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**(2009) 05 DEL CK 0424**

**In the Delhi High Court**

**Case No : Writ Petition (C) No. 6525 of 2008**

Om Prakash

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision : 04-05-2009**

**Acts Referred:**

Constitution of India, 1950 — Article 309

**Citation : (2009) 05 DEL CK 0424**

**Hon'ble Judges : Suresh Kait, J;A.K. Sikri, J**

**Bench : Division Bench**

**Advocate : R.K. Shukla, for the Appellant; R.V. Sinha and Rekha Aggarwal, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Suresh Kait, J.—The present writ petition is directed against the order dated 23.05.2008 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 900/2008. Being aggrieved, the petitioner has filed this writ petition and has challenged the aforesaid order passed by the Tribunal.

2. We feel appropriate, here, to mention facts of this case in brief.

3. The petitioner was appointed as part time daily wager on 23.04.1997 and since then he was working continuously without any break. In the year 2002, the petitioner had filed OA No. 303/2002 claiming appointment on full time basis and regularization after according temporary status. The Tribunal has disposed of the aforesaid OA vide its order dated 12.03.2003 keeping in view of the decision in State of Haryana and others Vs. Piara Singh and others etc. etc., wherein it was held that, "in case of employees working for a fairly long period, say 2 to 3 years, it will be presumed that their services are required on permanent basis and steps should be taken for regularization of their services. In this view of the matter, it is stated that applicant is entitled for appointment on full time basis and for further regularization."

4. After considering the arguments of both sides, the Tribunal directed the respondents that, "having regard to the contents put forth by the learned Counsel for the respondents, and in the light of OM dated 2.07.1994, claim of applicant for accord of temporary status cannot be countenanced. However, it is observed, in view of the respondents communication dated 15.11.2002, if the work is available, applicant shall be continued on part time basis. In the event of full time work is available in the office, which required engagement of daily wagger, applicant shall be engaged in preference to juniors and outsiders."

5. Issue involved in the present case, starts from advertisement dated 07.12.2007 for the post of Sepoy Group ?D? post in the Department of Central Excise, New Delhi. The petitioner had applied for the aforesaid post of Sepoy in the pay scale of Rs. 2610-4000. The said advertisement of the Central Excise Department is reproduced below:

For all Status & Categories

Dated 7.12.07

Recruitment of Sepoy in Delhi

Educational qualification : 8th passed

Age 18-27, (Age relaxation is admissible to reserve category)

Physical Measurement Male Height 157.5 CM

Chest 81 to 86 CM

Female height 152 CM

Address to submit application:

Office of the Commissioner of Central Excise Delhi

CR Building, I.P. Estate

New Delhi.

6. The contention of the learned Counsel for the petitioner is that as per the advertisement, maximum age is 27 years. However, age relaxation for reserve category is also mentioned. As the petitioner was born on 07.04.1976 and running age is 32 years, therefore, after getting five years of age relaxation being Scheduled Caste candidate, the petitioner is not timely overage.

7. Finding negative attitude of the respondents in considering his candidature for the aforesaid post, he made representation dated 19.04.2008 before the National Commission for Scheduled Caste. Thereafter, the petitioner filed the OA before the Tribunal, mainly on the following two grounds amongst others:

(vi) Because the respondents have started to issue a call letter to the candidates whosoever applied for the post of Sepoy and selection proceeding is going on, for

this purpose last date has been fixed as 5th May, 2008 despite the application submitted by the applicant, he has not been issued call letter, even though he fulfils all the requisite criteria for the candidatures of Sepoy and Group D peon.

(vii) Because the Hon'ble High Court of Delhi at New Delhi in the case of Raj Kumar who was also part time sweeper had directed the respondents (same department) to consider the case of the writ petitioner along with others. The applicant is identically situated like Raj Kumar and also belongs to same department, the respondents ought to have issued call letter to appear in the selection proceedings.

The petitioner has made the following prayers which are as under:

(a) to direct the respondents to consider his regularization in terms of para 44 of judgment of Uma Devi's case and Mineral Exploration Corporation case;

(b) to direct the respondents to issue a call letter to the applicant with regard to appearing in the case of sepoy and group D Peon published in Employment News for which he had been duly applied, in the interest of justice and equity;

(c) to further direct to the respondents to extend the benefit of judgment dated 14.12.2007 passed in writ petition No. 528/2007;

(d) to pass any other or further orders which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

The petitioner also sought interim relief, which is as under:

The applicant had applied for the post of Sepoy published in the Employment News of 17.11.2007 and the selection is going on for which call letters are being issued to those who had applied. It would be appropriate to issue an order in favour of the applicant directing the respondents to permit the applicant to participate in selection proceedings of Group D Sepoy.

The Tribunal dismissed OA on the grounds as under:-

... In the light of the decisions cited by the Apex Court and more particularly the decision of the Constitution Bench in Umadevi's case (supra) being a litigious continuance as part time daily wager, applicant is not an exception to be carved out for consideration of regularization.

