

CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH

Original Application No. 180/00161/2017

Monday, this the 26th day of February, 2018

CORAM:

Hon'ble Mr. U. Sarathchandran, Judicial Member
Hon'ble Mr. E.K. Bharat Bhushan, Administrative Member

A. Gheevarghese, aged 43 years, S/o. A. Alphonse,
Turner, Marine Engineering Division, Fishery Survey of India,
Fore Shore Road, Cochin 682 016, residing at Muthiravilla House,
Janatha Road, Vytilla PO, Cochin 682 019. **Applicant**

(By Advocate : Mr. Shafik M.A.)

V e r s u s

1. Union of India, represented by Secretary,
Department of Animal Husbandry, Dairying and
Fisheries, Ministry of Agriculture, New Delhi 110 001.
2. The Director General, Fishery Survey of India,
Plot No. 2A, Unit No. 12, Sassoon Dock, Colaba, Mumbai – 400 005.
3. The Zonal Director, Fishery Survey of India, Kochi – 682 016.
4. S. Kalesan, aged 53 years, S/o. M.K. Sreedharan,
Milling Machine Operator, Fishery Survey of India,
Kochangadi, Kochi – 682 005, residing at Gowri Bhavan,
No. 16/1981-B, St. Mary's Chappel Road,
Thoppumpady, Kochi – 682 005. **Respondents**

**[By Advocates : Mr. N. Anilkumar, Sr. PCGC ® (R1-3) &
Mr. T.C. Govindaswamy (R4)]**

This application having been heard on 20.02.2018, the Tribunal on
26.02.2018 delivered the following:

O R D E R

Per Hon'ble Mr. U. Sarathchandran, Judicial Member –

Applicant is currently working as Turner in the Marine Engineering

Division of Fishery Survey of India (for short, FSI). Initially he joined service in the Integrated Fisheries Project (for short, IFP) as Turner with ITI qualification on 18.2.1999 and have passed diploma in Mechanical Engineering during 2007. Due to the reorganization occurred, he was transferred to FSI as per Annexure A2 order dated 19.5.2005 and started working with FSI from 30.9.2005. His pay was fixed in the pay band of Rs. 5,200-20200/- with Grade Pay of Rs. 1,900/- with effect from 1.1.2006. He was granted 1st MACP with effect from 18.2.2009 resulting in rise of his Grade Pay to Rs. 2,000/- as per Annexure A3 order.

2. The applicant is aggrieved by the provisions in Annexure A1 Recruitment Rules wherein his promotion prospects to the post of Assistant Foreman (Machine Shop) in the Marine Workshop, FSI has been shut down permanently. According to him Annexure A1 Recruitment Rules have been framed in violation of the agreement by respondent No. 1 at the time of re-organization of IFP and the resultant transfer of various divisions and staff of IFP to CIFNET and FSI. He states that in the industrial dispute raised by the employees of IFP on re-organization of IFP and transfer of its divisions and staff to CIFNET and FSI, the respondents had given an undertaking vide Annexure A4 statement that seniority of the staff transferred to CIFNET and FSI will be governed under the existing rules/regulations on the subject. In Annexure A5 statement given by the Director of IFP before the Assistant Labour Commissioner (Central) it was further stated that all service matters of the staff under transfer will be dealt with as per existing Government instructions on the subject in consultation with DOP&T and

that efforts would be made to safeguard the interest of the staff while dealing with their service matters including seniority to the extent possible. The applicant alleges that Annexure A1 Recruitment Rules have been notified on 13.8.2009 violating the aforesaid undertaking.

3. Applicant states that while he was working in IFP as Turner his promotion to the post of Assistant Foreman (Machine Shop) was governed by Annexure A6 Recruitment Rules wherein the required qualification was diploma in Mechanical Engineering with two years experience or ITI certificate in Machinist/Turner with 7 years experience. As he had completed 17 years as Turner he could have become eligible for promotion on 10 years. However as per Annexure A1 Recruitment Rules of FSI, the promotion post of Assistant Foreman (Machine Shop) with pay scale of Rs. 5,200-20,200/- with Grade Pay of Rs. 2,800/- is filled up from (i) Milling Machine operator in pay scale of Rs. 5,200-20,200/- with grade pay Rs. 2400/- with 5 years' service in the grade after appointment on regular basis or a combined service of 8 years in the post of Milling Machine operator and Machinist in the pay scale of Rs. 5,200-20,200/- with Grade Pay of Rs. 1,900/- put together or (ii) Turner and Machinist in the pay scale of Rs. 5,200-20,200/- with Grade Pay of Rs. 1,900/- with Diploma in Mechanical Engineering with 5 years regular service in the grade and those with ITI in Machinist or (iii) Turner trade with 10 years of service and those without ITI with 15 years of service. However, as per the note under the Rule itself it is specified that on each occasion of promotion, the eligibility list shall be prepared duly placing the employees holding the post of Milling Machine

