Original OA 1180/97

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.: 1180 TO 1211/97.

Dated the 28th day of August, 1998.

CORAM :

HON'BLE SHRI JUSTICE R. G. VAIDYANATHA, VICE-CHAIRMAN.

HON'BLE SHRI D. S. BAWEJA, MEMBER (A).

Ms. Subhangi K. Kutarekar,
employed as L.D.C. in L.O.
at Jogeshwari.
Residing at -
2/8, Omprakash Chawl,
Bandrekar Wadi,
Jogeshwari (East),
Mumbai - 400 06. .. Applicant in O.A. No. 1180/97.

Smt. Vidya A. Naik,
(Ms. Vidya S. Naik),
Employed as L.D.C. in
103-A Section at
Lower Parel, E.S.I.C.
Residing at -
Rablai, Post Sopara,
Taluka Vasai,
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Pin Code - 401 203. .. Applicant in O.A. No. 1181/97.

Ms. Pratibha B. Desai,
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8/43, Khimji Nagji Building,
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Mankar Building, Room No. 4,
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Smt. Ujwala R. Yerunkar,
(Nee Ujwala A Rane)
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Residing at -

D-23, Ambedkar Nagar,
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Elphinstone Road,
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Jogeshwari (East),
Mumbai - 400 060. .. Applicant in O.A. No. 1186/97.

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employed as L.D.C.
(Telephone Operator) in E.S.I.C.,
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Residing at -
18/725, D. N. Nagar,
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Mumbai - 400 053. .. Applicant in O.A. No. 1187/97.

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220, Sahajeewan C.H.S.,
2nd Floor, N. M. Joshi Marg,
Near Deepak Cinema,
Mumbai - 400 013. .. Applicant in O.A. No. 1188/97.

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Bhaskar H. Khopkar
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.. Applicant in
O.A. No. 1189/97.

Ms. Sangeeta P. Nesarikar
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Local Office at N. M. Joshi Marg.

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.. Applicant in
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Smt. Prachi P. Dudvadkar,
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.. Applicant in
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Ajit S. Kolekar,
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No. 1203/97.

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Hindi Section at Lower Parel
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O.A. No. 1205/97.

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E.S.I.C.

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Bombay - 400 018.

... Applicant in
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... Applicant in
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... Applicant in
O.A. No. 1208/97.

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Residing at -

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... Applicant in
O.A. No. 1209/97.

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Ali Yavar Jung Marg,
Bandra (East),
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... Applicant in
O.A. No. 1210/97.

Smt. Ujwala A. Mohite,
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Residing at -

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... Applicant in
O.A. No. 1211/97.

(By Advocate Shri M.S. Ramamurthy)

VERSUS

1. Employees' State Insurance
Corporation, through the
Director General,
Panchdeep Bhavan,
Kotla Road,
New Delhi - 110 001.

2. The Regional Director,
Employees' State Insurance
Corporation, Panch-deep,
Bhavan 108, N. M. Joshi Marg,
Lower Parel, Mumbai - 400 013.

.. Respondents in
all the O.As.

(By Advocate Shri V. D. Vadhavkar)

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: ORDER :

PER.: SHRI R. G. VAIDYANATHA, VICE-CHAIRMAN

These are thirty-two applications filed by the respective applicants on identical allegations. The respondents have filed reply. Since an ex-parte interim order was passed by the Tribunal in favour of the applicants, the respondents pressed for vacating the interim order. It was also stated that regularly selected candidates had to be given an appointment and the interim order is coming in the way. In these circumstances and since the point involved is also a short point, by consent, we are disposing of all these applications at the admission stage itself. We have heard Mr. M. S. Ramamurthy, the Learned Senior Counsel for the applicants and Mr. V. D. Vadhavkar, the Learned Counsel for the respondents. Since we are disposing of the applications at the admission stage itself, we are referring to the pleadings briefly, so far they are necessary for deciding the points of controversy.

