

Dwarka Prasad And Others vs Union Of India And Others on 28 July, 2003

Equivalent citations: 2003 (6) ACE 407, AIR 2003 SUPREME COURT 2971, 2003 (6) SCC 535, 2003 AIR SCW 3626, 2003 LAB. I. C. 2564, 2004 (1) SERVLJ 376 SC, 2003 (4) SLT 656, (2003) 9 ALLINDCAS 860 (SC), 2003 (5) SCALE 461, 2003 (9) ALLINDCAS 860, (2003) 6 JT 113 (SC), 2003 (3) UPLBEC 2082, (2004) 1 SERVLJ 376, (2003) 3 UPLBEC 2082, (2003) 5 SUPREME 166, 2003 SCC (L&S) 941, (2003) 98 FACLR 896, (2003) 3 LAB LN 860, (2003) 3 PAT LJR 200, (2003) 4 SCT 13, (2003) 5 SERVLR 153, (2003) 5 SCALE 461, (2003) 3 ESC 382, (2004) 1 JLJR 102, (2003) 9 INDLD 414

Bench: Doraiswamy Raju, D. M. Dharmadhikari

CASE NO.:

Appeal (civil) 5332 of 1997

Appeal (civil) 5333 of 1997

PETITIONER:

Dwarka Prasad and others

Rudresh Kumar Thomar & Ors. .

RESPONDENT:

Vs.

Union of India and others

Union of India and Others

DATE OF JUDGMENT: 28/07/2003

BENCH:

Doraiswamy Raju & D. M. DHARMADHIKARI.

JUDGMENT:

J U D G M E N T Dharmadhikari J.

In these appeals the appellants question the correctness of and assail the order dated 30.10.1996 of the Mumbai Bench of the Central Administrative Tribunal. The appellants were appointed as Preventive Officers (Grade I) in Central Services Group 'C' (non- gazetted). The question before the tribunal was on the validity of 20% quota fixed for them for promotion to the post of Appraiser.

According to them a much lower quota fixed for them as compared to 75% quota fixed in favour of the Examining Officers is arbitrary and discriminatory.

The two categories of officers' namely Preventive Officers and Examining Officers shall for convenience be shortly referred to hereinafter as POs and EOs respectively.

The Mumbai Bench of the tribunal rejected the challenge of POs both on merits as also on the ground of res judicata by relying on a two-member judgment of Madras bench of the same tribunal in which similar challenge was negated on a petition filed by All India Customs Preventive Services Federation representing the POs as a class.

It may be mentioned that the above-mentioned 75% quota for EOs and 20% quota for POs to the promotion post of Appraiser has been fixed by statutory rules framed under Article 309 of the Constitution of India viz., Department of Revenue (Custom Appraisers Recruitment) Rules 1988.

The appellants assail validity of the Rules and schedule appended to it whereunder 75% and 20% quota has been fixed respectively for EOs and POs.

The principal contention advanced is that fixation of 20% quota for promotion of POs is not proportionate to their cadre strength. Fixation of such small quota of 20% for POs as compared to 75% for EOs is described as arbitrary and discriminatory hence violative of Articles 14 & 16 of the Constitution of India.

Learned Senior Counsel Shri PP Rao and Shri AK Ganguli appearing for POs in these appeals submit that approved principle is that fixation of quota for promotion between various feeder categories or posts should be proportionate to the respective cadre strength. Reliance is placed on a decision of this Court in All India Federation of Central Excise vs. UOI [1997 (1) SCC 520]. To elucidate and highlight their grievance of discriminatory treatment to POs as a class, the counsel have handed over to us a chart to explain at a glance the alleged shocking disparities in chances of promotion between POs and EOs.

Asst. Commissioner, Customs

(Group 'A)

DR

(Promotion)

Superintendents	Appraiser (Group 'B')	Superintendents of
Customs (250)	(520)	Central Excise
(Group 'B')		(Group 'B')

100% promotion	DRs 50%(260)	Promotion 50%
of POs Preventive		(260)
Officers (Group 'C')		

75% = 195	20% = 52	5% = 13
(Examiners) (350)	Preventive Officers	Office
(Group 'C') (Group 'C')	(1708)	Supdts*
		(Group 'C')

75%	25%	75%	25%	100%
DR	promotion	DR	promotion	promotion
	of UDCs &		of UDCs	of UDCs
	Stenos		& Stenos	& Stenos

