

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A. No. 203/1990
xxTxxNx

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DATE OF DECISION 16-04-1992

Bombay Customs Group-D Officers Petitioner
Union & 2 ors.Mr. M S Ramamurthi

Advocate for the Petitioner(s)

Versus

Union of India & 11 ors.

Respondent

Mr. P M Pradhan

Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. Justice U C Srivastava, Vice Chairman

The Hon'ble Mr. M Y Borkar, Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement? ✓
2. To be referred to the Reporter or not? ✓
3. Whether their Lordships wish to see the fair copy of the Judgement? ✓
4. Whether it needs to be circulated to other Benches of the Tribunal? ✓

MGIPRRND-12 CAT/86-3-12-86-15,000

VICE CHAIRMAN

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, "GULESTAN", BUILDING NO.6
PRESOT ROAD, BOMBAY-400001

O.A. NO. 203/1990

1. Bombay Customs Group 'D'
Officers Union,
A Registered Trade Union
through Shri Suresh
Kashinath Bhosale,
Hon. General Secretary
of the Union, having
its office in New
Custom House, Ballard
Pier; Bombay 400038.
2. Vijay Gangaram Shinde
BDD Chawl No. 70,
R. No.16; Worli
Bombay 400018
3. Kshore Vasant Raut
residing at Bori Chawl
No.6, Room No.3
N M Joshi Marg
(Delisle Rd.)
Bombay 400011.

.. Applicants

V/s.

1. Union of India
through the Secretary
Ministry of Finance
Dept. of Revenue
Government of India
New Delhi 110001.
2. Collector of Customs
New Customs House
Ballard Pier
Bombay 38
3. Sub-Regional Director
Employment Exchange
Hutment Nos. 1 and 2
Foreshore Road
Bombay 400021
4. Shri Krishna K Shriyan
Bldg. 19, Room No.585
Tagore Nagar, Vikhroli
Bombay 83

AND 8 others

.. Respondents

CORAM: Hon. Shri Justice U C Srivastava, V.C.
Hon. Shri M Y Priolkar, Member (A)

APPEARANCE

Mr. M S Ramamurthi
Advocate
for the applicants

Mr. P M Pradhan
Counsel
for the respondents 1 to 3

(25)

Mr. B. Menon
Advocate
for the Respondent no.4

JUDGMENT DATED: 10-04-1992
(PER: U C Srivastava, Vice Chairman)

Bombay Customs Group 'D' officers Union along with two individuals whose names were sponsored by the Employment Exchange with the names of other for being appointed as 'sepoy' in the year 1985 for which requisition was sent and who after found fit for employment could not get it so far because of appointment of 'Canteen employees', 'liftmen' drivers and others by the Collector of Customs, New Customs House, have approached this Tribunal with certain prayers. They have prayed that Union of India and the Collector of Customs be restrained from appointing or recruiting ^{as} seploys any employee working in other departments, outsiders including canteen employees who in fact are not departmental canteen employees but are private employees being employees of Cooperative Society, unless sponsored by Employment Exchange in response to advertisement and the appointment be made strictly in accordance with Rules and the appointment of respondent 5 to 12 and that of 4 if appointment has been made be set aside, and liftmen and canteen employees be appointed only as Hammals and be considered for promotion after working as such for five years as required under the Recruitment Rules of 1979 and relaxation be granted in the case of Hammals even in direct quota and candidates who have been interviewed and found fit be given appointment.

2. Statutory Rules for appointment were framed in the year 1979 for Sepoys which post is a Non-Gazetted Class 'D' post, the age prescribed is between 18 to 25 years and the educational qualification prescribed is Middle School ~~pass~~ pass. The appointment is direct appointment but 25% of the vacancies will be reserved for being filled up by transfer of Farashes, chowkidar, sweepers subject to certain conditions which include the prescription of ~~maximum~~ age viz., 45 years. In case if suitable persons like Farashes etc., fulfilling the requisite conditions are not available then unfilled quota will lapse and such vacancies will be diverted to direct recruitment through Employment Exchange.

