

CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION No. 72/95 /199

Date of Decision: 10-12-96

Vasant Bhimrao Kharat & 4 Ors.

_____ Petitioner/s

Mr. M. S. Ramamurthy

Advocate for the
Petitioner/s

V/s.

U.O.I. & Ors.

_____ Respondent/s

Mr. R. K. Shetty

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?

M.R. Kolhatkar

(M.R. KOLHATKAR)

M(A)

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CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

O.A.NO: 72/95

Pronounced this, the 10th day of December 1996

CORAM: HON'BLE SHRI B.S.HEGDE, MEMBER(J)

HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

1. Vasant Bhimrao Kharat
2. Ashok Banurao Sadare
3. Damodar Kondiba Barbate
4. Subhash Madusudan Samatn
5. Bhagavan Abaji Sonene

All working in the office of
the Directorate of Census Operations,
Exchange Building, 2nd Floor,
Sprott Road, Ballard Estate,
Fort, Mumbai - 400 038.

.. Applicants

(By Advocate Shri M.S.Ramamurthy)

-versus-

1. Union of India
through
Secretary,
Ministry of Home Affairs,
North Block,
New Delhi.
2. Registrar General of India,
2/1, Mansingh Road,
Kotha House Annexe,
New Delhi - 110 011.
3. Director of Census Operations,
Maharashtra,
Exchange Building, 2nd Floor,
Sprott Road, Ballard Estate,
Mumbai - 400 038.

(By Advocate Shri R.K.Shetty)

.. Respondents

-: O R D E R :-

(Per M.R.Kolhatkar, Member(A))

In this O.A. the applicants have challenged

their reversion by the order dt. 28-2-1995, at Annexure A-8. By this order read with earlier order dt. 23-1-1995 at page 21 the applicants who were working as adhoc LDCs were reverted as Chowkidars. The applicants have not only challenged their reversion but they have further prayed for the declaration that the applicants are entitled to be regularised as LDCs and that the respondents be directed to regularise the services of the applicants as LDCs right from the initial dates of their appointments as LDCs and they be extended the benefit of seniority and other consequential benefits. The details of past service of the applicants are to be seen at page-7 of the O.A. from which it is seen that the first four applicants has started work in 1980-81 as Coder Tabulator in Group 'C' in the consolidated pay of Rs.280/- and then from 28-5-1981 worked as Checker in the consolidated pay of Rs.330/- then were appointed as Chowkidar from 4-8-1983 and then promoted as adhoc LDC w.e.f. 23-8-1994. Applicant No.5 was ab-initio appointed as Chowkidar w.e.f. 20-8-80 and thereafter promoted as adhoc LDC on 23-8-84 along with the first four applicants. Although the initial appointment order dt. 23-8-84 states that the promotion is purely temporary and on adhoc basis till 28-2-85 it is not disputed that the applicants were continuously working as LDC though on adhoc basis from 23-8-84 till the issue of the order dt. 23-1-95 at page 21.

2. The contention of the applicants is that they have completed 10½ years of service as LDC and they had drawn several annual increments as on the date of reversion and they possessed requisite academic qualification for being appointed as LDCs. The Recruitment Rules provide for promotion of Chowkidars (Group 'D' employees) as LDCs against a certain quota of LDCs posts and even if the applicants might have been promoted against the vacancies of LDCs in excess of the quota, in view of the fact that the applicants have continued as LDCs for 10½ years, the Government must be presumed to have relaxed the provisions in that behalf and therefore the Government should be directed to regularise the applicants from the date of their appointment. Alternatively the applicants contend that they were to be regularised after appearing for the examination conducted by Staff Selection Commission and they had applied for the examination in 1991 but the department delayed the forwarding of the application and therefore they could not appear for the examination. Subsequently the department ^{had} forwarded their applications and the Staff Selection Commission had not issued the hall tickets and the department had taken up the issue with the Staff Selection Commission and they were provisionally admitted to the Special Qualifying examination held on 26-12-1993 and it was only because the Staff Selection Commission disapproved the applicants' candidature on the ground that they were not initially appointed through Employment Exchange as LDC, that the correspondence shows that their case for appearing for the examination was

espoused by the department and the department should be directed to continue applicants as LDCs irrespective of the advice of the Staff Selection Commission.

It may be stated that the counsel for the applicants mainly emphasised the aspect of implicit relaxation and the adjustment of the applicants against the promotion quota and the second contention raised by him in relation to treatment of the applicants against direct recruitment quota is only an alternative prayer.

