

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH MUMBAI

ORIGINAL APPLICATION NO:743/99

DATE OF DECISION: 30th day of August 2000

Shri Manohar Dhondu Gawade

Applicant.

Shri K.R. Yelwe

Advocate for
Applicant.

Versus

The Union of India and others.

Respondents.

Shri R.K. Shetty.

Advocate for
Respondents

CORAM

Hon'ble Shri D.S.Baweja, Member (A)

Hon'ble Shri S.L.Jain, Member (J)

(1) To be referred to the Reporter or not? Yes

(2) Whether it needs to be circulated to No. other Benches of the Tribunal?

(3) Library. Yes

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(S.L.JAIN)
Member (J)

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CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO:743/99

the 30th day of AUGUST 2000.

CORAM: Hon'ble Shri D.S. Bawejia, Member (A)

Hon'ble Shri S.L.Jain, Member (J)

Manohar Dhondu Gawade
Residing at
G-5, B-Wing, Deepal
Co-Operative Housing Society
Ltd., Jaihind Colony,
Dombivali (W) Dist. Thane.

...Applicant

By Advocate Shri K.R. Yelwe.

V/s

1. Union of India through
The Central Provident Fund
Commissioner (Head Office)
Bhavishya Nidhi Bhavan,
14, Bhikaji Cama Place,
New Delhi.
2. The Regional Provident
Fund Commissioner (Admn)
Employees Provident Fund
Organisation Regional
Office, Maharashtra and Goa,
Bhavishya Nidhi Bhavan,
Namdra (E), Mumbai.

...Respondents.

By Advocate Shri R.K. Shetty.

O R D E R

(Per Shri S.L.Jain, Member (J))

This is an application under Section 19 of the
Administrataive Tribunals Act 1985 for a direction to the
respondents to ascertain the correct vacancy position taking into
account the anticipated vacancies for the year 1997-98 and to
arrange for the declaration of result based thereon, to take the
correct position of vacancies numbering 16 as notified and
communicated vide respondent No.2's letter dated 7.7.1998,
16.10.1998 and to declare the applicant as successful if the

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number of vacancies exceed twelve in respect of which appointments have been effected and as recommended by respondent No.2 vide letter No. Adm.I(5)/159 dated 16.10.1998, the applicant be promoted to the post of E.O./Supdt./A.O. with effect from 19.11.1998.

2.....The applicant was appointed on 24.8.1983 as Lower Division Clerk in the Office of Regional Provident Fund Commissioner Maharashtra and Goa, Mumbai, after passing departmental written examination he was promoted to the post of Upper Division Clerk with effect from 22.12.1986 and he was directed to draw the scale of pay of Rs. 1200 - 2040 admissible to Upper Division Clerk Special Grade with effect from 19.10.1993. The applicant was working as Upper Division Clerk with effect from 1.10.1993. As per Recruitment Rules 1992, the vacancies in the post of EO/AAO/Supdt. are to be filled in as under:

- (i) 50% by promotion on the basis of seniority subject to fitness. The applicant crave leave to refer to and rely upon the same when produced.
- (ii) 25% by Departmental Competitive Examination.
- (iii) 25% by direct recruitment.

The Central Provident Fund Commissioner has to hold a Departmental Examination for the post of Enforcement Officer/ Assistant Accounts Officer and Superintendent. The applicant was eligible to appear for Departmental Competitive Examination as per Rules as he was holding the post of Upper Division Clerk for the last 12 years. The respondents are required to ascertain the number of vacancies in the posts of Enforcement Officer / Assistant Accounts Officer / Superintendent in every regional