? In addition OSs have a channel of promotion as Asst. Administrative Officers, Administrative Officers and Chief Administrative Officers. On behalf of petitioners from the above chart, it is explained that by working out 75% quota of the then total sanctioned strength of 253 posts of promotion, the then 469 available EO's got chance of being considered for promotion. As against that it is pointed out that by working out 20% quota, for available 2607 posts of POs only 337 Posts were available for consideration for promotion of POs. The chances of promotion provided for POs with much larger strength are thus too low as compared to EOs with much lesser strength. According to the POs this glaring disparity exists in the chances of promotion for POs. In normal course they would be taking fifteen years for promotion to Grade 'D' cadre as compared to EOs who might take only five years for promotion to that grade. It is submitted that this situation is creating a huge imbalance as employees working in clerical cadre under POs who might earn promotion as EOs would get promotion as Appraisers to become seniors to many POs under whom they had worked.

Learned Senior Counsel Shri PP Malhotra, appearing for the union of India representing the concerned Department and Shri Nageshwar Rao who appears for the contesting EOs have opposed the appeal and tried to meet the various contentions advanced. On behalf of the Union of India as employer, it is submitted that although POs and EOs have been recruited through common competitive examination, the functions and nature of their work are distinct. The stand of the Union of India is that, as has been shown in the chart, POs have two channels of promotion; one to the post of Superintendent (Customs) Grade 'B' and the other for the post of Appraiser Group 'B'. A conscious decision has been taken to provide only 20% quota to POs for the post of Appraiser which is ex-cadre post for them because they have 100% quota for the post of Superintendent (Customs) Group 'B' in their own channel. It is not disputed that the EOs are mainly involved in assisting the Appraiser in assessment of duties. The POs work in the field and are engaged mainly in the duties of checking of smuggling and evasion of duties. Second Pay Commission does take cognizance of the fact that in certain custom offices in big cities like Kolkata, Mumbai and Goa, sometimes duties of EOs and POs overlap. The pay Commission, therefore, has recommended a common scale of pay for them. On behalf of the Union of India reference is made to the previous Rules of 1961 whereunder promotions to the higher post of Custom Appraiser were based on length of service between POs

and EOs with age restriction on the former. According to the Union of India, in 1961 Rules, there were no quotas separately fixed in the ratio of 75%, 20% and 5% for EOs, POs and Office Superintendents (OS) respectively. It was experienced that under the earlier recruitment rules, EOs were taking a sizeable quota and hence their quota was reduced from 72% to 54% and promotional prospects of POs and OS were increased from 12% to 15% and from 5% to 10% respectively. In other words, the promotion prospects of POs and OSs were increased by 1988 Rules. Had the post of Appraiser been filled exclusively from the group of Examiners who have no other channel of promotion the promotional prospects of POs would have been poorer. It is submitted that POs have 100% chances of promotion in their own channel to the post of Superintendent (Customs) (Group 'B') and in the other channel for the ex-cadre post of Appraiser if their quota is further increased above 20% they would make inroad into the chances of EOs. This is the reason given by respondents for restricting quota of POs to 20% for ex-cadre post for them of Appraiser.

In the course of hearing of these appeals it was brought to the notice of this court that there has been large-scale up-gradation of POs to the post of Superintendent of Customs (Preventive) in the years 1996-97. As a result of this upgradation the chances of promotion of POs in 20% quota have naturally improved. On behalf of the appellants it was submitted that by this upgradation broadly though not strictly, parity has been achieved in the matter of chances of promotion of EOs and POs but that would have beneficial effect only prospectively.

Learned counsel for the appellants submits that even after upgradation of a sizable number of posts of POs as Superintendent of Customs, the grievance for past injustice suffered by POs between January 1988 to 29.5.1997, that is before certain posts were upgraded, survive and deserve redressal by this Court. It is also submitted that on proper fixation of just or equal quota for promotion of POs proportionate to their strength they deserve to be retrospectively considered for promotion to grade 'A' posts and fixation of notional seniority, as, in the meantime, they have already earned one promotion. A suggestion was made on behalf of the appellants through their counsel that in order to do complete justice by undoing the alleged past illegalities, the upgradation of 429 posts in 1996 and 120 posts made in 1997 of POs, be pushed back to the date of commencement of 1988 Rules and respondents be directed to undertake the exercise over again of considering promotions of POs and EOs on the basis of the posts notionally available as a result of upgradation. Some suggestions were also made with regard to the consideration of POs for future promotion from Group 'B' to Group 'A' posts.