3. The respondents have opposed the O.A. According to respondents the applicants were promoted on purely temporary and ad-hoc basis specifically in the short term posts created for 1981 census and the promotions were given strictly according to the instructions contained in para 2(1) of Registrar General, India's letter No.18/40/79 Ad.I dt. 19-2-1980. The promotions were made on en-mass basis and not against 10% quota. 10% promotion quota is available only when promotions are made on regular basis and approved by DPC. In this case no DPC was held after the promulgation on 15-9-84 of the recruitment rules for the promotion against 10% quota. So far as the question of considering the applicants against direct recruitment quota is concerned all the five applicants submitted their applications for appearing in the Special Qualifying Examination 1991 of the Staff Selection Commission for the purpose of their regularisation as LDCs. While forwarding the applications, this Directorate had requested SSC to entertain their applications, but SSC returned their applications

with the reason that applications are received after due date. Therefore, they could not appear at this examination. D.C.P.T vide OM No.28036/01/92 Estt(D) dated 2.8.93 sent another scheme of special qualifying examination for the regularisation of ad-hoc LDCs. The examination was fixed in December 1993. Accordingly, they submitted their applications, which were forwarded to SSC. Staff Selection Commission vide letters No.23/1/93 EHQ/5010054 dt. 15-12-1993 and No.23/1/93-EHQ/5010056 dated 15-12-1993 rejected candidature of Shri D.K.Barbate and Shri V.B.Kharat respectively on the ground that they are not initially recruited through Employment Exchange as LDC. The Staff Selection Commission, Western Region, Bombay was acquainted vide letter No.A.123034/2/93-Ad.I(396) dated 22-12-1993 about the recruitment of LDC by promotion on adhoc basis from Group 'D' posts and requested to issue Hall Tickets to all such persons so that they can appear for examination. Hall Tickets were issued to them by the Staff Selection Commission, Western Region, Bombay and these persons appeared for examination provisionally. The examination was held on 26-12-1993. Subsequently, the Staff Selection Commission, New Delhi vide its letter No.23/1/94-Exam(HQ)/5010001 dated 5-2-1994 disapproved the applicants' candidature to appear for Staff Selection Examination on the ground that they were not initially appointed through Employment Exchange as LDC. Hence the respondents had no alternative but to revert the applicants.

4. The applicants have referred to the fact

the DPC has favourably considered their case for crossing the EB under FR 25 vide order dt. 26-10-94 at page 20 and this fact belies the contention that DPC has not considered their case for promotion. Respondents ~~reply that the~~ consideration by the DPC of the case for crossing EB has nothing to do with the promotion of the applicants. It only indicated that because of the long service the applicants had reached a particular stage ^{in time scale} and therefore decision of the DPC was required to be obtained to regulate their further ~~pay.~~

5. We first consider the case of the applicants for regularisation against promotion quota. This we do in the ~~context~~ of strong reliance placed by the counsel for the applicants on the observation of the Supreme Court in the case of The Direct Recruit Class-II Engineering Officers' Association and others v. State of Maharashtra & Ors AIR 1990 SC 1607. The reliance is placed particularly in the context of contention of the applicant that 10% quota rule is required to be treated as relaxed. Para 23 is reproduced below :

"23. Mr. Tarkunde is right that the rules fixing the quota of the appointees from two sources are meant to be followed. But if it becomes impracticable to act upon it, it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible. Of course, the Government, before departing from the rule, must make every effort to respect it, and only when it ceases to be feasible to enforce it,

that it has to be ignored. Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But merely for the reason that this step is not taken promptly the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source takes place - and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case - and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the Government to relax the provisions fixing the ratio, the position for the appointees is still better; and a mere deviation therefrom would raise a presumption in favour of the exercise of the power of relaxation. "

6. So far as rules which are required to be relaxed are concerned the counsel for the applicant has produced an extract of Recruitment Rules dt. 22-12-1973 which were in force at the time applicants were appointed.

A These rules state as below :

"By direct recruitment

Note: 10% of the vacancies shall be reserved for being filled up by Class IV employees (borne on regular establishment of the office of the Director of Census Operations and ex-officio Superintendent of Census Operations) subject to the following conditions:

- (a) Selection would be made through Departmental examination confined to such Class IV employees who fulfill the requirement of minimum educational qualifications viz. Matriculation or equivalent.
- (b) The maximum age for this examination would be 45 years (50 years for Scheduled Caste/Scheduled Tribe candidates)
- (c) At least 5 years' service in Class IV would be essential. The maximum number of recruits by this method would be limited to 10% of the vacancies in the cadre of Lower Division Clerk occurring in a year and unfilled vacancies would not be carried over."

