

(2019) 07 DEL CK 0268

In the Delhi High Court

Case No : Civil Writ Petition No. 2853 Of 2015

Director General, E.S.I.C.

APPELLANT

Vs

Saurabh Kumar & Anr

RESPONDENT

Date of Decision : 24-07-2019

Acts Referred:

Employees' State Insurance Corporation (Staff And Conditions Of Service) Regulations, 1959 — Rule 4

Citation : (2019) 07 DEL CK 0268

Hon'ble Judges : Vipin Sanghi, J;A.K. Chawla, J

Bench : Division Bench

Advocate : Biji Rajesh, Diwankar Sethi, Gaurang Kanth, L.R. Khatana, Avadh Kaushik

Judgement

////////

Vipin Sanghi, J",////////

1. The Director General, Employee's State Insurance Corporation (hereinafter referred to as "ESIC") has preferred the present writ petition to",////////

assail the order dated 05.09.2014 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No. 1427/ 2012",////////

preferred by respondent 1- Saurabh Kumar. The Tribunal has allowed the said Original Application and directed the petitioner to prepare an All India,////////

Seniority list of the Lower Division Clerk (LDC) cadre of the ESIC and on the basis of the said seniority list, to give consequential benefits of further",////////

promotion(s) to respondent 1 within three months from the date of receipt of the copy of the order.,////////

2. ESIC is a Statutory Body established under the Employee's State Insurance Act, 1948 and Director General is its Chief Executive Officer. Its",////////

Headquarter is in Delhi and it has offices in various other cities of the country. The conditions of service of employees of the ESIC are governed by,,,,,,,,

ESIC (Staff and Conditions of Service) Regulations, 1959 which are statutory in nature, as they have been framed in exercise of powers conferred by" ,,,,,,,,,

Employees State Insurance Act, 1948. Some of the relevant provisions contained in these Regulations are the following:" ,,,,,,,,,

â??2(d) â??Director Generalâ?? means the Director General of the Corporation.,,,,,,,,,

2(g) â??Postâ? means a post under the Corporation and a post shall be deemed to be post in Class I, Class II, Class III or Class IV, according as" ,,,,,,,,,

such post is specified in /Class I, Class II, Class II or Class IV in the First Schedule." ,,,,,,,,,

4. Appointing Authority â?" All appointments to posts shall be made by the Director General:,,,,,,,,

Provided that the Standing Committee or the Director General may, by general or special order, delegate to any other authority or office to the" ,,,,,,,,,

Corporation, powers to make appointments to any post or class of posts other than posts in Class I and Class II.â?" ,,,,,,,,,

3. ESIC has also framed the ESIC (Recruitment) Regulations, 1965 and the ESIC (Lower Division Clerk/ Adrema Operator/ Telephone" ,,,,,,,,,

Operator/Computer) Recruitment Regulations, 2006. (â??ESIC LDC Recruitment Regulationsâ?? for short)" ,,,,,,,,,

4. Respondent No. 1 â?" an employee of ESIC, is working as an Upper Division Clerk (UDC) in one of the regional offices of the ESIC, i.e. office of" ,,,,,,,,,

Director (Medical) Delhi. Respondent No. 2 is also an employee of the ESIC who is serving as an Assistant in the Northern Region of ESIC at,,,,,,,,

Rohini, Delhi. Respondent No.1 & 2 both participated in the same All-India Competitive Examination of LDCs conducted by the petitioner ESIC in the" ,,,,,,,,,

year 2000. In the said competitive examination, Respondent No.1 was ranked No. 342, and Respondent No. 2 was ranked No. 690. Thus, respondent" ,,,,,,,,,

No.1 was found more meritorious than respondent No.2. As aforesaid, respondent No.1 joined the office of Director (Medical), Delhi, whereas" ,,,,,,,,,

respondent No.2 joined Northern Region of ESIC at Rohini, New Delhi. On the basis of their respective service and performance, they earned" ,,,,,,,,,

promotion as UDC in their respective Regions after putting in the requisite length of service; upon occurrence of vacancies, and; conduct of promotion" ,,,,,,,,,

processes in UDC.,,,,,,,,,

5. Respondent No.1 preferred the aforesaid Original Application, impleading ESIC as respondent No.1 and Respondent No.2 herein â?" Shashi",,,,,,,,,