Operator above the others as per the seniority position in respective posts and that among the Turners and Machinists, the eligibility list shall be prepared on the basis of the date of completion of the number of years of minimum service required in the respective posts. According to the applicant the aforesaid note under Annexure A1 Recruitment Rules giving undue preference to the employees holding the post of Milling Machine Operator above the others forecloses his promotion prospects since unlike in the IFP, a Milling Machine Operator is available in FSI . According to him Milling Machine Operator is discharging less important jobs than Turner and reports to the Assistant Foreman whereas the Turners who are also looking after the repair and maintenance of structural components and parts required for the vessels, reports directly to the Assistant Engineer as could be seen respectively from Annexure A7 and A8 description of duties.

4. Though the applicant had submitted Annexure A9 representation stating his grievances on 13.10.2017, no action was taken by the respondents. According to him had he continued in IFP he could have got promotion as Assistant Foreman but now he has to remain in service without promotion to the post of Assistant Foreman till the end of his career. He points out that there is only one post of Assistant Foreman (Workshop) and as there would be an eligible Milling Machine Operator in FSI the Turners will never get a chance to be considered whereas in IFP the category of Milling Machine Operator did not exist and the promotion to the post of Assistant Foreman was only from Turner alone. He submits that the requirement of giving superior consideration to Milling Machine

Operator is in violation of the agreement the IFP had made while transferring the employees to FSI. He therefore, seeks relief as under:

- “(i) To call for the records relating to Annexure A-1 to A-9 and to declare that the preference given for Milling Machine Operator under Column 12 of the schedule and the note (A) of A-1 Recruitment Rules are discriminatory and against the equality clauses under Article 14 and 16 of the Constitution of India;
 - (ii) To quash A-1 Recruitment Rules to the extent it gives preference for Milling Machine Operator under column 12 of the Schedule and the note (A); being arbitrary and discriminatory;
 - (iii) To direct the respondents to amend the Recruitment Rules in order to give equal opportunity to all feeder cadres;
 - (iv) To direct the respondents to conduct promotion to the cadre of Asst. Foreman (Machine Shop) only after amendment as prayed for in prayer (iii) and to consider the applicant also on equal terms with Milling Machine Operator;
 - (v) To issue appropriate order or direction to the respondents which this Hon'ble Tribunal deems fit, just and proper in the circumstances of the case;
- And
- (vi) To award costs of this proceedings to the applicant.”

5. At the time of admission hearing this Tribunal had issued an interim order dated 8.3.2017 directing the respondents to maintain *status quo*. Vide order dated 11.8.2017 in MA No. 180/628/2017 respondent No. 4 - a Milling Machine Operator - was impleaded as additional respondent. However, respondent No. 4 did not file reply statement. Shri T.C. Govindaswamy, learned counsel appearing for respondent No. 4 made only oral submissions.

6. The official respondents admit that the applicant was one among the staff transferred from IFP to FSI. They state that out of 32 category of posts of the workshop at FSI 25 categories were not common to those available in the FSI. In respect of the common posts also, the method of recruitment, feeder grade for promotion prescribed in the Recruitment Rules of the IFP varied from those prescribed in the Recruitment Rules of FSI. On a

thorough review of the then existing Recruitment Rules of both institutions, the amendment of the Recruitment Rules of all the posts transferred from the IFP and of a few posts of the FSI became necessary. The existing Recruitment Rules of the IFP were found to be very old. As per the then existing rules of the IFP the post of Machinist/Turner in the pay scale of Rs. 3,050-75-3,950-80-4,590/- is the feeder post for the post of Assistant Foreman (Machine shop) in the pay scale of Rs. 4,500-125-7,000/-. However, as per the Recruitment Rules of FSI the post of Machinist equivalent to the post of Turner in the pay scale of Rs. 3,050-75-3,950-80-4,590/- is the feeder post of Milling Machine Operator in the scale of Rs. 4,000-100-6,000/-. As disparity of promotional pay is perceived between FSI and IFP and in order to maintain the uniformity and parity between the posts of workshop staff of FSI and IFP, it was necessary to amend the Recruitment Rules and accordingly, amendments were made. The official respondents go on to state in their pleadings as under:

“4.The R.Rs received from IFP could not however be utilized to fill up the vacant pots (existing as well as the future vacancies) by Fishery Survey of India, because of posts then belongs to FSI and hence necessary changes like provision of feeder grades particularly commensurate with the posts available in the Fishery Survey of India including the incorporation of method of recruitment and constitution of the DPCs etc. Several issues pertaining to the staff transferred from the IFP had arisen. Moreover, two recruitment rules of same post cannot be operated. Accordingly, the amendment of recruitment rules of assistant Foreman was necessary.....