3. The applicants made several attempts for stopping such backdoor appointment which are against statutory rules, too, and for appointment of candidates sponsored by Employment Exchange who were found fit for the job. The applicants also raised their voice in respect of appointment of two drivers found medically unfit to the post of Sepoy, lower in scale than that of driver on the ground of alternate employment as per decision of Government for which also there is no provision in the rules. They have also questioned the appointment of sportsman or on compassionate grounds on similar pleas as in the cases of others. It has been stated that respondents have taken shelter behind some Government orders issued prior to passing of Statutory Rules which became unenforceable or applicable after coming in force of the Rules in so far as the same were inconsistent with it. The Central Board of Revenue itself vide its letter dated 6.12.1979 (on the record as Ex. B) pointed out that all the administrative instru-

ctions relating to recruitment/promotion to the posts of Group C and D issued earlier may be treated to have been superseded by Recruitment Rules.

4. The respondents have disputed the claim and pleas of the applicants. It has been pleaded that recruitment of liftmen, canteen employees, casual workers is not in violation of Recruitment Rules. They are treated at par as per orders of Department with the candidates sponsored by Employment Exchange. Liftmen have been appointed on the condition that they will not claim past seniority. Regarding canteen employees it has been stated that as per letter by Ministry containing various instructions regarding relaxation in age of canteen employees were considered and they were given employment. It has been further stated that the Canteen employees were working in Bombay Customs Departmental Canteen and were holding a 'Civil Post' as per declaration made by Ministry of Home Affairs (Welfare) in the year 1979. The canteens run in the premises of Customs House are 3 in number and are registered with the Directorate of Canteens, Min. of Home Affairs, Department of Personnel and Administrative Reforms. The sponsorship by Employment Exchange has been pleaded to be not mandatory and there is no such provision in Recruitment Rules i.e., Customs Department (Group D) Recruitment Rules 1979. The canteen employees were considered as departmental candidates as they were permanent and confirmed in the canteen. The letter issued by Board of Central Taxes in 1979 has been said to be ^{of} no relevance in view of Ministrys instructions issued ⁱⁿ after framing of recruitment rules. Regarding cases of two drivers viz., S G Kumbhar and V L Koli it has been stated, request for light duties on

medical ground could have been considered under Fundamental Rule 15-A. Similarly under F.R.22(9)(iii) if appointment to a new post is made at the request of an employee under F.R.15(A) and maximum in the time scale of that post is less than his substantive post, he will be entitled to draw that maximum as initial pay. The cases of these two drivers being deserving and would not have resulted in injustice to any one the same were allowed. A plea that the previous panel so prepared in 1985 has come to an end by lapse of time and as such applicants have no claim for appointment which can be made from a fresh panel.

5. If service rules framed under Article 309 exist any executive ~~Q~~instructions issued before framing of it or subsequent to it in so far as they are in variance or inconsistent with service rules the same would be unenforceable and inoperative and will be without legal sanctity. Executive instructions can supplement the statutory rules but cannot supplant it. If the rules are complete or contains a particular matter no executive instructions modifying, varying the same in any manner can be looked into or recognised.

6. The 'note' to a rule or schedule appended to it containing details is part of it. The schedule to the Recruitment Rules provides for direct recruitment to the post of 'Sepoys' but the note which is part of it reserves 25% from amongst 3 categories viz., Farash, Sweeper and Chowkidar and the failure to have suitable candidates from amongst them, the post would revert back to direct quota to be filled in through the agency of Employment Exchange. There cannot be two different modes of direct appointment. From this note it is clear that nothing specific having been provided regarding direct appointment this note will govern it

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meaning that direct appointments is to be resorted through the agency of Employment Exchange only. Even otherwise in view of section 4 of the Employment Exchanges (Compulsory Notification of Vacancies) Act employers are barred to appoint persons not sponsored by Employment Exchange and Employers are only obliged to notify vacancies. Government offices are also included in the expression, 'establishment in public sector' as has been held with reference to its definition given in Section 2(f) and (e) of the said Act in the case of UNION OF INDIA AND ORS. V. N. HARGOPAL & ORS. (AIR/SC 1227). In the said case it was further held that Government instructions enjoin ^{ing} employers to fill up notified vacancies by candidates sponsored by Employment Exchange is mandatory for Government Department though directory for bodies created by Statues or statutory bodies.