So far as relaxation clause is concerned although the same ⁱⁿ ~~in~~ Recruitment Rule dt. 22-12-1973 has not been produced before us we may assume that it was para-materia with relaxation clause of 1984 Rules which reads as below:

"Power to relax:-

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."

So far as the number of posts available are concerned

counsel for the applicants would argue that the quota of promotion has to be calculated with reference to total number of Gr.'D' posts and according to his calculation the total number of posts is about 42 because the department had reported 21 vacancies to the Staff Selection Commission, there are 16 Asstt. Compilers which are also group 'D' posts and 4 LDCs were promoted as UDC's creating 4 vacancies and there was a post of librarian which is also a post equivalent to LDC making the total to 42 and the department can fill atleast 4 posts by promotion. The respondent, however, have disputed the statistics quoted by the applicant. According to them there are only 9 posts of Asstt. Compilers and at the most 19 posts equivalent to LDCs. There is therefore no legal/regular way of adjusting the five applicants as Group 'C' employees against promotion quota.

7. If the contentions of the counsel for the applicants are accepted what it would mean is that the theory of deemed relaxation will have to be applied in relation to number of posts (the rules are relaxed to increase the promotion quota from 1 to 5) with regard to length of service (as against 5 years regular service as Group 'D' four applicants who have only one year of service as Group 'D' would be included in addition to one applicant who has four years of service as Group 'D' and thus, substantially complies with rule) and
/ further the department would be deemed to have dispensed with the requirement of making the selection through DPC.

8. In our considered view the contentions raised by the counsel for the applicants are plausible but cannot be accepted in toto because of the basic consideration that the judgment in Direct Recruits case was clarified in the case of K.C.Joshi vs. U.O.I., 1993 SCC (L&S) 694, In that judgment the Hon'ble Supreme Court observed that Narender Chadha's case proceeded on the basis of "rule of deemed relaxation of the relevant rules" and that the same can be considered only when the length of adhoc service extended to 15 to 20 years and only in the light of the nature of the rule permitting relaxation. In particular Hon'ble Supreme Court observed that when the power has been given to Governor to relax conditions of service and not rules of recruitment then the theory of deemed relaxation cannot be accepted. In the instant case the length of service of the applicants is less than 15 years and therefore the question of directing treatment ^{on} regular of adhoc service of all the applicants does not arise especially when the relaxation involved covers several facets of the rule. However, keeping in view the language of the rules in the instant case which is quite distinct from the language of the rules in K.C.Joshi's case we are of the view that the theory of deemed relaxation could be extended to the case of 5th applicant keeping in view of the following considerations. The 5th applicant has put in four years of regular service as Group 'D' employee which falls short only ^{by} one year from the length required

in the recruitment rules. Secondly no relaxation as to quota is involved because 10% quota rule is adequate to cover one vacancy. Thirdly the power to relax vests in the Central Government without any requirement of consultation with UPSC and the power to relax extends to recruitment rules themselves and not merely to the conditions of service. We are, therefore, of the view that the case of applicant No.5 can be covered under the theory of deemed relaxation in terms of observations of the Supreme Court in para 23 of the Direct Recruits case and we direct that the respondents should be deemed to have relaxed the rules in relation to applicant No.5 who should be deemed to have been regularised as an LDC after completion of five years of service viz. w.e.f. 4-8-1988.

9. So far as the case of remaining applicants viz. applicants No.1 to 4 is concerned it is required to be considered in the context of following points. There is Registrar General's circular dt. 19-2-1980 and para 2.1 thereof which is relevant is reproduced below:

"2(1) Wherever the statutory recruitment rules or in the absence thereof, the executive instructions provide for appointment by promotion/transfer on deputation/transfer, as the case may be vacancies in the short-term posts created/ to be created specifically for work connected with the 1981 Census Operations, may be filled on a regular basis, in a temporary capacity, in accordance with the provisions thereof, (So far as vacancies in the short-term posts of Lower Division Clerk are concerned, preference may be given

to the extent possible, and subject to suitability, to Group 'D' employees who are educationally qualified and are within 35 years of age, even for appointment but on ad-hoc basis against direct recruitment vacancies outside the 10% quota prescribed for them in the statutory recruitment rules."

It is thus clear that the instructions of the authorities were to appoint Group 'D' employees otherwise eligible against direct recruitment quota. Thus there were legitimate expectations that the applicants would be allowed to appear for test to be conducted for direct recruitment.

10. Counsel for the applicants has invited our attention to the correspondence entered into by the respondents themselves with the Staff Selection Commission. He particularly invited our attention to letter dt. 22-12-1993 which is at Ex.R-3 to the written statement and is reproduced as below :

"In view of the contents of the letter referred to above, it may be clarified again for your information that the reason quoted by SSC, New Delhi, barring Shri Barbate for the said examination is not correct. The factual position is as under.

