

CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION NO. 1235/1996.

Date of Decision: 16.7.97.

Dharm Das, Petitioner/s

Shri G. K. Masand alongwith Advocate for the
Shri A. I. Bhatkar, Petitioner/s

V/s.

Union Of India & Another, Respondent/s

Shri V. S. Masurkar, Advocate for the
Respondent/s

CORAM:

Hon'ble Shri B. S. Hegde, Member (J).

Hon'ble Shri M.R. Kolhatkar, Member (A).

- (1) To be referred to the Reporter or not ?
- (2) Whether it needs to be circulated to other Benches of the Tribunal ?


(B. S. HEGDE)

MEMBER (J).

OS*

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.: 1235/96.

Dated this 16 the Wednesday day of July, 1997.

CORAM : HON'BLE SHRI B. S. HEGDE, MEMBER (J).
HON'BLE SHRI M. R. KOLHATKAR, MEMBER (A).

Dharm Das,
Administrative Officer,
Naval Dockyard, Lion Gate,
Mumbai.

C/o. Shri A.I. Bhatkar,
Advocate,
4/13, Mohamed Hussain Chawl,
Opp.: Antop Hill Post Office,
Shaikh Mistry Road,
MUMBAI.

(By Advocate Shri G. K. Masand
alongwith Shri A. I. Bhatkar).

VERSUS

1. Union Of India
through the Secretary,
Ministry of Defence,
Sena Bhavan,
New Delhi.
... Respondents.

2. The Chief of the Naval Staff,
Naval Headquarters,
Sena Bhavan,
New Delhi - 110 011.

(By Advocate Shri V.S. Masurkar)

: ORDER :

¶ PER.: SHRI B. S. HEGDE, MEMBER (J) ¶

By this O.A., the applicant is challenging the impugned advertisement dated 7 - 13 December, 1996 for filling up one post of Deputy Director of Civilian Personnel in the Indian Navy on transfer on deputation basis issued by the Ministry of Finance and published in the Employment News and to direct the respondents to convene a D.P.C. to consider the claim of the applicant and all other eligible officers for promotion to the posts of Deputy Director of Civilian Personnel in accordance

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with the Recruitment Rules in force on the date when the vacancies arose.

2. Heard the Learned Counsel Shri G. K. Masand alongwith Shri A.I. Bhatkar for the applicant and Shri V. S. Masurkar for the respondents. The applicant joined the Indian Navy as a Civilian Gazetted Officer and in due course of time he was selected for the higher post and was promoted to upgraded C.G.O. with effect from 22.05.1989. Thereafter, he became due for further promotion to the grade of P.M./A.O. and he was selected for the said post and placed on the panel vide letter dated 14.10.1992. The applicant is placed at Sl. No. 3 in the said panel. Thereafter, an order for promotion on regular basis in the grade of P.M./A.O. was issued by the respondents vide dated 26.10.1992. Therefore, the learned counsel for the applicant submits that despite his order of promotion issued by the Competent Authority, the said promotion was not effected by the authorities at Mumbai. Instead of giving effect to the promotion order, he was transferred to Naval Dockyard, Mumbai on temporary attached in the month of November 1992. Though, he had taken up the matter with the higher authorities, no action was taken. On the other hand, the applicant was transferred to Goa with malafide intention just to harass him, which action has been challenged by the applicant by filing the O.A. No. 42/94 before this Tribunal. The Tribunal delivered the judgement in favour of the applicant and disposed it of on 29.04.1994 and thereby the transfer order was quashed and the respondents

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were directed to give a posting to the applicant at Bombay to the entitled post of P.M/A.O. in an available vacancy and the applicant was directed to make a suitable representation to the competent authority regarding his unjustified non-promotion between the period from 27.10.1992 to 03.06.1993. The learned counsel for the applicant urged that neither any disciplinary proceedings nor anything adverse, which will disentitle the applicant for promotion to the higher grade, was pending against him when the promotion orders were issued. Despite this, the applicant was not given promotion. Ultimately, the applicant was promoted w.e.f. 28.10.1992 i.e. the date on which his colleagues were promoted and accordingly, his pay was fixed in the pay scale of P.M./A.O. w.e.f. 28.10.1992. The applicant further submits that he was due for further promotion to the post of Deputy Director of Civilian Personnel and there are four posts which have been sanctioned by the Government. The Recruitment Rules for the post of Deputy Director of Civilian Personnel prescribed that the said post is a selection post and is to be filled up by way of promotion only. The Rules further prescribes that the promotion to the said post will be made from the grades of Personnel Manager, Administrative Officer, Naval Dockyard, Mumbai and Staff Officer (Training). As per the existing Recruitment Rules, the officers in the feeder cadre with three years service in the respective grade on a regular basis will be eligible for promotion to the post of Deputy Director of Civilian Personnel. Out of the four posts, one post at Naval Headquarters has been occupied by one Shri C. K. Sarkar and the remaining three