Bhushan Kumar as respondent No.2 with the grievance that the cadre of LDCs in the ESIC was a common cadre and a common seniority list ought,,,,,,,,

to be maintained in respect of all the Regions. He was aggrieved by the fact that Respondent No. 2 in the Original Application stole a march over him,,,,,,,,

due to disregard of the inter-se merit position in the recruitment process. The O.A. was earlier dismissed by the Tribunal vide its order dated,,,,,,,,

21.11.2013. Subsequently, respondent No. 1 filed a Review Application No. 24/ 2014. The Review Application was allowed by the Tribunal vide its",,,,,,,,,

order dated 09.07.2014, and the O.A. was restored for fresh hearing.",,,,,,,,,

6. The O.A. has finally been allowed by the Tribunal by the impugned order. Respondent Nos. 3 to 7 sought impleadment in the writ petition by filing,,,,,,,,

C.M. No. 23190/2016, which was allowed on 06.06.2016. They support the cause of respondent No.1/ Original Applicant in the case. Similarly,",,,,,,,,,

respondent No.8 was impleaded by this Court by allowing his application i.e. C.M. No. 27272/2016 vide order dated 01.08.2016. He too supports the,,,,,,,,

cause of respondent No.1/ original applicant.,,,,,,,,,

7. The case of the applicant/ respondent 1- Saurabh Kumar was that there was only one cadre of LDCs in the ESIC, which had the sanctioned",,,,,,,,,

strength of 2321 posts and there were no notified sub-cadres or regional cadres. He claimed that since he ranked higher than Respondent No.2 in the,,,,,,,,

open competitive examination, he was entitled to rank senior to Respondent No.2 in the seniority list of LDCs, and was entitled for consideration for",,,,,,,,,

promotion to the post of UDC/ prior to those junior to him â?" such as, Respondent No.2. However, he was not considered, and his seniority",,,,,,,,,

disregarded. He claimed that the respondents- in not preparing a combined All-India seniority list of the LDC cadre, and resorting to giving promotions",,,,,,,,,

on the basis of local region- wise seniority, acted contrary to the Statutory Rules and Regulations.",,,,,,,,,

8. On the other hand, the petitioner- ESIC submitted that cadre of LDC in ESIC is a decentralized cadre having Regional seniority. The respondent",,,,,,,,,

sought to place reliance on the ESIC (Staff & Conditions of the service) Regulations, 1959, as per which, the Appointing Authority in the case of",,,,,,,,,

LDCs was not a common All-India authority, but the respective Regional Directors/ Director (Medical) Delhi/ MS/ D(M) Noida/ JD-V Headquarters," ,,,,,,,,,

as the case may be.,,,,,,,,,

9. The petitioner also contended that the Director (Medical) Delhi had, on an earlier occasion, finalized the seniority list of LDCs in its Region on" ,,,,,,,,,

26.04.2004 by circulating a provisional seniority list and inviting objections thereon. Respondent 1 neither raised any objections, nor challenged the" ,,,,,,,,,

same at that stage by contending that a common seniority list should be prepared on All India basis. Thus, he accepted the seniority list drawn by the" ,,,,,,,,,

Director (Medical) Delhi for LDCs in the said Region. On the basis of the said seniority list, respondent 1 was promoted to the post of UDC in his" ,,,,,,,,,

turn. Thus, it was not open to him to question the same after 8 years and, his O.A. was liable to be dismissed as barred by limitation." ,,,,,,,,,

10. The Tribunal while allowing the Original Application held that the Statutory Rules and Regulations hold supremacy over the executive instructions.,,,,,,,,,

The Tribunal held that the Regulations provided for only one combined cadre of LDCs. Even though, there had been a long standing practice in the" ,,,,,,,,,

respondent's organization of having Regional cadre of LDCs with different appointing authorities, the said practice was held to be not in" ,,,,,,,,,

accordance with the Statutory Rules and Regulations. The Tribunal, thus, held that the respondent- ESIC was duty bound to act in accordance with" ,,,,,,,,,

the Statutory Rules, and further directed the petitioner to prepare an All-India Seniority list of the cadre of Lower Division Clerks (LDCs) of the ESIC" ,,,,,,,,,

and, on the basis of the said seniority list, to give consequential benefits of further promotion(s) to respondent 1. The relevant extract from the" ,,,,,,,,,

impugned order reads as follows:.,,,,,,,,,

2. The contention of the applicant that Statutory Rules and Regulations hold supremacy over Executive Instructions cannot be disputed. From the" ,,,,,,,,,

facts presented above, it is quite obvious that Regulations provided only for one Combined Cadre of LDCs. Even then there has been a long standing" ,,,,,,,,,