office all over India and these vacancies are required to be split up on the basis of the rosters maintained by the Regional Offices for General Category, Schedule Castes and Schedule Tribes. The Departmental Examination is open to the categories in regions where vacancies for the said category exist. During the year 1997 - 98, the respondents issued circular No. Exam 5(1)/97/324 dated 6.11.1997 to the effect that Departmental Competitive Examination for the post of EO/AAO/Superintendent will be held from 5th to 9th January 1998 for the Regions and Central Office and requested All Regional Provident Fund Commission to assess the vacancies under the cadre of EO/AAO/Superintendent in their regions under different categories and obtain applications from the eligible and desirous candidates, prescribed the time-schedule for submission for forwarding of the applications and final list of candidates due to appear in the said examination. No specific date in regard to which the vacancies were to be calculated was mentioned in the said letter. The time table for the examination, the Centres for the examination and the list of eligible employees was issued on 24.12.1997 vide O.M. No.MH/PF/Adm-I(3)/EO.AAU Exam/98/1644. The name of the applicant was at serial No.3 as eligible candidate. Respondent No.2 vide letter No.MH/PF/Adm-I/82 dated 7.7.1998 in advance communicated to respondent No.1, the position of vacancies to be filled in from the Examination Quota for which the examination was held on 5.1.1998 to 9.1.1998 in the cadre of Enforcement Officer/Assistant Accounts Officer as under:

General	SC	ST	Total
06	06	04	16

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The result of the above said examination was declared on 6.10.1998. Respondent No.1 forwarded the mark list of employees who appeared in the Departmental Competitive Examination held in January 1998. Respondent No.1 did not empanel the applicant in the office order dated 19.11.1998 while he has secured 286/600 and H.M. Wadhwani has secured 289/600.

3. Respondent No. 2 appears to have constituted DPC and on its recommendation vide No. MH/PF/Admn-I(5)/Prom/EO-AAO / 1010 dated 19.11.1998 appointed six officials in the grade of EO/AAO in the scale of pay of Rs. 5500 - 175 - 9000 on long term regular basis with effect from the date of their assumption of charge at their present place of posting. The respondents did not take notice of the true position explained by respondent No.2 in his letter No. MH/PF/Adm-I/82 dated 7.7.1998 and also letter No. Adm.I(5)/159 dated 6.10.1998.

4. The applicant represented the matter to the Central Provident Fund Commissioner, New Delhi vide his representation dated 3.12.1998 through respondent No.2 followed by reminder dated 2.2.1999 and 19.3.1999 and letter dated 26.4.1999. Meanwhile when his representation was under consideration of respondent No.1 circular No. Examination 5(1)/98/595 dated 11.11.1998 declaring the Departmental Competitive Examination for the year 1998-99 scheduled to be held on 4th to 8th January 1999 was issued. Hence the applicant requested vide letter dated 4.1.1999 to respondent No.1 to keep one vacancy unfilled till the finalisation of his representation dated 3.12.1998. He appeared for the said examination but could not pass the same which was held on 4.1.1999 to 8.1.1999. But fact remains that his right so far as examination held on 5.1.1998 to 9.1.1998 remain unaffected.

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5. The grievance of the applicant is that the respondents have not notified the vacancies which were to be filled in by those who passed the Departmental Competitive Examination correctly. The vacancy position as stated by the Assistant Provident Fund Commissioner (Adm) vide his letter No. MH/PF/Adm-I(3)/EO-Exam/97/1500 dated 19.11.1997 and mentioned in the Central Provident Fund Commissioner's letter No. Exam 5(1)/97/Vol.-II/536 dated 7.10.1998 was as under:

General	SC	ST	Total
3	5	4	12

Whereas the vacancy position following in Examination Quota as communicated by the office of the respondent No.2 vide their letter No. MH/PF/Adm.I/82 dated 7.7.1998 was as under:

General	SC	ST	Total
6	6	4	16

Thus in view of letter dated 19.11.1997 read with letter dated 7.7.1998 the vacancy for General category was 6 while in view of letter dated 7.7.98 it is 8. The non-consideration of the anticipated vacancies or vacancies occurring during the year 1997/98 has adversely affected the right of the applicant for being considered for promotion to the post of EO/AAO. The respondents action in not considering the vacancies occurring

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during the year 1997-98 is arbitrary, capricious, illegal and cannot be sustained in law. The examination conducted under the Enforcement Officer/Assistant Accounts Officer and Superintendent Examination Scheme 1992 is competitive as distinct from the qualifying. Hence all the candidates who have passed the written test in order to assess the competitive merits of each candidate and prepare merit list on the basis of gradings that might be allotted by them. Non-observance of the proper and legal precedence of selection by DPC is illegal, unlawful and cannot be sustained in law. The action of the DPC without ascertaining the correct and proper vacancies are arbitrary, capricious, illegal and cannot be sustained in law. The result of the examination deserves to be declared on merits. The action of respondent No.1 in not considering the applicant is illegal and suffice of non-application of mind. The correct vacancy position of 1997-98 was 18 while it is taken as 12. The respondents have notified for more than 50% vacancies for SC/ST is in violation of Apex Court judgements in the case of Indira Sahwany and R.K. Sabharwal. Hence this OA for the above said relief.