2. The facts are briefly as follows :

All the thirty-two applicants have been appointed on adhoc/temporary basis as Lower Division Clerks in the Regional Office of the Employees' State Insurance Corporation, Bombay. Some of the applicants were appointed in 1994, some in 1995 and some in 1996 (vide chart at page no. 33 of the Paper Book in O.A. No. 1180/97 which gives the different dates of appointments of the applicants and their service particulars). It is stated that all the applicants came to be sponsored by the Employment Exchange and were selected as

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Lower Division Clerks in regular scale of pay after they passed the typing test and were successful in interview and medical examination. There was no condition mentioned anywhere that the applicants have to pass a further examination or test for being regularised. The applicants were appointed against substantive vacancies. The recruitment is governed by the E.S.I.C. (Recruitment) Regulations, 1965. Then it is pleaded that previously the E.S.I. Corporation was filling up the post of Lower Division Clerks by getting candidates from the Employment Exchange and then holding a written examination and typing test followed by interview and medical examination. That hitherto selections were made to the post of Lower Division Clerks only on regional basis and not on All India basis. But for the first time in 1997, the Corporation advertised for filling up the posts of Lower Division Clerks by an All India examination. About one lakh of candidates, including the applicants, appeared for the All India Examination. In Maharashtra State itself about 25,000 candidates appeared for the examination. It is stated that for the post of Lower Division Clerks, which is not an All India post and not subject to transfer all over India, holding of an examination on All India basis is illegal. The applicants have been working continuously from the date of their respective appointments and they have to be regularised and if necessary, by subjecting them to a departmental qualifying examination. There was no necessity for the applicants to compete with the

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open market candidates and that too, at an All India level. The results of the written examination held in 1997 has been published in the Employment News dated 13/19.09.1997 which contains successful list of 1600 candidates who passed the written examination all over India. The names of the applicants do not appear in the said list. Typing test has been held for the candidates who were successful in the written examination. The results of typing test are awaited. Then after the typing test, interview will be held and about 550 candidates will be empanelled for filling up the vacancies of all over India. It is stated that in a sister organisation, namely - the Employees' Provident Fund Organisation, the procedure is to appoint candidates on regional basis. Now, in view of the recent examination and appointment of candidates who have passed in the examination and in the interview, there is likelihood of the services of the applicant being terminated. Hence, the applicants have approached this Tribunal challenging the legality and validity of the All India Examination for filling up the post of Lower Division Clerks. Any action to be taken by the respondents in terminating the services of the applicants due to alleged failure in the written examination on All India basis is illegal, arbitrary and bad in law. There is no provision for following the examination on All India basis. The present deviation from the practice which was in vogue for the last 30 years, is illegal and has not been approved by the Standing Committee of the Corporation. The alleged failure of

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the applicants in the written examination cannot be a ground to dispense with their services. Even if the applicants have failed in the examination, they should be given a further chance to pass in the examination for the purpose of being regularised and confirmed in the post. Then there was reference to some litigation of Smt. M. P. Kulkarni. There are number of vacancies in the Corporation and therefore, there is no necessary to dispense with the services of the applicants. On these grounds, the applicants pray for a declaration that their services are not liable to be dispensed with for alleged failure in the examination, to restrain the respondents from terminating the services of the applicants, for a direction to the respondents to regularise the services of the applicants and if necessary, by subjecting them to a regularisation test and for a declaration that the applicants are entitled to be regularised without competing in the All India examination and for cost, etc.

3. The respondents in their reply have stated that all the applicants came to be appointed on purely adhoc and temporary basis. They are not appointed regularly as per the recruitment rules. The applicants' services being temporary, are liable to be terminated at any time without giving any reason, as per the provisions of C.C.S. (Temporary Services) Rules, 1965. That the applications are barred by limitation. As per the Recruitment Rules, 1965, a candidate to become a Lower Division Clerk has to pass a open competitive test. However, when there are vacancies, in administrative exigencies, stop-gap arrangement is

made by appointing candidates on adhoc basis. They can continue till the regular candidates are selected and appointed. The 1997 All India Examination was held by giving public advertisement for filling up of 550 vacancies of Lower Division Clerks all over India. The results of the examination have been declared and all the applicants have failed in the examination. The rules provide for an open competitive examination and it is for the respondents to decide whether it should be on All India basis or regional basis. It is also stated that since the applicants have applied for the post in question and participated in the recruitment process and appeared in the examination, they are now estopped from challenging the correctness or legality of the selection process after becoming unsuccessful in the examination. The applicants have no right to the post in question since their appointments are adhoc and temporary. The question of regularisation of the services of the applicants does not arise, since the mode of selection is by way of passing in the written examination, typing test and interview. As far as the litigation of Smt. M.P. Kulkarni is concerned, it is stated that it was an individual case and further, inspite of succeeding in the litigation, she has not joined in the services. It is not a judgement in rem. That since the applicants have failed in the examination and since their appointments are adhoc and temporary, they have no right to the post in question and they are not entitled to any of the reliefs prayed for.