7. But there can be exceptions to it also. The same are in respect of meritorious sportsmen by relaxation of all recruitment rules vide Home Ministry, Department of Personnel and Administrative Reforms, (Dept.PT) notification dated 4th August 1980 and consolidated notification dated 30th June 1987 issued by Ministry of Personnel, Public Grievances and Pension in continuation of previous notification on the subject viz., Compassionate appointment of son/daughter/near relations of deceased Government servants. Reference has already been made to F.R.15 regarding President's power ^(to) transfer a Government servant from one post to another on his written request also regarding which reference has already been made earlier and has been read along with Fundamental Rule 22(9)(iii) (which covers the cases of two Drivers appointed as Sepoys). Rule 6 of the Recruitment Rules provides for power to relax and it confers powers on Central Government when it is in its ^{opinion} necessary

of expedient so to do it may by order and for reasons to be recorded in writing relax any provisions of these rules in respect of any class or category of person or posts. This power is exercisable in respect of a class or category of persons or posts and not individuals. This is what has been held in the case of J C YADAVA V. STATE OF HARYANA (1990) 2 SCC 199 while interpreting identical provision of a different Act. For exercising this power apart from considering necessity or expediency of the same reason for the same are to be recorded in writing. In the instant case there is no notification as none has been produced or stated relaxing the provisions of the Act for appointment of canteen employees and lift men who admittedly have not come through employment exchange and whose eligibility in accordance with rules for being appointed against direct quota which is wanting has also not been considered for being appointed as Sepoys as they are not included in the category of persons who can be appointed and from amongst the departmental people. Any notification or executive instruction by Board past or present will be of no use if it is not in exercise of powers for relaxing class or category of persons or post in accordance with Recruitment Rules. In this view the liftmen and canteen employees if they are employees of Department cannot be appointed as sepoys beyond outside the category of Departmental candidates who can be appointed as sepoys, nor sponsored by Employment Exchange and there being no relaxation of Rules in this behalf by Central Government in their favour in accordance with Recruitment Rule 6 referred to above.

8. Whether canteen employees who in fact are employees of the Department or private employees as has been asserted it is to be noticed that they are employees of registered Canteen registered with Director of Canteens which is said to be run by Employees Cooperative Society and not by any contractor or outsiders society. The obligation to establish a canteen is on the employer and the object of providing for establishment of Managing Committee may it be of employees cooperative society is to see that the employees of the factories have some amount of say in the Management of the affairs of the canteen. These canteens would be Departmental Canteens, the holders of which have been declared to be holders of 'Civil Post'. The Administrative Instructions on Departmental Canteens in offices and Industrial Establishments of the Government are applicable not only to non-statutory canteens but statutory canteens as was held in the case of M.M.R. KHAN V. UNION OF INDIA, AIR 1990, SC 937. The canteen employees in the instant case will thus be employees of the Department and not employees of any private body.

9. On behalf of the respondents a plea has been taken though in reply to Miscellaneous application that in view of the Memorandum No.22011/5/86-Estt(d) dated 10.4.1989 the panel prepared and drawn by D.P.C. is always valid for a period of one year only. Upon expiry of a period of one year six months or when a fresh panel is prepared whichever is earlier the panel prepared earlier will cease to be in force. In the absence of any specific instructions it was decided that waiting list subsequently prepared on 31.3.91 out of which 40 persons could be appointed as sepoys was

referred to the Ministry for extension but the Competent Authority directed the list to be returned to the Employment Exchange and did not grant extension. The names of applicant and others were forwarded in 1985 and waiting list was prepared in the year 1989 after due selection. The applicants have pointed out that in fact there was 100 vacancies but some of it appears to have been diverted to the newly carved out Nhava-Sheva Custom House from the Bombay Custom House. According to the applicant the Nhava Sheva Custom House was brought into existence vide notification dated 28.4.1989 and the existing vacancies were from before creation of this new Custom House. It may as has been stated on behalf of Nhava Sheva Custom House which has also put in appearance in the case though not formally impleaded as a party that requisite number of posts were created in June 1990 for the new Collectorate and a separate cadre controlling authority came into existence as Ministry of Finance letter dated 26th December 1990 and separate appointments are to be made but it cannot be denied that various posts belonging to the bigger Custom House, where the number has been now reduced, would have been filled earlier many of the Class-D employees would have been transferred to this new Custom House. Thus according to the applicants in this new Custom House those who were entitled to be appointed earlier those posts if transferred to this new House could not be filled in afresh and persons like applicant if appointed even now which appointment would date back when vacancies existed would first get those posts and remaining only if some of them are sent to new House alone can be filled in.

10. The reference made by the respondent regarding life of panel prepared by D.P.C. in view of notification of the year 1989 (10-4-89) is out of tune and not



applicable in such selection. Even otherwise the post being from before issuance of notification and process for same having started much earlier the forceable stretching of notification to these posts will even then not apply to these posts. It has not been shown to us under which provision of law or notification or order having force of law a particular Ministry had jurisdiction to limit its life or grant extension or sanction to the waiting list so prepared.