Name of the Post, Number of Post, "Method of recruitment

whether by direct

recruitment or by

promotion or by

deputation/ absorption and
percentage of the posts to
be filled by various
methods",,,,,,
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1922

NAME OF POST,RO,"VIJAYWAD
A",VISHAKAPATANAM,SMC,"ESIH
NACHARAM","ESIH
SANATH
NAGAR","ICT
DIV.",PMD,TOTAL
COMMISSIONER,,,,,,,,,0
ADDL. COMM,1,,,,,,,,,1
DIRECTOR,,,,,,,,,1,,1
DIRECTOR (OL),,,,,,,,,,0
JOINT DIRECTOR,3,1,1,,2,1,,,8
JOINT DIRECTOR
(OL)",,,,,,,,,,0
JT. DIRECTOR
(TECH.)",,,,,,,,,,1,,1
DY. DIRECTOR,8,3,2,2,2,2,2,1,22
DY. DIRECTOR (OL),,,,,,,,,,0
ASSISTANT
DIRECTOR",19,6,4,,,,,,,,,29
ASTT. DIRECTOR
(OL)",1,,,,,,,,,1
SSO,58,14,9,5,4,1,6,3,100
SR. HINDI
TRANSLATOR",1,,,,,,,,,1
JR HINDI
TRANSLATOR",3,2,1,,,,,,,,,6
ASST/ H.C,93,22,14,2,7,5,3,4,150
ASSISTANT (AUDIT),7,3,2,,,,,,,,,12
UDC,"17
6",44,27,2,24,13,3,3,292

LDC,19,5,3,,5,2,,,34
 STAFF CAR DRIVER,2,,,,,,,2
 PS/PA/ STENO,7,2,2,1,3,2,1,,18
 MTS,10,26,17,2,6,6,1,3,166
 ,5,,,,,,,
 GEST/ LIFT
 OPERATOR" ,,,,,,,,0
 OTHER,6,,,,,,,6
 TOTAL,"50
 9",128,82,14,53,32,18,14,850

36. ESIC (Staff and Conditions of Service) Regulations, 1959 may also be referred to. The post of LDC is classified as a Group â??Câ? post under" ,,,,,,

Schedule I to the said Regulations. Fifth Schedule of these Regulations, inter alia, sets out as to who are the Appointing Authority; Disciplinary" ,,,,,,

Authority and; Appellate Authority in respect of officers/ employees holding Group â??Aâ?, Group â??Bâ?, Group â??Câ? and Group â??Dâ?" ,,,,,,

posts. In respect of Group â??Câ? and Group â??Dâ? staff, the Appointing Authority is the Regional Director/ Administrative Officer. Pertinently, in" ,,,,,,

respect of the Region i.e. the Office of the Director (Med.), Delhi, the Appointing Authority is stated to be the Director (Med.), Delhi." ,,,,,,

37. Thus, the submission of Mr. Khatana that the appointments are made to all posts in ESIC by the Director General is not correct in as much, as," ,,,,,,

Rule 4 of the ESIC (Staff and Conditions of Service) Regulations, 1959, states that all appointments to the posts shall be made by the Director" ,,,,,,

General, provided that, the Standing Committee or the Director General may, by General or special order, may delegate to any other authority or office" ,,,,,,

to the Corporation, powers to make appointments to any post or class of posts other than posts in Class I and Class II. Since the posts of LDC are" ,,,,,,