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4. The Learned Counsel for the applicants maintained that since the applicants have been appointed through Employment Exchange after screening them, passing the typing test, etc., the applicants are entitled to continue in service and their services are to be regularised and if necessary, they should be subjected to a departmental examination. Then he questioned the legality and validity of the All India Examination now adopted by the respondents by deviating from the old practice of holding the examination on regional basis. It was argued that the respondents have no right to hold such an examination on All India basis. Then he also attacked the selection process on the ground that the advertisement does not mention the qualifying marks and the rules also do not provide for the same. On the other hand, the Learned Counsel for the respondents supported the action taken by the respondents and contended that the question of regularisation of the applicants' services does not arise when their appointments are not according to the recruitment rules. He also justified the action of the respondents in holding of All India Examination in view of the law declared by the Apex Court in Radhey Shyam Singh V/s. Union Of India & Others reported in AIR 1997 SC 1610. He further submitted that the applicants having participated in the selection process and took a chance of being selected and after becoming unsuccessful, they are estopped from challenging the selection process. He also pressed into service that the applications are barred by limitation.

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5. After hearing both sides and going through the materials on record, we are not satisfied about the respondents' contention on the question of limitation. The applicants have approached this Tribunal challenging the legality and validity of the selections in pursuance of 1997 All India Examination. The applications are filed within two to three months after the results were published in 1997. Though the applicants came to be appointed in 1994, 1995 and 1996, their immediate cause of action is apprehension of termination of service in view of the results of 1997 All India Examination. A person need not rush to Court unless his rights are threatened. Since the applicants had continued as Lower Division Clerks from the respective dates of their appointment, there was no immediate urgency or necessity to rush to Court. But the cause of action arose for the applicants only when they failed in the examination as per the results published and there was a serious threat or apprehension of their services being dispensed with to accomodate the regularly selected candidates. They have come to Court within two to three months after the results of the examinations were announced. Hence, we do not find any merit in the plea of bar of limitation.

6. The points that fall for determination in these applications are -

(i) Whether the applicants' services are liable to be regularised, and if necessary, by subjecting them to a departmental test or examination?

(ii) Whether holding of All India Examination for recruiting Lower Division Clerks to E.S.I. Corporation is illegal and the 1997 Selection Process is liable to be quashed ?

(iii) Whether the applicants are estopped from questioning the legality and validity of the 1997 Selection Process ?

(iv) What order ?

7. POINT NO. 1 :

At number of places in the application and number of times during the course of argument, it was pressed by the Learned Counsel for the applicant that the applicants' service should be regularised and if necessary, by giving a direction to the respondents by subjecting the applicants to a written test or departmental examination. In our view, the whole concept of the applicants that it is a case of regularisation of adhoc appointment is misconceived. We are concerned about appointment under the Recruitment Rules, 1965. We have gone through the recruitment rules more than once and do not find any scope for adhoc appointment, much less regularisation of adhoc appointment. The recruitment rules are in page 35 of the Paper book of O.A. No. 1180/97. The recruitment rules only provide for appointment on a regular basis by holding a open competitive examination. Admittedly and undisputedly, the applicants have appeared for the said open competitive examination held in 1997

and it is also an admitted fact that in the results published by the respondents, the applicants' names or registered numbers are not shown (vide the notification regarding results of the examination which is at page 53 of the Paper Book).

The recruitment rules provide for a direct recruitment of Lower Division Clerks by an Open Competitive Examination (vide Rule 21 of the Recruitment Rules). Then those who have qualified in the written examination will be called for a typing examination and then they will be called for an interview and then final selection is made. The rules nowhere provide for an adhoc appointment or regularisation of an adhoc candidate by holding a departmental examination. Therefore, the whole theory of the applicants that they are to be regularised, if necessary by holding a departmental examination, is misconceived and not borne out by the recruitment rules. If we tell the respondents to regularise the services of the applicants and if necessary, by subjecting them to a departmental test, then our direction will run contrary to the recruitment rules and we will be commanding the respondents to do something which is not permitted by the rules. A judicial review cannot be exercised to give a direction to the Government to do something contrary to rules. It is not permissible in law. A judicial review could be exercised only if any department of the Government is not conforming itself to the rules. But here, the action

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taken by the respondents is fully within the four corners of the recruitment rules. Hence, we cannot give any direction to the respondents to regularise the service of the applicants contrary to the recruitment rules.

