul Salam has filed his reply in which he has stated that Shri. Arun Jadav was appointed against a vacancy which arose prior to the promulgation of Recruitment Rules of 2004. Thus that cannot be considered for determining the quota of Diploma holders. The subsequent vacancy which is a deputation vacancy can only held by ad-hoc arrangements and the said vacancy is a first vacancy under the new Rules. As such, as per the Rules, that can only be filled by a Degree holder who is entitled to 66 2/3% of vacancies. Hence the said private respondent has prayed for the dismissal of O.A. In so far as 6th respondent is concerned, he was duly represented by an Advocate but no reply has been filed.

7. Counsel for the applicant submitted that the judgment of the High Court has to be religiously implemented and since it has been specifically stated that the first vacancy after the revised Recruitment Rules came into force should be filled by a Diploma holder, the applicant has a claim over others.



8. Counsel for the official respondents submitted that the vacancy which was filled by the 6th respondent pertained to the period prior to the revision of the Recruitment Rules and as such he will not be dislodged. However, the vacancy filled on ad-hoc basis by Abdul Salam, the 7th respondent shall have to be filled up by considering a Diploma holder. Senior counsel for the 7th respondent Abdul Salam stated as under :-

- (a) As per the prayer, the 6th respondent is to be declared as not entitled to be considered for promotion against a 3rd vacancy. This could hold good only if that vacancy pertain to posterior to the revised Recruitment Rules. Admittedly, as per official respondent, the post held by Arun Jadhav pertains to the period prior to the revision of Recruitment Rules.
- (b) As regards the post held by the 7th respondent, the same too cannot be stated to be posterior to the revised Recruitment Rules. Once the vacancies are to be filled by pre-revised Recruitment Rules, the question of consideration of Diploma holders does not arise.
- (c) Even assuming that the vacancy held by the 7th respondent arose after 3.3.2004, then again on the basis of the judgment by the Apex Court reported in 1999 (3) SCC 384, it is only the vacancies that should be rotated for being filled up by the Degree holders and the Diploma holders in the ratio of 2:1 irrespective of whether the other posts have been filled up by a particular category.

9. In his rejoinder, counsel for the applicant distinguished his case from the above decision of the Apex Court stating that the said case dealt with



two different sources viz. Direct Recruitment on one hand and Promotion on the other, whereas in the case of the applicant it is by way of a single source viz. Promotion though from two different methods :-

- (a) One for Degree holders and
- (b) the other for Diploma holders.

10. Arguments were heard and documents perused. The High Court has held that its judgment dated 24th September 2007 would not affect the claim of the applicant herein for the first vacancy that may arise after the introduction of the new recruitment rules, as admittedly there is dearth of diploma holders in the cadre of Executive Engineers. This direction is proposed to be followed by the respondents. Para 9 of their counter refers. Though the senior counsel for the private respondent Shri Abdul Salam contended that vacancy that arises immediately on the introduction of the revised recruitment rules, would, on the basis of vacancy slot, have to be filled up by a general candidat, the contention cannot, at this point of time be allowed to be raised, as the same would go against the direction of the High Court. The said respondent had been the petitioner in the writ petition before the High Court and as such, this point ought to have been urged at the relevant point of time, or at least a review must have been filed. This not having been done, we are bound to follow the direction of the High Court. As such, the applicant has to be considered for promotion to the post of Executive Engineer in respect of that vacancy which had arisen for the first time after the revised recruitment rules came into force on 3rd March 2004. This could be done without disturbing the promotions already made as the applicant had superannuated in July 2009. The promotion could well be notional and in case the applicant had been found fit to hold the said post of Executive Engineer, his pay could well be fixed notionally from the date of



occurrence of the vacancy and the pay fixed on that basis together with annual increments, if any, that would have accrued, may be taken into account for working out the average emoluments for the purpose of calculation of terminal benefits and pension.

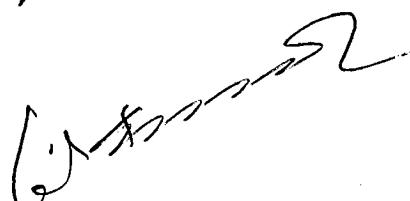
11. In view of the above, the OA is allowed. It is declared that the applicant has to be considered for promotion to the post of Executive engineer against that vacancy which arose for the first time after the introduction of the revised Recruitment Rules in March 2004. Respondents are directed to consider the other diploma holders, if any, along with the applicant and in case the applicant is selected, he be deemed to have been promoted from the date of occurrence of vacancy but on notional basis, and annual increment on notional basis be also afforded till the date of superannuation of the applicant and terminal benefits calculated on the basis of the pay so arrived at. Arrears arising out of the same should be paid to the applicant. If for accounting purposes, the respondents have to create a supernumerary post to accommodate the applicant, the same be also considered. Time calendared for this purpose is six months.

12. No costs.

(Dated, the 24th August, 2009)



K. GEORGE JOSEPH
ADMINISTRATIVE MEMBER



Dr. K.B.S. RAJAN
JUDICIAL MEMBER