vacancies, one at Mumbai and other two at Visakhapatnam are vacant since long time. He further submits that the post/vacancy at Headquarters Eastern Naval Command, Visakhapatnam and Naval Dockyard, Visakhapatnam are vacant even prior to the date of retirement of Smt. M. Fernandes. Nevertheless, these posts are not filled up. It is not the case of the respondents that they were not having sufficient number of vacancies to the post of D.D.P.C. and eligible officers having minimum requisite qualifying service. Though 3 vacancies existed, the respondents did not care to fill up the vacancy. It is further stated that Government of India has issued instructions from time to time for filling up the post on promotion after constituting Departmental Promotion Committees and how the posts are to be filled up, necessary instructions are given in this direction. Despite the vacancies. Though the vacancy existed, which are required to be filled up by promotion under the existing Recruitment Rules, the respondents published an advertisement in the Employment News for filling up of one post of Deputy Director of Civilian Personnel on transfer on deputation basis and the same will be considered under the proposed amendment to recruitment rules. The D.o.P.T. instructions clearly stipulate that holding of D.P.C. meetings need not be delayed or postponed on the ground that the Recruitment Rules for the post are being reviewed/amended. The instructions further stipulate that a vacancy shall be filled in accordance with the Recruitment Rules in force on the date of vacancy, unless rules made subsequently have been expressly given retrospective effect. Since amendments to Recruitment Rules normally have prospective applications, the existing vacancies should be filled as per the Recruitment Rules

in force. Therefore, the advertisement issued by the respondents is a malafide one and the same is required to be quashed.

3. The respondents in their reply contended that the recruitment rules for the post of Deputy Director of Civilian Personnel has since been superseded in the year 1996 and fresh Recruitment Rules have been framed after adopting due procedure which has the approval of M.O.D., D.O.P.&T., U.P.S.C. and Ministry of Law and hence the interim reliefs granted be vacated and the O.A. be dismissed with costs. The Recruitment Rules for the post of DDCP which were framed in 1975 have since been revised after adopting due process and the copy of the revised Recruitment Rules duly approved by the U.P.S.C. is annexed at R-1 to the reply. As per the revised recruitment rules, the eligibility condition for promotion to the above post is five years and not three years as indicated by the applicant. However, dispensation has been made in respect of the existing P.M./A.O. for qualifying service being three years and accordingly the applicant who is No. 3 on the seniority list is being considered for promotion against the other two vacancies of DDCP falling to DP quota and his case is already under examination by MOD/UPSC. The UPSC has finally revised the quota of promotion from 100% to 75% and rest of the 25% is to be filled up by transfer on deputation. In view of the revision of Recruitment Rules for DDCP, one out of 4 post falls to transfer on deputation quota. The justification offered by the respondents is since the Recruitment Rules for the post of Deputy Director of Civilian Personnel were framed long back in 1975 in accordance with the guidelines existing at that time, these guidelines have since been revised by the Government Of India after