8. The Learned Counsel for the applicant placed reliance on an unreported judgement of this Tribunal dated 30.03.1988 in Transfer Application No. 452/86 (Trimbak Punjaji Adke V/s. E.S.I. Corporation & Others). Even in that case, the Tribunal noticed that the applicants in those case had failed in the written examination number of times. Infact, in para 5 of the judgement the Division Bench observed that the applicants in that case are not eligible for regular appointment since they have not passed the examination. Then it is further observed in the same para that to regularise a person who has failed in the examination would be promoting inefficiency in the E.S.I. Corporation. But however, as a concession, a direction was given to give one more opportunity to the applicants in those case to pass in the examination. The Tribunal has not laid down any proposition of law. But on facts, it thought of giving a one time concession to the applicants of those case to appear for another examination. A decision could be relied on as a precedent if it decides any question of law. The Tribunal in that case has not laid down a proposition of law that in every case an adhoc appointee should be given one more opportunity for passing an examination. A direction given on the facts

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of that case cannot be treated as a precedent in the present case. Even otherwise, we will presently point out number of decisions of the Supreme Court where a ~~judicial~~ view is taken that no adhoc appointment can be regularised contrary to statutory rules.

9. . . An identical case of adhoc L.D.C. Officials of the same E.S.I. Corporation has been considered by the Supreme Court in an unreported judgement dated 10.03.1992 in the case of Director General, E.S.I.C. & Another V/s. Shri Trilok Chand & Others in Civil Appeal No. 5302-of 1992 and connected cases. In that case also a Division Bench of this Tribunal at the Principal Bench had given a direction to the E.S.I. Corporation to regularise the service of the applicants of those cases. That was also a case where some candidates had been appointed as adhoc L.D.Cs. since regular recruitment took time. Those adhoc appointees contended that they should be regularised though regularly selected candidates are now available.Though that argument found favour before the Principal Bench of the Tribunal, the Supreme Court rejected that contention. The Supreme Court's view is that, when regularly selected candidates are available, the question of regularisation of adhoc employees will not arise. Therefore, the decision of the Tribunal was reversed and the applications filed by the applicants were ordered to be dismissed. Even in the present case, regularly selected candidates are now available as per the results of 1997 Selection Process and that cannot be with-held or stopped to accomodate the applicants

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and, therefore, the question of regularisation of their service does not arise in view of the decision of the Supreme Court in an identical case of the same department.

10. The Learned Counsel for the respondents has brought to our notice some authorities on this point.

In 1994 (27) ATC 56 (J & K Public Service Commission & Others V/s. Dr. Narinder Mohan & Others) the Supreme Court has pointed out that adhoc appointment in violation of statutory rules and regularised by relaxing the rules, was invalid. It was further pointed out that such adhoc persons should be replaced by persons regularly recruited according to rules. It is clearly pointed out that relaxation is not possible without subjecting the candidates to open competitive examination as per rules. Even the Government has no power to relax such a rule.

It is clearly mentioned in para 11 of the same reported judgement that the temporary employees are also entitled to compete alongwith others for regular selection but if he is not selected, he must give way to the regularly selected candidates. It is further pointed out that the appointment of the regularly selected candidate cannot be with-held or kept in abeyance for the sake of such an adhoc or temporary employee. In the light of the law declared by the Apex Court, the applicants cannot ask

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for regularisation, except according to the recruitment rules. Since the applicants have failed in the open competitive examination held in 1997 and when regularly selected candidates are available, the applicants have to give place to the regularly selected candidates.

In a case reported in 1996 LAB IC 588 (Dr. Kashinath Nagayya V/s. State of Maharashtra & Others (an adhoc appointee was working for eleven years but he was not selected in the regular recruitment. It was observed that the applicant has to give place to the candidates who are regularly selected and appointed.