6. The respondents have resisted the claim by an averment that the applicant applied for the said examination, appeared but could not make the grade as per the examination scheme in vogue the number of persons declared successful will be limited to the number of vacancies available as per the marks received by them. The respondents initially vide letter dated 13.11.1997, presumed that there were 3 vacancies under the General category, 5 under the SC category and 4 under the ST category making the total of 12 posts. However subsequently at the time of declaration of the

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result it was found that there were 6 posts for the General Category, 6 posts for the SC category and 4 posts for ST category making a total of 16 vacancies. The six vacancies to be filled by General candidates have already been filled by the employees set out therein and that 6 persons have secured more marks than the applicant and hence made the grade. The question of appointing the applicant under a reserved category vacancy does not arise as the applicant is a General category candidate. The reservation for SC/ST in the said post does not exceed 22.5%. Hence the stand of the Department granting 6 vacancies to the SC and 4 vacancies to ST is very much in order and cannot be faulted with. The vacancy position existing as on 31.3.1998 was forwarded to the Head Office vide respondent's letter dated 13.11.1997. Later on the vacancy position as on 30.6.1998 was intimated vide letter dated 25.6.1998. The Departmental Promotion Committee considered only the persons who are declared successful in the examination, having no powers to declare a candidate successful. The representation of the the applicant was forwarded to the Head Quarters vide letter No.MH/PF/Admn/69 dated 22.2.1999. The persons are kept in the merit list purely on merit. Hence prayed for dismissal of the OA alongwith costs.

7. The applicant has filed rejoinder affidavit and stated that it is wrong to state that there is no vacancy for the post of EO/AAO meant for General candidates in which he could be accommodated. The number of vacancies which could be filled by the candidates belonging to reserved communities cannot exceed 50% of the total vacancies in a year. Thus in view of 16

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vacancies, 8 in number in pursuance of O.M. No. 36012/2/96-Estt.(Res) dated 2.7.1997. Thus there are 8 vacancies earmarked for reserved communities and 8 vacancies could be filled by General candidates. However only 6 candidates have been appointed and 2 more vacancies still remain to be filled in. In case the quota to the extent of 22.5% of the total strength of the cadre is to be filled up by SC/ST, then the question of reservation in vacancies for SC/ST does not arise and in case the quota is not filled up to the extent of 22.5% then restriction of 50% operates. The respondents have indicated reluctance to apply restriction on filling the vacancies in excess of 50% of the vacancies in a year as stipulated in O.M No, 36012/3/78-Estt.(SCT) dated 9.2.1982 read with O.M. No. 36012/2/96-Estt. (Res) dated 2.7.1997. The Departmental Promotion Committee should consider all candidates who have qualified in the examination but restrict their selection to the number of vacancies available to them.

8. The respondents have filed sur-rejoinder stating the fact that the applicant has come out with the new plea that not more than 50% of the vacancies in a year can be reserved and is heavily relying on O.M. No. 36012/2/96-Estt (RAS) dated 2.7.1997. The said O.M. nowhere states that not more than 50% of the vacancies can be earmarked for reserved category in any given year. The reservation for the entitled categories is to be kept within the prescribed percentage of reservation and the total reservation should in no case exceed 50% of the cadre. There is absolutely no provision which restricts or disallows the respondents from filling up more than 50% of the vacancies available with reserved candidates. This of course is

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notwithstanding the respondent's contention that of the 16 vacancies available, 6 have already been filled up by the General candidates whereas 6 vacancies of the SC and 4 vacancies of the ST continued to remain unfilled as none of the SC/ST candidates have managed to make the grade. The total strength of EO/AAO until 20.11.1998 is 49, only 4 SC have been promoted whereas the respondents have right to promote upto 15% of the cadre so far as SC are concerned. O.M. dated 9.2.1982 is no longer relevant as the said O.M. was relating to the period during which reservation was being given on the basis of vacancies and not on the basis of posts. After the decision of the Apex Court in the case of R.K. Sabarwal, J.C. Mallick, Ajit Singh, II, etc. the respondents are following post based Rosters instead of vacancy based Roster.