Moreover, it is only casual labour, who has to be considered and part time worker cannot be regularized in the light of the decision of the Apex Court in State of Punjab and Others etc. Vs. Supreet Rajpal and Another etc., At one point of time, learned Counsel of the applicant has referred to the statutory rules framed under proviso to Article 309 of the Constitution circulated by DOP&T for relaxation of age. However, this would apply only to a casual worker but a part time daily wager is not covered within its ambit.

As the applicant is not qualified and eligible as per the rules and is not covered as an exception to Umadevi's ratio (supra), he has no valid legal claim. OA is

accordingly dismissed. No costs.

8. We have perused the advertisement dated 08.12.2007, which is in fact in Hindi and is annexed at page 49 of the writ petition. As per the advertisement, some relaxations were given in age and physical fitness to Garhwal, Kumaon, Scheduled Tribes and chest relaxation was given to OBC and Schedule Caste. The advertisement itself clarifies the age relaxation which shall be applied in the case of categories mentioned above including Scheduled Caste. Therefore, there is nothing wrong with the advertisement.

9. We, also have perused the call letter dated 28.03.2008 for physical test which is annexed at page 53 of this writ petition, wherein, in Para-6 at page 53, it is mentioned that the SC/ST candidates shall be entitled to get travelling allowance subject to submission of ticket etc. It is clear from Para-6, the Scheduled Caste candidates were also entitled for the travelling allowance. As per Clause (c) of the said letter, the caste certificate was also sought by the respondents from the Scheduled Caste category candidates.

10. Admittedly, the petitioner is working with the respondents from 21.04.1997 as per communication dated 28.09.1997, which is annexed at page 46 of this writ petition. As per prayer (c) before the Tribunal, the petitioner is seeking directions to extend the benefit of judgment dated 14.12.2007 passed in WP (C) No. 528/2008 titled as Raj Kumar v. Union of India and Ors. by this Court which is annexed at page 65 of this writ petition, wherein the respondents were directed as under:

In the meantime, the respondents have advertised certain vacancies of sepoy and peon, which are to be filled up on regular basis. The petitioner has applied for appointment to these posts. Last date of submission of the application was 8.12.2007 and the petitioner states that he fulfils the eligibility conditions, including the condition regarding age. He states that he belongs to SC category. Prayer made in this application is that his candidature be considered along with other candidates who have applied for the said post. If the petitioner fulfils all the conditions of eligibility attached to these posts, he has right to be considered and, therefore, we direct the respondents to permit the petitioner to participate in the written test, which would be conducted for recruitment to the post of sepoy and peon, if any and his case shall be considered for appointment on merits along with others.

11. Learned Counsel appearing on behalf of Union of India has relied upon the following judgments:

- (1) E. Ramakrishnan and Others Vs. State of Kerala and Others,
- (2) Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others,
- (3) Union of India and Anr. v. Narendra Singh 2008 (2) SC 413.
- (4) Secretary, Ministry of Communications and Others Vs. Sakkubai and Another,

(5) State of Punjab and Ors. Etc. v. Supreet Rajpal and Anr. Etc. 2007 (13) Scale.

12. All the aforementioned judgments are either related to the casual or part time workers claiming regularization or asking further age relaxation. None of the judgment is on the issue, as is in the present case.

13. Learned Counsel for the petitioner has relied upon the OM dated 15.07.1968 which is reproduced below:

Ministry of Home Affairs Office Memorandum No. 16/5/68-Estt. (D) dated the 5th July, 1968 (1)

Subject: Appointment of part-time casual labour to regular establishment.

As the Ministry of Finance are aware, casual labourers who have rendered a minimum period of two years? continuous service can be appointed to Class IV posts, borne on regular establishment which are required to be filled by direct recruitment, subject to certain conditions vide para 2 of this Ministry?s Office Memorandum No. 16/10/66-Estt. (D) dated 2nd December, 1966. A question has been raised as to whether casual labourers appointed on part-time basis should also be made eligible for appointment to class IV posts borne on regular establishment, which are required to be filled by direct recruitment. It has been represented that, in certain offices, casual labourers are employed for a number of years on part-time basis, the workload there being not such as to justify their employment on whole time basis. It has accordingly decided that casual labourers appointed on part-time basis may also be made eligible for the concession sanctioned in para 2 of the aforesaid Office Memorandum No. 16/10/66-Estt. (D) dated 2.12.1966. Accordingly, with effect from the date of the issue of this Office Memorandum, part-time casual labourers shall also be eligible for appointment to class IV posts borne on the regular establishment, which are required to be filled by direct recruitment, provided they were appointed through Employment Exchange and had acquired experience of a minimum of four years continuous service as part-time casual labour in the office/establishment to which they were appointed through Employment Exchange. Those part-time casual labourers who were recruited in an office/establishment, without reference to the Employment Exchange and who are working on the date of issue of this Office Memorandum should not be considered for appointment to the regular establishment, unless they (i) get themselves registered with the Employment Exchange (ii) render from the date of such registration a minimum of four years continuous service as part-time casual labour and (iii) are subsequently sponsored by the Employment Exchange in accordance with their position in the register of the Exchange.