In P. Ravindran & Others V/s. Union Territory of Pondicherry & Others reported in 1997 SCC (L&S) 731, it was again a case of adhoc appointee working for number of years. The adhoc appointee also applied for regular selection but not selected. In those circumstances, the Supreme Court observed that the rules cannot be bypassed by issuing a direction for regularisation of adhoc persons. In that case, some lecturers had been appointed on adhoc basis and though they were not selected during regular selection, they approached the Tribunal for regularisation of their service. The Tribunal rejected the claim on the ground that when regularly selected candidates are available, the Tribunal has no power to issue direction for regularisation of the service of adhoc employees. The Supreme Court confirmed the said view of the Tribunal and dismissed the appeal.

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In 1997 SCC L & S 331 (E. Ramakrishnan & Others V/s. State of Kerala & Others) similar question arose about regularisation of adhoc employees. The Supreme Court found that the applicants in that case were appointed dehors the said rule and working on adhoc basis for about fourteen years. The High Court refused the relief of regularisation. The Supreme Court observed that no regularisation could be granted dehors the rules.

The Supreme Court has again considered this question in the case of Santosh Kumar Verma V/s. State of Bihar (1997 SCC (L&S) 751), where also the question whether was the service of adhoc appointees could be regularised or not. The Supreme Court observed that regularisation in violation of recruitment rules cannot be made. The Supreme Court confirmed the order of the High Court which had refused to issue any mandamus for regularisation of the service in contravention of law.

If we now grant the relief of regularisation, we will be bypassing the recruitment rules. The applicants have taken a chance to participate in the regular selection by appearing in the written examination held in 1997. They have failed in the examination. Therefore, the applicants will have to give way to the regularly selected candidates and there is no provision in the recruitment rules for regularising the service of an adhoc appointee. Even in future, the applicants can go on appearing in the examination as and when held and if they succeed in the examination, they will get a right

for being appointed as a L.D.C. in the E.S.I. Corporation. The prayer for regularisation is not permissible as per the recruitment rules and, therefore, the applicants are not entitled to the prayer for regularisation. Point No. 1 is answered accordingly.

11. POINT NO. 2 :

The Learned Counsel for the applicants at the time of argument questioned the legality and validity of holding an All India Examination. He pointed out that for the past so many years the department was holding examination at the regional or zonal level and for the first time in 1997, an examination at All India level is held. The Learned Counsel for the respondents submitted that though previously examination was held at regional level, the department has now decided to hold an All India Examination in the light of the law declared by the Supreme Court in Radhey Shyam Singh's case.

Though some allegations are made in the O.A. regarding the validity of holding the examination at All India level, no relief is claimed in the prayer column for quashing the 1997 Examination and the results declared in consequence of that examination. The relief claimed is only to regularise the service of the applicant by holding a departmental examination, if necessary, and their services should not be terminated. There is no prayer for declaring that the 1997 All India Examination is illegal and bad in law and it should be quashed. How could we grant a relief in the absence of a specific prayer in

the application. Further, any finding of ours holding that the 1997 Examination was illegal will affect the candidates who were successful in the 1997 Examination and who have passed in the written examination and now selected after the typing examination and interview. If we accept the contention of the applicants' Counsel and declare the examination as bad in law, then it will vitally affect the 550 candidates who have now been selected as a result of the 1997 Selection process. Those candidates or atleast some of them, are not made parties to this application. In a matter like this, a Court or Tribunal should not give a relief which is going to vitally affect the persons who are not made parties to the application. Further, as already stated, there is no prayer in the application for quashing the 1997 Examination or any other consequential relief in respect of the selection of candidates in 1997 Examination. Hence, on both these grounds we cannot consider the applicants' present contention that holding of an All India Examination is bad in law.

12. Even after expressing our view that no relief could be granted in the absence of specific prayer and further, no relief can be granted in the absence of persons to be affected vitally by any order passed by us, still we consider the contention briefly and give our views on merits.

The 1965 Recruitment Rules only provide for an "Open Competitive Examination" for selection of

Lower Division Clerks. It does not say whether it should be on All India basis or regional basis. It may be, in the past the department was holding the examination at regional level. Whether the examination is held at the regional level or all India level, it will not be bad in law because rules only say 'Open Competitive Examination'. It is, therefore, left to the Government to adopt whichever type of examination they may deem fit in the circumstances of the case. In our view, the question whether the examination should be held at the regional level or All India level is a policy matter. Previously, the department was holding the examination at regional level and now they have switched over to All India level. As long as holding of All India Examination is not prohibited by the rules, then the Court cannot interfere with the policy decision of the Government to hold the examination at All India level. Suppose the rules had provided that Competitive examination should be held at the State level or Zonal level or Regional level, then the Government will have no discretion or right to hold the examination at All India level. Similarly, if the rule had mentioned that the examination should be held at All India level, then the Government cannot hold it at zonal level or regional level. In this case, the rule is silent on this point. Therefore, it is a matter left to the policy decision of the Government either to hold examination at regional level or at All India level.