9. The respondents have filed further affidavit after part hearing of the OA on 25.7.2000, stating the fact that after the examination of the records they have come to the conclusion that General vacancies continued to be 6, SC vacancy has reduced by one and ST vacancy increased by one.

10. The correct position is that on 20.6.1998, the General vacancy continues to be six, which is filled by the candidates of the General category who made the merit and no vacancy of SC/ST is being filled.

11. The learned counsel for the applicant relied on an order passed by the Principal Bench in case of Ravindra Singh V/s. The Secretary (Revenue) Ministry of Finance and others decided alongwith other OAs which states as under:

"3. Not to leave matters to doubt, we specifically asked Learned Counsel for respondents whether this statement of fact is denied. Candidly he admitted that 105 of 127

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posts have been reserved. According to him such reservation will not militate against Indira Sawhney Rule. As in his view the 50% limit attaches itself only to the vacancies arising in a particular year. We cannot assent to the submission. In clear and in unambiguous terms the Supreme Court has stated that the 50% Rule applies to every unit of a year irrespective of the composition of the vacancies. It follows that there is a clear violation or overstepping of the parameters laid down by the Constitution and the Apex Court. The selection cannot be upheld. We allow the applications and quash the selection made. This does not mean that the selection has to be done again. Form the existing select list appointments can be made applying the limit of 50% quota."

12. It is true that O.M. No. 36012/2/96 Estt (Res) dated 2.7.1997 does not lay down that in respect of the vacancies of a particular year, reservation in no case shall exceed 50%. Such an omission is a serious one which ignores the judgement of the Apex Court of the land in Indra Sawhney V/s. Union of India (AIR 1993 SC 477) which is being followed by the Principal Bench in case of Ravinder Singh V/s Union of India and others alongwith other OAs. As no post of SC/ST is being filled in view of the examination held from 5.1.1998 to 9.1.1998, vacancies communicated from time to time i.e. 19.11.1997, 7.7.1998 and 7.10.1998 though varies with each other (as per letter dated 19.11.1997 it is General 3, SC - 5, ST - 4, while as per letter

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dated 7.7.1998 and 7.10.1998 it is General 6, SC - 6, ST - 4 as on 30.6.1998 and the correct position is General 6, SC - 5, ST - 7) it makes no difference for the reason that vacancies in respect of SC and ST are not filled in.

13. The learned counsel for the respondents argued that whatsoever may be the vacancy in respect of the SC/ST candidates, the non-filling of the vacancy in the said category, does not create a vacancy/post in favour of the General Category as dereservation is banned. We agree to the submission of the Learned counsel for the respondents that if vacancy continues in the category of SC/ST, the number of vacancy is not increased in General category as dereservation is banned.

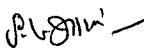
14. The learned counsel for the respondents relied on 1999 SCC (L & S) 513 State of Punjab and Others V/s Dr. R.N. Bhatnagar and Another which lays down the proposition that in case of promotion where the rule is filling vacancies in the cadre by promotees/~~by~~ direct recruits in ratio of 3:1 - Rules concerned with appointment and hence Article 16(1) and not Article 16(4) applicable - Roster provided in the rule should be followed every time a vacancy arises. Applying the said principle, there exists no vacancy for the General candidate.

15. The applicant appeared in the subsequent examination, though represented about the earlier one but respondents failed to take a decision in respect thereof, filed the OA after appearing in the said examination, representation was only to the effect that one vacancy/post may kindly kept unfilled till decision is taken on representation cannot be said to be appearing under protest. The applicant took a chance but failed,

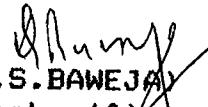
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hence stood estopped by conduct on principle of acquiescence and waiver (2000 SCC (L & S) 313 Suneeta Agarwal V/s State of Haryana and others).

16. In the result, we do not find any merit in the DA, It is liable to be dismissed and is dismissed accordingly with no order as to costs.


(S.L.JAIN)

Member (J)


(D.S.BAWEJA)

Member (A)

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