While forwarding the applications to the SSC initially, position in respect of Sr.No.17 to 22 was made clear in the concluding para of our letter of even number, dated 16 September 1993. To give elaborate information, it may be brought to your notice that Shri Barbate was initially recruited through EE in the consolidated

salariated post in the then E&C Cell of 1981 Census. Some of the consolidated employees were considered for Chowkidar's post, on a regular scale of pay, as the salary of the Chowkidar's was more than that of the consolidated post. Enough posts of Chowkidar were available at that time.

Subsequent to this, they were appointed again as LDC on adhoc basis, since there were number of vacancies available at that point of time, in connection with the additional work of 1981 Census Operations and ordered to be filled on ad-hoc basis, being short term posts. Thus, he has been holding the post of LDC from August, 1984. His appointment was made taking into consideration the minimum Educational qualification and typing skill. They were tested on the typewriters and found suitable to be appointed as LDC on adhoc basis.

Secondly, your kind attention may be drawn to one of the letter's RGI, wherein a provision was laid down for consideration of the eligible person for promotion/appointment in the short term posts (letter No.18/14/79-Ad.I dated 19-2-80 is enclosed) In addition to this letter, a copy of this Directorate's order No.A.12021/1/83-Ad.I dated 4-8-83 appointing Shri Barbate as Chowkidar is also sent herewith. This order is an evidence to show that he has been initially recruited through EE. For your information, it may be brought to your notice that in the similar cases i.e. S/Shri S.M.Samant, A.B.Sadare and B.A.Sonone, have been considered by you (Sr.No.20 to 22 in our letter dt.16.9.93)

In view of the foregoing, it is presumed that evidence now brought as above are sufficient for your purpose to satisfy Clause IV of the

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SSC letter. Since the examination is fast approaching, Shri Barbate may be issued hall ticket. Similarly there are two other persons viz. Shri V.B.Kharat and Shri S.Teli who have not been issued hall tickets so far. Their case may also be considered on the same footing and they all may also be issued Hall Tickets."

Counsel for applicants therefore contend that the four of the five applicants were initially recruited as Group 'C' employees through Employment Exchange and the mere fact that they were not ab-initio recruited as Group 'C' employees through Employment Exchange may be ignored in view of this background and the length of service put in by them. All the same the Staff Selection Commission did not announce the results. It was noted that the applicants had not made Staff Selection Commission as ^a party respondent. Counsel for the applicant however, pointed out that he has made Union of India as a party respondent and that in O.A. 60/95 which also relates to the same department the Staff Selection Commission has taken the stand that it is only a recruiting and recommending body and not an appointing authority. The counsel for the applicant has further pointed out that the Staff Selection Commission have made a grievance of the fact that the Directorate of Census had gone on changing their version on the vacancy position.

11. We cannot altogether ignore the background of the case in which the employees were given to understand that they will be regularised after they appear for tests of and are selected by Staff Selection Commission. Their effort to get regularised did not

succeed in 1991 entirely for the reasons beyond their control viz. department forwarded their application late. So far as special qualifying examination in 1993 is concerned all the applicants did appear for the examination but the results have been withheld on the ground that they were not initially recruited through employment exchange. Keeping in view the fact that the appointment of the four applicants ~~was made~~ in terms of Registrar General's instruction dt. 19-2-1980 consciously, the department was duty bound to give an opportunity to the applicants to appear for the appropriate examination. In the instant case the four applicants were allowed to appear for the examination but the results have been withheld on the ground that they were not initially recruited as ~~xxxxx~~ LDC's through employment exchange.

We have observed that four out of five applicants have been recruited as Group 'C' employees ~~if not~~ LDC's in 1980 ^{therefore} and so far as first four applicants are concerned the respondents are directed to take up the matter with Staff Selection Commission and arrange to announce results and if the four applicants have cleared the test they should be given an appointment to the posts of LDC. If the four applicants have not cleared the tests the four applicants may be given one more opportunity of appearing for the special test and till ~~that~~ time they may be continued as LDCs.

M ~~12~~ We, therefore, allow the O.A. and dispose of

the same by directing regularisation of applicant No.5 as promotee LDC w.e.f. 4-8-1988 (vide para 8) and regularise the first four applicants against direct recruitment quota as mentioned in para 11.

12. There will be no order as to costs.

M.R. Kolhatkar

(M.R. KOLHATKAR)
Member(A)

B.S. Hegde

(B.S. HEGDE)
Member(J)

M