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13. In the present case, the respondents have come out with a valid reason as to why for the first time in 1997 they held the examination at All India level. The reason is that, the Supreme Court has declared that such types of examination should be held at All India level and not at zonal level. Reliance is placed on Radhey Shyam Singh's case reported in AIR 1997 SC 1610.

That was a case where, for selection of candidates to different posts in the Customs Department, the recruitment was sought to be made on zonal basis. That means, though the examination is held on All India basis, selection or recruitment was made on zonal basis. Separate merit list had to be drawn for different zone in respect of candidates who appeared in various centres within the particular zone. The said process was challenged before the Principal Bench of this Tribunal by filing an application. The application came to be dismissed by the Tribunal at the admission stage. Then the matter was carried in appeal before the Supreme Court. Even in that case, it was canvassed before the Supreme Court by the other side that this practice of selection on zonal basis was in vogue from 1975. It was, therefore, submitted that it has stood the test of time and such a selection at zonal level should not be quashed. The Supreme Court rejected this contention. It was held that doing selection at the zonal level is bad in law and that the selection should be made on All India basis. The Supreme Court has clearly ruled in para 8 of the

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reported judgement that such selection at zonal level violates the principles ennunciated ' Articles 14 and 16 of the Constitution of India. Therefore, the Supreme Court has clearly held that the selection should be made by holding examination at All India level.

In view of the law declared by the Apex Court that zonal basis selection is bad in law and it should be on All India basis, if the respondents hold the examination in 1997 at All India basis, it cannot be said that it is illegal or bad in law. The law declared by the Supreme Court is binding on everybody under Article 141 of the Constitution of India. If the respondents want to implement the law declared by the Supreme Court, this Tribunal cannot find fault with the Government for doing the recruitment by holding examination at All India level, as has been done in this case.

The Learned Counsel for the applicant placed reliance on an observation at para 10 of the reported judgement that it is open to the Government to make zonal selection for some posts. It may make a scheme for that purpose in the light of the guidelines given by the Court from time to time. It may be so. But here, the respondents are stating that they do not want zonal selection and they want All India selection. Liberty is given to the Government to make a scheme for reserving certain posts on zonal basis. In this case, the Government has not formulated any scheme to reserve certain posts on zonal basis. This observation would be helpful

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to the applicants only if the Government formulates its scheme as suggested by the Supreme Court. Till such a scheme is formulated by the Government, the applicants cannot challenge the validity of the recruitment at All India level, which is in conformity with the law declared by the highest court of the land.

Another contention of the Learned Counsel for the applicants is that, the Supreme Court has observed that its judgement should have prospective application and will not apply to whatever selection has been made under the impugned process of selection. In our view, this observation will not help the applicants in any way. The applicants are not selected in the impugned selection of 1997. If by chance, we had held that the 1997 Selection is bad, then we could have given a direction that the impugned selection of 1997 is saved but in future, the Government should not make selection as per that procedure. Since the Supreme Court has held that zonal wise selection is bad, it did not want to interfere with the zonal-wise selection already made as per the impugned selection of 1993 advertisement. Though the Supreme Court held that zonal selection is bad, it did not want to quash the selection already made as per the 1993 advertisement but it observed that the law laid down by it should be applied prospectively in future selections. That is why, the respondents want to apply the law declared by the Supreme Court for the future selections. The judgement of the Supreme Court is dated 15.02.1996 but the present examination is held in 1997.

Therefore, the All India examination and All India selection is in conformity with the law declared by the Supreme Court. We do not find any illegality or infirmity in the 1997 Examination and selection procedure.