Class III posts, the said power of appointment stands delegated at the Regional/ State level. In any event, even if the submission of Mr. Khatana were" ,,,,,,

to be accepted - that appointment to all posts of ESIC have to be made by the Director General, the same does not ipso facto lead to the conclusion" ,,,,,,

that a unified cadre of LDCs exists in the ESIC. There is nothing to show that the Director General could not make appointments on Regional/ State" ,,,,,,

basis in respect of sanctioned posts in different regions/ states, or that merely because he is the Appointing Authority, it would tantamount to" ,,,,,,,,,

appointment to a unified/ All India cadre.,,,,,,,,,

38. We may next refer to the ESIC (Upper Division Clerk or Upper Division Clerk â?" Cashier Recruitment Regulations, 2011). These Regulations" ,,,,,,,,,

show that 15% posts are filled through promotion on the basis of seniority cum fitness. 10% posts are filled by LDCE. Promotions are made from the.,,,,,,,,,

post of LDC to the post of UDC. 75% posts are filled through direct recruitment by written examination. In respect of promotions made on the basis.,,,,,,,,,

of seniority and through LDCE, the DPC - like in the case of LDC, is held on Regional/ State wise basis. The DPC for making promotions to UDC" ,,,,,,,,,

consists of : ,,,,,,,,,

1) Director (Medical) Delhi/ Regional Director/ Additional Commissioner/ Medical Superintendent, Employeesâ? State Insurance Corporation. -" ,,,,,,,,,

Chairman.,,,,,,,,,

2) Deputy Director, Employees State Insurance Corporation. - Member" ,,,,,,,,,

3) An Officer of appropriate rank from Employeesâ?? Provident Fund Organisation. - Member.,,,,,,,,,

39. On the other hand, it clearly emerges from the ESIC (Insurance Inspector/ Manager Grade â?" II/ Superintendent Recruitment Regulations, 2007)" ,,,,,,,,,

that the said posts fall in a unified All India cadre, and when an employee reaches the said post, his seniority would have to be fixed on All India basis." ,,,,,,,,,

However, that cannot be said in respect of LDCs, UDCs and Head Clerks/ Assistants." ,,,,,,,,,

40. The submission of the petitioner that he ranked higher in merit than respondent No.2 when recruited to the post of LDC and, therefore, he was" ,,,,,,,,,

entitled to be considered for promotion to the post of UDC earlier to respondent No.2 or others - who ranked junior to him in the recruitment.,,,,,,,,,

examination for the post of LDC, has no merit. This is for the reason that the petitioner consciously applied for and opted to get recruited in the" ,,,,,,,,,

specific region, namely Director (Med.), Delhi. Therefore, his seniority and inter se merit has to be seen only in respect of those candidates who were" ,,,,,,,,,

recruited to the same region in the same recruitment process. It is not his case that any other person recruited along with him in the same region, who" ,,,,,,,,,

was less meritorious than him, was promoted to the post of UDC earlier in point of time when compared to his date of promotion to the post of UDC." ,,,,,,,

Merely because the ESIC may have conducted a unified recruitment examination â?" since the recruitment Rules, and eligibility criteria are the same" ,,,,,,,

throughout all the Regions/ States of ESIC for the post of LDC, and merely because a common merit list may have been prepared, it does not follow" ,,,,,,,

that the petitioner can compare himself with others, who may have opted for and joined other States/ Regions in the same recruitment process. The" ,,,,,,,

respondent No.1 opted for recruitment to the Director (Med.), Delhi region with open eyes, knowing fully well the set up of the regions that he opted" ,,,,,,,

for; the location of the said region; the number of posts and hierarchy in the said region, and he was aware of the pros and cons of opting for the said" ,,,,,,,

region. It is precisely for this reason that he did not raise any grievance with regard to drawing up of the regional/ State wise seniority lists of LDCs," ,,,,,,,

or even UDCs for 8 years after his recruitment. Thus, we also find merit in the objections raised by the petitioners with regard to the timing of the" ,,,,,,,

original application. If the original applicant had any grievance with regard to the maintenance of region/ state wise seniority, he should have raised the" ,,,,,,,

issue in the first instance when regional seniority list was prepared in the cadre of LDC. The petitioner was well aware that recruitments to the posts,,,,,,

of LDC were being made on region wise basis. He took advantage of the said regional recruitment in as much, as, he did not have to face the" ,,,,,,,

prospect of being subjected to transfer to any other region/ State in the exigencies of service. We may also observe that, by and large, the norm is that" ,,,,,,,

employees working in Group â??Dâ? and â??Câ? posts are generally not transferred due to exigencies of service, as their posts are not considered" ,,,,,,,

transferable. By contending that a unified cadre on All India basis is required to be maintained in respect of LDCs, UDCs and Assistants, respondent" ,,,,,,,

No.1, in our view, is seeking to expose all others in the said cadres to the hazard of facing inter-regional/ State transfers in the exigencies of service." ,,,,,,,