7. Out of 32 categories of posts belonging to the workshop, 25 categories were not common to those available in the FSI. In respect of the common pots also, the method of recruitment, feeder grade for promotion etc. prescribed in the RRs of the IFP varied from those prescribed in the RRs of FSI. Therefore, amendment of the RRs of all the posts transferred from the IFP and few posts of the FSI became necessary. A thorough review of the existing RRs of both the institutes was found necessary for amendment of the RRs. Further, the existing RRs of the IFP were more than 2-3 decades old.....

9. As per the existing RRs in the FSI the Machinist in the pay scale of Rs. 3,050-75-3,950-80-4,590/- is the feeder post for the post of Milling Machine Operator in the pay scale 4,000-100-6,000/-. However, as per the existing RRs of the IFP, the post of Machinist/Turner in the pay scale of Rs. 3,050-75-3,950-80-4,590/- is the feeder post for the post of Assistant Foreman (Machine Shop) in the

pay scale of Rs. 4,500-125-7,000/-. Therefore, it had been obvious and necessary to amend the Recruitment Rule for the post of Assistant Foreman (Machine shop) so as to maintain the hierarchy to the posts of Machinist/Turner which would be beneficial to the employees with promotional prospects in common to the Machinists of FSI & IFP.”

7. According to the respondents the merger of IFP and FSI is a well thought out action to merge the two institutions in to a single body and not divided parts of the organization. Therefore, the contention of the applicant that the post of Milling Machine Operator did not exist in the IFP prior to its merging is wrong. As per the existing rules in the FSI, the post of Machinist is the feeder post for the post of Milling Machine Operator. As per the then existing rule in IFP the post of Machinist/Turner is the feeder post for the post of Assistant Foreman (Machine Shop). Since the promotional scales of the post of Machinist of both the Departments was found to be discriminatory leading to anomalous situation, as a remedial action, the Recruitment Rules were amended.

8. A rejoinder was filed by the applicant stating that IFP was under the Factories Act whereas FSI was not under the said Act. According to the applicant the service condition offered by respondent No. 1 to the IFP employees and the Recruitment Rules are alive until all employees are transferred/retired. Change in the Recruitment Rules to form uniformity of FSI and IFP is a violation of standard offer issued to employees of IFP.

9. An additional reply statement was filed stating that the scale of pay of Assistant Foreman (Workshop) in IFP is not Rs. 5,000-8,000/- with effect from 1.1.1996 but is Rs. 4,500-7,000/- which was upgraded to the pay scale

of Rs. 5,000-8,000/- and was replaced with pay band of Rs. 9,300-34,800/- plus Grade Pay of Rs. 4,200/- w.e.f. 1.1.2006. Respondents admit that applicant having completed 10 years of service as Turner was granted 1st MACP.

10. We have heard Shri Shafik M.A., learned counsel for the applicant, Shri N. Anilkumar, learned Sr. PCGC ®, for respondents Nos. 1-3 and Shri T.C. Govindaswamy learned counsel for respondent No. 4. Perused the record.

11. The short question to be considered is whether Annexure A1 Recruitment Rules which gives priority to the Milling Machine Operator above the Turners and Machinists for promotion to the post of Assistant Foreman (Machine Shop) in FSI is to be declared unconstitutional or not ?

12. According to the applicant the superior preference given to the Milling Machine Operators for promotion to the post of Assistant Foreman (Machine Shop) than the Turner/Machinist is violative of Articles 14 & 16 of the Constitution as the same is arbitrary and discriminatory. As noted above, the present situation leading to the introduction of Annexure A1 Recruitment Rules to the post of Assistant Foreman (Machine Shop) was a sequel to the merger of the IFP where the applicant was working with FSI. Respondents make it clear that by this merger there was no involvement of any surplus staff or re-deployment but the *modus operandi* was transferring of the existing staff and departments of IFP to FSI. We notice that at the

time of merger of the two departments separate Recruitment Rules were existing both in IFP and FSI for each posts.

13. According to the applicant, in IFP, Turner being the feeder post for promotion to Assistant Foreman (Machine Shop) he could become Assistant Foreman within five years . Respondents point out that in FSI, Milling Machine Operator is the immediate promotion post of Turner/Machinist and on merger of both the institutes, interests of Turners in the IFP who were enjoying the direct promotion to Assistant Foreman (Machine Shop) and the interests of the Milling Machine Operators who enjoys a higher pay scale than the Turner/Machinist to the next promotion grade of Assistant Foreman (Machine Shop), had to be protected and accordingly after merger Recruitment Rules were amended bringing in Annexure A1 Recruitment Rules for the post of Assistant Foreman (Machine Shop) in the merged institute.