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studying and examination of IVth Pay Commission recommendations. According to these guidelines, the Recruitment Rules for all the posts required to be amended and therefore, they thought fit to fill up one post by transfer on deputation under the amended rules. Accordingly, the respondents took up the case for amendment with the M.O.D., D.O.P&T., U.P.S.C. and Ministry of Law. The Naval Headquarters never recommended filling up any post by transfer on deputation basis. The DOP&T did not agree to provide 100% promotion and advised for 75% by promotion and 25% by transfer on deputation basis. Accordingly, the Naval Headquarters took up the case for advertising one vacancy out of the three for filling up the same by transfer on deputation basis. The respondents at para 11 of the reply conceded that the applicant deemed to be promoted as P.M/A.O. w.e.f. 28.10.1992 and completed three years of service on 28.10.1995, thereby, the applicant became eligible for promotion to the post of DDCP in 1996-97. Since the crucial date for determining the eligibility is 1st October of every year, the U.P.S.C. advised vide their letter dated 28.12.1994 that next DPC in the grade would be held only after the amendment of Recruitment Rules. Accordingly, the applicant is being considered for promotion by U.P.S.C. against the two vacancies earmarked for departmental promotion. He cannot simultaneously be considered for promotion as well as for deputation. Infact, he can be considered for promotion only, as deputation is meant for officers belonging to foreign cadre and an officer of the same cadre cannot be appointed on deputation. The respondents have conceded that the officers are being considered for the post of D.D.C.P. as and when they complete five years of service as P.M./A.O. Accordingly,

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S/Shri K. Chandrahasan and Van Murthy were considered by the D.P.C. only when they completed five years service as PM/AO. and were promoted

4. The applicant in his rejoinder submits that three vacancies existed since 1993, which has not been denied by the respondents in their reply. The respondents ought to have filled up the vacancies immediately after eligible officers were available in the feeder grade. Against the contention of the respondents that there was an acute shortage of officers in the grade of D.D.C.P. and therefore, immediately after the alleged amendment of the Recruitment Rules they advertised the post of D.D.C.P. for filling up on the basis of transfer on deputation, the applicant submits that same thing could have been done by them in the month of November 1995 when not only one but five officers in the feeder cadre became eligible for consideration of the promotion to the post of D.D.C.P. including the applicant. Since the third post is filled up by way of transfer on deputation, the applicant contends that he will lose the chances of promotion for a longer period till any of these officers retire and the post will be available for promotion of the applicant. Under the Rules, the vacancies shall be filled up in accordance with the Recruitment Rules in force on the date of vacancy. The vacancies which arose in the year 1993 and 1994 are required to be filled up as per the recruitment rules in force then, since the amendment, if any, to the Recruitment Rules will have prospective effect and will operate against the vacancies which/arise after the Recruitment Rules have been amended and not on the earlier date.

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5. Having heard the rival contentions of the parties, the question to be determined is, whether the post is to be filled up in accordance with the existing rules or under the amended rules. It is an admitted fact that the amendment to the Recruitment Rules have not been notified till now, therefore, the counsel for the applicant urged that the respondents cannot resort to the amended rules and the posts will have to be filled up on the basis of Recruitment rules existing on the date when the vacancies arose. Admittedly, the applicant was promoted as P.M./A.O. on 26.10.1992 and he was eligible for promotion to the post of DDCP in 1995. The advertisement for filling up of one post of Dy. Director of Civilian Personnel for transfer on deputation was published in December 1996. Since the amended rules have not been notified by the respondents, the same cannot be given effect to in law. Both the Counsel rely upon the decision of the Supreme Court in Dr. K. Ramulu & Another V/s. Dr. S. Suryaprakash Rao & Others reported at (1997) 3 SCC 59. In that connection, the Apex Court has observed as follows :

"It is seen and is not in dispute that under Rule-4 of the General Rules all first appointments to the State Service and all promotions/appointments by transfer shall be made on grounds of merits and ability and shall be made in accordance with the special Rules. It shall be prepared ordinarily during the month of September every year on the basis of estimated vacancies sent in terms of sub-clause (iv) and 30th of September shall be reckoned as the qualifying date to determine the eligibility of the candidate for such appointment which shall cease to be in force on the afternoon of 31st December of the

succeeding year or till the new panel is prepared, whichever is earlier. Q Second proviso to the Rule provides that if the vacancies are not available for the particular panel period, subject to the appointing authority recording a certificate to that effect or "where the appointing authority does not consider it necessary", it is not necessary to prepare the panel. At this stage, it is necessary to emphasise that the opinion of the Government by the proviso would (sic) should not be arbitrary. As rightly pointed out by Shri L. Nageswara Rao, the decision not to prepare the panel should be on valid and relevant consideration and it should not be an arbitrary decision taken by the Government. The object of Rule-4 is that all eligible candidates should be considered in accordance with the Rules. Panel should be finalised and operated so as to give an opportunity to the approved candidates to scale higher echelons of service which would augment the efficacy of service, inculcate discipline and enthuse officers to assiduously work hard and exhibit honesty and integrity in the discharge of their duties. Nonetheless, it is seen that clause (ii) of the second proviso gives power to the State Government to prepare the panel and to consider the case though the vacancies are available, as stated earlier, pending amendment of the Rules or recasting the Rules afresh. The Government have taken conscious decision not to fill up any of the pending vacancies until the process is completed which they had started on administrative grounds."