41. The past practice adopted by the petitioner ESIC is not only in conformity with the Rules and Regulations taken note of herein above, even" ,,,,,,,

otherwise, there was no justification to upset the same, particularly, when there was nothing in the Rules and Regulations to suggest that a unified All" ,,,,,,,

India Cadre existed in respect of LDCs, UDCs and Assistants. The Supreme Court

in N. Suresh Nathan and Anr. (supra) held that a past practice," ,,,,,,,
 extending over a long period, should not be upset by the Court, unless the
 practice is not tenable under the Rules. The Supreme Court observed:" ,,,,,,,
 â??4. In our opinion, this appeal has to be allowed. There is sufficient material
 including the admission of respondents diploma-holders that the" ,,,,,,,
 practice followed in the department for a long time was that in the case of
 diploma-holder Junior Engineers who obtained the degree during service," ,,,,,,,
 the period of three years' service in the grade for eligibility for promotion as
 degree-holders commenced from the date of obtaining the degree and the ,,,,,,,
 earlier period of service as diploma-holders was not counted for this purpose.
 This earlier practice was clearly admitted by the respondents diploma- ,,,,,,,
 holders in para 5 of their application made to the Tribunal at page 115 of the
 paper book. This also appears to be the view of the Union Public Service ,,,,,,,
 Commission contained in their letter dated December 6, 1968 extracted at pages
 99-100 of the paper book in the counter-affidavit of respondents 1 to" ,,,,,,,
 3. The real question, therefore, is whether the construction made of this
 provision in the rules on which the past practice extending over a long
 period" ,,,,,,,
 is based is untenable to require upsetting it. If the past practice is based on one
 of the possible constructions which can be made of the rules then ,,,,,,,
 upsetting the same now would not be appropriate. It is in this perspective that
 the question raised has to be determined. ,,,,,,,
 x x x x x x x x ,,,,,,,
 6. Consequently, the appeal is allowed. The impugned order of the Tribunal is set
 aside resulting in dismissal of the respondents' application made in" ,,,,,,,
 the Tribunal. The department will now consider the question of promotion in
 accordance with this decision. No costs.â?? ,,,,,,,
 (emphasis supplied) ,,,,,,,
 42. Similar view was taken by the Supreme Court in M.B. Joshi and ors. (supra),
 wherein it observed:" ,,,,,,,
 â??14. It is further important to note that in the cases before us, the
 Government itself has been adopting the practice and making promotion
 as" ,,,,,,,
 contended by the appellants and we are upholding such practice. In N. Suresh
 Nathan case [1992 Supp (1) SCC 584 : 1992 SCC (L&S) 451 : (1992) ,,,,,,,

19 ATC 928] also this Court had upheld the practice followed by the Government. It is also a well-settled principle of service jurisprudence that in the,,,,,,,,,

absence of any specific rule, the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of" ,,,,,,,,,

service and not on any other fortuitous circumstance.â??,,,,,,,,,

43. Pertinently, the petitioner has continued to make promotions and recruitments to LDCs on the basis of regional/ local seniority even in the year" ,,,,,,,,,

2008, which is evident from office order No. 19/2008, dated 07.08.2008. The same pertains to the promotions made to the post of LDC on the basis of" ,,,,,,,,,

DPC held on 17th and 18th May, 2008 on the basis of regional seniority." ,,,,,,,,,

44. Reliance placed by Mr. Khatana on A.K. Bhatnagar and Ors. (supra) & Ranajit Kumar Meher (supra) is misplaced. The Supreme Court held that,,,,,,,,

once rules are framed, the action of the Government in respect of matters covered by the rules should be regulated by the Rules. There can be no" ,,,,,,,,,

quarrel with this proposition. However, as we have observed hereinabove, none of the Rules and Regulations brought to our notice suggest that a" ,,,,,,,,,

unified All India cadre of LDCs has been created or exists in the ESIC. In fact, the regulations clearly point in the opposite direction." ,,,,,,,,,

45. For the aforesaid reasons, we are of the view that the decision of the Tribunal cannot be sustained. We, accordingly, set aside the impugned" ,,,,,,,,,

decision of the Tribunal dated 05.09.2014 and dismiss the Original Application No. 1247/2012, preferred by the respondent No.1." ,,,,,,,,,

46. The parties are left to bear their respective costs.,,,,,,,,,