14. Another point canvassed by the Learned Counsel for the applicants is that, qualifying or passing marks is not mentioned in the advertisement or rules. Since this is a selection procedure, the question of minimum marks for passing the examination does not apply. It is brought to our notice that two lakhs and odd candidates had appeared in the examination. How can one fix qualifying marks or passing marks for such an examination. Suppose the rules had fixed 45 marks or 50 marks as passing marks, then there may be one lakh candidates who have obtained those marks. Although one lakh candidates cannot be called for interview, adoption of suitable multiplies for short-listing the candidates is a well-known principle. When the department is holding examination for two lakhs and odd candidates, they cannot prescribe any qualifying marks at all. They may have to select twice or thrice the required number of candidates for purpose of interview. Suppose there are 100 posts, then the department may call 200 or 300 candidates for the purpose of interview as per the merit list and then select the best candidates among them. We may also place on record that the Learned Counsel for the respondents has since produced a copy of the confidential letter in a sealed cover. We have perused that confidential letter dated 14.08.1998. It says that the Director General

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has approved the decision of determining the cut off marks to call the candidates for typing test as three times the number of vacancies in each category. In the present case, we find that there are 550 vacancies and therefore, 1600 candidates have been called for Typing Test and that will satisfy the requirement for short-listing the candidates as per the decision approved by the Director General of E.S.I. Corporation. This procedure of short-listing of candidates cannot be said to be illegal or contrary to any rule.

15. One of the contentions of the Learned Counsel for the applicant is that, there is nothing to show the concious decision on the part of the Director General or Standing Committee to hold All India Examination. We have already referred to the confidential letter dated 14.08.1998 where also it is clearly mentioned that examination has to be held on All India basis because of the judgement of the Hon'ble Supreme Court in the case of Radhey Shyam Singh & Others. Therefore, this also goes to show that the Director General has taken a concious decision to make recruitment on All India basis by holding examination at All India level in the light of the law declared by the Supreme Court in Radhey Shyam Singh's case.

The argument that all posts cannot be thrown open on All India basis without keeping some reservation on regional basis has no merit in the light of the law declared by the Supreme Court in Radhey Shyam Singh's case. It is open to the Government to take a policy decision to restrict certain posts on regional basis. But in this case,

the Government has not taken any such decision to reserve any post on regional basis. Since the decision to hold examination on All India basis is based on the decision of the Supreme Court, we find no illegality in the same.

Then some grievance was made that the examination is not held by the Staff Selection Committee. This was explained by the Learned Counsel for the respondents that Staff Selection Commission has expressed its inability to hold the examination for want of direction and even requested the department to make their own arrangement. The Learned Counsel for the respondents placed before us the letter dated 13.03.1996 written by the Under-Secretary of the Staff Selection Commission, which is a part of D.O.P.T.

The Learned Counsel for the applicant also brought to our notice the decision of the Supreme Court regarding medical college admission reported in (1993) 3 SCC 332 (Sharwan Kumar V/s. Director General of Health Services and Another). In that decision the Supreme Court has not laid down any law but only approved the scheme introduced by the Medical College in which 15% seats had been reserved to be filled up at all India level. Even in the Radhey Shyam Singh's case the Supreme Court has observed that it is open to the Government to prepare a scheme under which certain vacancies can be filled up at regional level. It is purely a policy decision to be taken by the Government and unless such policy decision is taken by the Government, a Court or Tribunal cannot do anything in the matter.

For the above reasons, our finding is that no case is made out for interfering with the 1997 Selection Process. Point No. 2 is answered accordingly.

16. Before considering point no. 3, we may have to make some observation regarding the nature of appointment of the applicants.

In this case, among the 32 applicants there is no dispute that as far as 24 applicants are concerned, the condition mentioned in the order of appointment is that, the appointments are purely temporary and adhoc and further, it is made as a stop-gap arrangement and further it is stated that this appointment is subject to further orders or till regular incumbents are made available by the Staff Selection Commission, whichever is earlier. Then there is also a further condition that the services can be terminated at any time without giving any reason. In view of these conditions, there can be no difficulty to hold that the appointment of 24 applicants is purely adhoc and stop-gap arrangement till further orders or till the availability of regular candidates. But the Learned Counsel for the applicant submitted that in case of remaining 8 applicants, there are no such conditions and therefore it must be taken as regular appointment. One such appointment order is at page 32 of the Paper Book in O.A. No. 1211/97. This is in respect of Ujwala G. Ruke, but who is now known as Smt. Ujwala A. Mohite. It appears, after marriage her surname is changed.

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In the appointment order at page 32 it is shown that the appointment is made on temporary basis. This appointment is made subject to conditions of service as per rules. The appointment is liable to termination without assigning any reasons at any time. Though the word 'adhoc' is not used, the order clearly shows that it is a temporary appointment and subject to termination at any time without giving any reason. However, the appointment is as per service conditions as per rules.