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The Learned Counsel for the applicant also relied in support of his contention to another decision of the Apex Court in Y.V. Rangaiah & Others V/s. J. Sreenivasa & Others reported at (1983) 3 SCC 284 [wherein the Apex Court has held that vacancies in the promotional posts occurring prior to the amendment have to be filled up in accordance with the amended rules. Hence, the panel prepared for filling those vacancies under the amended rules set aside and fresh panel under the old rules were directed to be prepared . The ratio laid down in the said case would squarely apply to the facts of the present case because the amended rules have not been notified and there was no conscious decision on the part of the department not to fill up any vacancies till the amended rules are notified. In view thereof, the respondents are left with no other alternative but to fill up the vacancies i.e. by promotion and not by transfer on deputation. He also cited another decision of the Supreme Court in State of Rajasthan V/s. R. Dayal & Others [1997 (1) SLJ 496] which also says - the posts which fell vacant prior to the amendment of the Rule would be governed by the original Rule and not by the amended Rules and vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing on the date when the vacancies arose, etc. Therefore, the learned counsel for the applicant, Shri Masand, draws our attention even in Dr. K. Ramulu's case, the ratio laid down in Y.V. Rangaiah's case has not been disputed or revised, the same holds good. Therefore, the advertisement issued by the respondents in December 1996,



is uncalled for, especially when eligible candidates are available for further promotion and since the amended rules have not been notified, the respondents cannot fill up the vacancies under the amended rules, which is not permissible. It is not the case of the respondents that they have been filling up the promotional posts under the revised rules. Till 1993, the respondents were filling up the post under the existing rules. Even under the amended rules, 75% of the post to be filled up by promotion and 25% by transfer on deputation, thereby, it is improper on the part of the respondents to fill up the post by transfer on deputation. The first three posts are required to be filled up by promotion and after the retirement of the existing holder, the said post could be filled up by transfer on deputation, if they intend to adopt the procedure under the amended rules. Since there is no dispute that the vacancy arose in 1993, the procedure adopted by the respondents is per se illegal and there is nothing on record to show that the respondents have taken a conscious decision for filling up the post by transfer on deputation. The contention of the learned counsel for the respondents is that the Government has taken a conscious decision by consulting various agencies and after adopting due procedure which has the approval of Ministry of Defence, D.O.P.&T, U.P.S.C. and Ministry of Law. In this connection, the learned counsel for the applicant draws our attention to the circular issued by the D.O.P.&T vide dated 18.03.88 in which it is stated whose decision is required to be taken in this matter. Here it states that the Recruitment Rules including their amendments, should be approved at the level of Minister-in-Charge, unless the Minister has

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by general or special order authorised such approval at a lower level(s), etc. No such order has been brought to our notice. Therefore, in our view, the respondents have not taken a conscious decision not to fill up the vacancies till the amended rules are notified, thereby, the vacancies shall have to be filled up under the existing rules in view of three decisions of the Apex Court.

6. In the result, the O.A. is allowed. There is no justification on the part of the respondents to publish an advertisement in the Employment News and that the same is in contradiction with the existing rules and decisions of the Apex Court. Accordingly, the impugned advertisement no. CP(G)1784/1896/D(Appts) published in the Employment News of 7-13 December, 1996, is hereby quashed and set aside. The respondents are hereby directed to fill up the vacancies under the then existing rules and consider the applicant for the post of Deputy Director of Civilian Personnel by convening a review D.P.C. within a period of two months from the date of receipt of a copy of this order.

7. The O.A. is disposed of with the above directions. There will be no order as to costs.

MR Kolhatkar
(M. R. KOLHATKAR)

MEMBER (A).

B. S. Hegde
(B. S. HEGDE)

MEMBER (J).