2. The orders contained in this Ministry?s Office Memoranda No. 4/9/61-Estt. (D) dated 9th August, 1961 and 16th September, 1961, granting certain age concession to casual labourers in the matter of appointment to posts borne on regular establishment will be applicable also to part-time casual labourers. In other words, such labourers should be allowed to deduct from their actual age

the period spent by them as part-time casual labourers and if, after deducting this period, they are within the maximum age limit prescribed for the service or post in the regular establishment, they should be considered eligible in respect of maximum age. Broken periods of service rendered as part-time casual labourer will also be taken into account for the purpose of age relaxation for appointment to the regular establishment, provided that one stretch of such service is for more than six months.

3. Ministry of Finance etc. are requested to bring these instructions to the notice of their attached and subordinate offices.

Sd/- Harish Chandra

Under Secretary to the Govt. of India.

14. We have carefully gone through the above said OM. As per this OM even the persons belonging to General category and working on part time basis are also covered for age relaxation. However, Scheduled Caste candidates are on better footing.

15. We have noted from the reliefs sought by the petitioner in the OA that counsel for the petitioner has not set out the case properly and has sought the multiple reliefs whereas prayer Clause (b) was sufficient in the facts and circumstances of the present case. The Tribunal has decided the case on the basis of prayer Clause (a) only and has not advanced any discussion on the other prayers including prayer (b), which is reproduced as under:

(b) to direct the respondents to issue a call letter to the applicant with regard to appearing in the case of sepoy and Group D Peon published in Employment News for which he had been duly applied, in the interest of justice and equity.

16. Although, the Tribunal has very rightly, set out the question, in first two lines of the judgment i.e. 'applicant seeks relaxation with relaxation in age to participate in selection held for Group 'D' post'. However, while deciding the actual issue, has diverted to the other side, which is not the real issue here.

17. We have gone through the pleadings and the facts of present case. The petitioner has been working since 1997. In fact, he is not asking for relaxation but is asking for consideration of his name for the post of Sepoy Group 'D' post, since, he belongs to Scheduled Caste. The main controversy is that whether the petitioner being Schedule Caste candidate is entitled for age relaxation or not when the post is not reserved. The case of the respondent herein is that since the present post is not meant for Schedule Caste candidate and, therefore, the petitioner cannot be given age relaxation for consideration.

18. There is no doubt in our mind, whenever, a Scheduled Caste candidate appear in any of the exam or apply for any post, his candidature would be considered with all relaxations applicable to him subject to he is otherwise eligible. Therefore, any Scheduled Caste candidate can compete for an open

category seat in an open competition. In such like situation, since the post is not reserved for the Scheduled Caste, therefore, he or she has to compete with the General Category candidates. If he is found fit, he would be selected. For example, if Scheduled Caste candidate appears in any Examination, he secured high rank by virtue of merit, then he will be selected in General category, though, he has availed of all the relaxations like age, fee and other things applicable to him as Scheduled Caste candidate.

19. Similar situation arose, long back somewhere, in the year 1957, when a Scheduled Tribe candidate declared elected on a General seat to Lok Sabha from double member constituency i.e. one seat reserved for Scheduled Tribes and other one General seat. Though, he mentioned in his declaration that he belongs to a Schedules Tribe, accordingly he deposited the less security amount. This issue went up to Supreme Court and the Constitution Bench of Supreme Court in the case of *Shri V.V. Giri Vs. Dippala Suri Dora and Others*, by majority of 41, decided that a candidate belongs to reserved category cannot be deprived of his right to contest election from the general seat. In the aforesaid case, the deposit for the General candidate was Rs. 500/- and for SC/ST candidate was Rs. 250/-. Therefore, he availed the relaxed conditions applicable to these categories. The same is the situation in the present case in which the respondent has given the relaxation in height, chest and travelling allowance but not extending age relaxation, applicable to him.

20. Undisputedly, in the present case, the petitioner is asking only for consideration of his candidature, so that he can appear in the selection process and if he is otherwise found fit, surely, he would be entitled for an appointment. We are of the view that he is not asking for the age relaxation beyond which is applicable to the reserved category, as he belongs to Reserved Category. He is otherwise has right to compete in the open competition. The present posts are being recruited from the open competition. Had he not been in service, whether as casual worker or part time worker, otherwise also, he could have appeared for such type of post. Neither the Tribunal nor the department understood the case properly, therefore the result of OA is also incorrect. On this ground alone, the matter could be remanded back to Tribunal. Since, the issue involved is a narrow compass and covered by the Division Bench judgment of this Court in the case of *Raj Kumar (supra)*, therefore, we have decided to take up the present case at our level.

21. In view of the above discussion, we set aside the impugned order dated 23.05.2008 and direct the respondent to consider his candidature and if he is found fit, he would be entitled for the appointment. This exercise shall be completed within six weeks from today.

22. Accordingly, we allow the writ petition. There shall be no order as to costs.