Then the Office Order of appointment of these eight applicants is at exhibit R-1, page 19 of the written statement of respondents. This is an Office Order dated 14.12.1994 and it applies to the applicant in O.A. No. 1211/97 and 9 others. It covers all the eight applicants whose appointments are similar to the appointment at page 32 of the Paper Book in O.A. No. 1211/97. In this office order it is clearly mentioned that it is made on a purely temporary and adhoc basis and as a stop-gap arrangement. It is subject to conditions of services as per the 1959 Act. The services are liable to be terminated at any time without giving any reasons. The copies of these orders are sent to all the appointees and one more copy is sent to the General Secretary of the Employees' Union. On the face of this order, it is too late for these eight applicants to say that their appointment was not adhoc or temporary. Infact, the Learned Counsel for the respondents brought to our notice that letter written by the department to the Employment Exchange to sponsor names for the purpose of adhoc appointment. We have perused that letter, where also it is mentioned that the candidates are

required for adhoc appointment. In our view, all the 32 applicants are appointed purely on adhoc basis and as a stop-gap arrangement till the availability of regularly selected candidates.

17. POINT NO. 3 :

All the applicants have applied and then appeared in the 1997 Examination. They took a chance to succeed in the examination and getting selected on regular basis. Unfortunately, all of them have failed. Now the applicants cannot turn around and question the very foundation of the selection process. The principle of estoppel gets attracted in a matter like this. We are fortified in our view by the two decisions of the Apex Court, of which one was relied upon by the Learned Counsel for the respondents.

In 1997 (2) SC SLJ 157 (University Of Cochin V/s. N.S. Kanjoonjamma & Others) where the Supreme Court observed that when the candidates take a chance and appeared in the examination and failed, they are estopped later to challenge the validity or correctness of the procedure.

In AIR 1986 SC 1043 (Om Prakash V/s. Akhilesh Kumar Shukla & Others) in a similar matter where a party challenged the recruitment procedure and holding of the examination, etc. After having appeared in the examination and failing in the same, the Supreme Court observed that the appellant had not appeared in the examination under protest and he filed the petition only

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after he had perhaps realized that he would not succeed in the examination. In such circumstances, the party should not have been granted any relief by the High Court.

For the above reasons, we hold that the applicants in these cases having taken a chance to get selected by participating in the selection process, are now estopped from questioning the validity of the same in view of the above two decisions of the Supreme Court.

The Learned Counsel for the applicant contended that even in Radhey Shyam Singh's case, the applicants had participated in the examination and still the Supreme Court granted the relief. The perusal of the judgement shows that the applicants in that case had complained about the selection process and then participated in the selection process under protest. Further, the Supreme Court did not grant any relief to the applicants in that case. Though the law was declared that selection should be made on the basis of All India examination, the Supreme Court did not grant any relief to the applicant ~~while~~ and did not setting aside the selection process. The Supreme Court made it clear that the impugned selection should not be affected by their order and their order should have only prospective application.

Point No. 3 is answered in the affirmitive.

18. POINT NO. 4 :

In view of our findings on points 1 to 3, all these applications will have to fail. We have no doubt

sympathy for all the applicants but we cannot grant any relief contrary to the rules. Since the applicants are now working on adhoc basis, they are entitled to continue to work there till regularly selected candidates are appointed and come to take charge. We therefore, only direct that services of the applicants should not be terminated till regular candidates are posted in their place and comes to take charge. Suppose a regular candidate may be appointed and posted in a particular place and that candidate may not turn out due to some reason or other, in such case, there is no necessity to relieve any of the applicants. Therefore, even if the respondents wants to issue termination order, then they may make it effective from the date the new candidate takes charge in that particular vacancy.

Another thing we would like to observe is that the applicants are at liberty to appear for similar selection examinations as and when notified by the respondents. In such a case, the respondents shall give relaxation of age to the applicants for the period for which they have worked in the department on adhoc basis as per rules.

19. In the result, all the thirty-two applications are dismissed. The ~~impugned~~ interim order passed in all these cases is hereby vacated subject to the observations made in para 18 above. In the circumstances of the case, there will be no order as to costs.

(D. S. BAWEJA)
MEMBER (A).

(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

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