14. The applicant contends that the intervening post of Milling Machine Operator in FSI did not exist in IFP where he, as a Turner, could be promoted directly to the Assistant Foreman. According to the applicant with the introduction of Annexure A1 Recruitment Rules giving superior preference to the Milling Machine Operator than the Machinist/Turner for promotion to the Assistant Foreman (Machine Shop) his entitlement to be considered for promotion got foreclosed because there is only one post of Assistant Foreman in FSI and there has been always a post of Milling Machine Operator who acted a stumbling block for Machinist/Turner for

promotion to the post of Assistant Foreman (Machine Shop). According to the applicant this amended Rule is in violation of the undertakings given by the FSI to the labour authorities during conciliation proceedings in the industrial dispute raised by the employees of the merged institutions.

15. Shri T.C. Govindaswamy learned counsel for respondent No. 4 submits that no Recruitment Rule can remain as such on the basis of an undertaking given by the Department because it is a statutory rule framed under the proviso to Article 309 of the Constitution of India, reflecting the policy of the Government. In this connection he referred to *CMD/Chairman, BSNL & Ors. v. Mishri Lal & Ors.* - Civil Appeal No. 427 of 2008 decided by the Hon'ble apex court on 15.4.2011 wherein it was categorically held by the apex court as under:

“22. We are of the opinion that the above observations are not sustainable. When Rules are framed under Article 309 of the Constitution, no undertaking need be given to anybody and the Rules can be changed at any time. For instance, if the retirement age is fixed by rules framed under Article 309, that can be changed subsequently by an amendment even in respect of employees appointed before the amendment. Hence, we cannot accept the view taken by the High Court. There is no question of equity in this case because it is well settled that law prevails over equity if there is a conflict. Equity can only supplement the law, and not supplant it. As the Latin maxim states “Dura lex sed lex” which means “The law is hard, but it is the law””

It was also observed by the apex court that since the rule under the proviso to Article 309 is legislative in character, the rule can be amended, even with retrospective effect just as a legislation can be amended with retrospective effect.

16. In the light of the above legal position laid down by the apex court, we are of the view that the applicant has no valid ground to challenge

Annexure A1 Recruitment Rules for the reason that the same is not in tune with the undertaking made by the official respondents as reflected in Annexure A5. We note that the new rule became necessary in the light of the merger of the two institutions where the Recruitment Rules for the different posts were quite different from one another. Therefore, on account of the merger of the two entirely different institutions some adjustments had to be made by the authorities as a part of the policy of the Government, resulting in framing of Annexure A1 Recruitment Rules under the proviso to Article 309 of the Constitution of India. Therefore, we are unable to see any vitiating circumstances like arbitrariness or unconstitutionality violating equality provisions of Articles 14 & 16 of the Constitution.

17. For the foregoing reasons we dismiss the OA. The interim order is vacated. Parties shall suffer their own costs.

(E.K. BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

(U. SARATHCHANDRAN)
JUDICIAL MEMBER

“SA”

Original Application No. 180/00161/2017

APPLICANT'S ANNEXURES

- Annexure A1** – True copy of the Recruitment Rules of Assistant Foreman (Machine Shop) issued by the 1st respondent, published in the Gazette of India on 22.8.2009.
- Annexure A2** – True copy of the order No. 5-16/2002-Fy.(T-5)(II) dated 19.5.2005.
- Annexure A3** – True copy of the office order No. F.1-38/2010 E.II dated 31.1.2011 issued by the 2nd respondent.
- Annexure A4** – True copy of the statement dated 23.8.2005 of the Director, IFP before the Asst. Labour Commissioner (Central) Ernakulam.
- Annexure A5** – True copy of the statement dated 25.8.2005 of the Director, IFP before the Asst. Labour Commissioner (Central) Ernakulam.
- Annexure A6** – True copy of the Recruitment Rules of Asst. Foreman (Machine Shop) 1988 of the IFP.
- Annexure A7** – True copy of the brief description of the duties of Milling Machine Operator published by the respondents.
- Annexure A8** – True copy of the brief description of the duties of Turner published by the respondents.
- Annexure A9** – True copy of the representation dated 13.10.2016 submitted by the applicant.

RESPONDENTS' ANNEXURES

- Annexure R1(a)** - True copy of the OM notification dated 28.7.2009.
- Annexure R1(b)** - True copy of the order dated 19th May, 2005.
- Annexure R1(c)** - True copy of the Annexure-I of OM dated 9.8.1999.
- Annexure R4(a)** - True copy of interim direction in OA No. 180/00161/2017 dated 08.03.2017 rendered by this Hon'ble Tribunal.

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