In the case of PREM PRAKASH V. UNION OF INDIA, AIR 1984

SC page 1831 it was observed 'It is clear from this notification that if selected candidates are available from the previous list there should be either no further recruitment until those candidates are absorbed or in the alternative vacancies which are declared for the subsequent years should take into account the number of persons who are already in the list of selected candidates who are still awaiting appointment. The notification further shows that there should be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies once a person is declared successful according to the merit list of the candidates, the appointing authority has the responsibility to appoint him even if number of vacancies undergoes a change in the list of the successful candidates.

11. The notification to which reference has been made in the above case is a notification issued by Ministry of Home Affairs, Department of Personnel and Administrative Reforms Office Memorandum No.22011/2/79-Estt(D) dated 8.2.1982 which reads as follows:

Sub.: Validity period of list of selected candidates prepared on the basis of direct recruitment/Departmental Competitive Examination.

The undersigned is directed to say that references are being received from time to time from

Ministries/Departments inquiring as to what should be the validity period of a list of selected candidates prepared on the basis of direct recruitment or Departmental Competitive Examination.

Normally, in the case of direct recruitment a list of selected candidates is prepared to the extent of the number of vacancies (other persons found suitable being put on a reserve list, in case some of the persons on the list of selected candidates do not become available for appointment). Similarly, in the case of Departmental Competitive Examinations the list of selected candidates has to be based on the number of vacancies on the date of declaration of results, as the examination is competitive and selection is based on merit. A problem may arise when there is a fluctuation in the vacancies after the list of selected candidates is announced.

The matter has been carefully considered. Normally, recruitment whether from the open market or through a Departmental competitive Examination should take place only when there are no candidates available from an earlier list of selected candidates. However, there is a likelihood of vacancies arising in future, in case names of selected candidates are already available, there should either be no further recruitment till the available selected candidates are absorbed or the declared vacancies for the next examination should take into account the number of persons already in the list of selected candidates awaiting appointment. Thus, there would be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies, either by the method of direct recruitment or through a Departmental Competitive Examination.

Once a person is declared successful according to the merit list of selected candidates, which is based on the declared number of vacancies, the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change, after his name has been included in the list of selected candidates. Thus, where selected candidates are awaiting appointment, recruitment should either be postponed till all the selected candidates are accommodated or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates should be given appointments first, before starting appointments from a fresh list from the subsequent recruitment or examination.

Ministry of Finance, etc., are requested to bring the above instructions to the notice of all the appointing authorities under them for information and guidance.

Sd/-

(J K Sharma)
Director

12. The above notification also makes it clear that the list of panel will not come to an end after a particular period. No notification to the contrary has been pointed. In the instant case it has not even been pointed out that when the requisition was sent to the Employment Exchange ~~on~~ the vacancies were notified it was mentioned at all that the life of the panel to be prepared would be for one year. Even otherwise it is not possible as everything was done in 1985 and the panel was prepared in the year 1989 only and the respondents delayed the matter at their own level, for which they can only be held responsible and the applicant even if he has become overaged because of the delay on the part of the respondents cannot be made to suffer.

13. In view of what has been said above the life of the panel which was framed earlier would not come to an end and those who were eligible in respect of available vacancies are also entitled to get the appointment. It is a different matter that obviously the New Custom House has to make its new appointments. But in case the employees are to be transferred from Bombay Custom House and that strength includes all categories of employees would obviously not exclude employees who in normal course of time would have got their appointment before this transfer, and that cannot be lost sight of.

14. In view of above the application deserves to be allowed in part inasmuch as although the appointment on compassionate grounds and sports quota and drivers is to be held valid, but the appointment of

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canteen employees and lift men is invalid as the same is not in accordance with the rules. Although in case their appointment has been made in relaxation of the qualifications for their category by the Government of India in accordance with Rule 6 of the Recruitment Rules, in that case the appointments made would be valid and such appointments will remain in tact though the same does not appear to be the position here. So far as the vacancies which were to be filled in before the notification for creation of a new Custom House was issued in the year 1989, they are to be filled in from amongst the panel which was prepared and of which applicant no. 2 is a member. Applicant no. 2 and others ^{when their} ~~whose~~ turn comes be appointed without making any appointment of any other persons other than ^{from} the panel. Let this be done expeditiously say within a period of three months. There would be no order as to costs.


(M Y PRIOLKAR)
MEMBER (A)


(U C SRIVASTAVA)
VICE CHAIRMAN