Awaiting formal instructions to be received by the counsel for the Union of India we adjourned the matter on 16.4.2002. On 30.4.2003 it was directed to be re-listed on 9.7.2003. On the date when the matter was listed for further hearing Learned counsel for the Union of India, on instructions, very categorically stated that the proposal made on behalf the appellants after upgradation of posts for their retrospective consideration for promotion is unacceptable to the Government as it is impracticable and would involve a cumbersome exercise of reopening all promotions between January 1988 to 29.5.1997. It would also adversely affect a large number of EOs and POs who were not parties before the tribunal and are not parties before this Court, besides unsettling things and state of affairs which came into existence all along and upheld by competent adjudicating forums on earlier occasion.

Fixation of quotas or different avenues and ladders for promotion in favour of various categories of posts in feeder cadres based upon the structure and pattern of the Department is a prerogative of the employer, mainly pertaining to policy making field. The relevant considerations in fixing a particular quota for a particular post are various such as the cadre strength in the feeder quota, suitability more or less of the holders in the feeder post, their nature of duties, experience and the channels of promotion available to the holders of posts in the feeder cadres. Most important of them all is the requirement of the promoting authority for manning the post on promotion with suitable candidates. Thus, fixation of quota for various categories of posts in the feeder cadres requires consideration of various relevant factors, a few amongst them have been mentioned for illustration. Mere cadre strength of a particular post in feeder cadre cannot be a sole criteria or basis to claim parity in the chances of promotion by various holders of posts in feeder categories.

Normally, where officers are to be drawn for promotion from different posts in the feeder cadre, quota for each post in the feeder cadre is maintained proportionately to the sanctioned strength in that post. This, however, cannot be an inviolable rule of strict application in every case, with any absolute equality of arithmetical exactitude but may vary case to case depending upon the pattern, structure and hierarchies in the Departmental set up as well as exigencies and balancing needs of Administration. There are other relevant considerations, some of which have been mentioned above, which may require departure from the practice of fixation of quota for each post in the feeder cadre, solely proportionate to its strength. In the instant case, on behalf of the UOI, full and overall justification has been shown for fixing only 20% quota for POs as against 75% quota for EOs. It has been stated in the counter- affidavit by the UOI that regular channel of promotion for POs in their own line is to the post of Superintendent (Customs)(Group B) and in that they have 100% promotion quota. EOs and Superintendents (Group C) can claim no consideration for promotion on those posts which are exclusively earmarked for POs. It is submitted that keeping in view the availability of large number of POs with severe competition for them for limited number of posts of promotion in their own line, additional avenue of promotion to the extent of 20% has been provided to them for the posts of Appraiser which is ex cadre post for them outside their own channel and to which otherwise they would not be entitled to. Thus, the amended rules which provide them dual chances of promotion i.e. 100% in their own channel and 20% for the ex-cadre post of Appraisers along with EOs who have 75% quota more than sufficiently takes care of their interests as well and cannot be said to be so arbitrary, discriminatory, unreasonable as to call for interference in these proceedings. On behalf of POs argument advanced is that even taking together the quota of 20% fixed of promotion to the post of Appraiser and 100% fixed for Superintendent (Custom), Group 'B', the total posts available for promotion to POs are far less than those available to EOs. In actual practice, as is sought to be demonstrated, many EOs within comparatively lesser period of service secure a march over POs in getting promotions earlier. Sometimes, EOs, who were promoted from ministerial staff and who worked under the POs get chance of promotion earlier than the latter.

Subject to further verification by the department, accepting the realities as have been pointed out to us, that many times EOs with lesser length of service get early promotion to posts of Appraisers in Group 'B', in our opinion, that alone can be no ground to declare quota of 75% and 20% fixed for EO's and PO's respectively, as either discriminatory or arbitrary. It has been pointed out on behalf of the UOI that if, as prayed by POs, there 20% quota is stepped up to make it 50% or above, there is

likelihood that even in the ex-cadre line of Appraisers the POs would surpass the EOs and there would be stagnation for latter. In such a situation, in order to balance the chances of promotion, EOs who have only one channel of promotion as compared to POs who have two channels of promotion, POs have been consciously given smaller quota in the channel of EOs. We do not find any arbitrariness or discriminatory treatment on the part of the department in fixing such a quota for the two posts. The lesser chances of promotion to POs in the line of ex cadre post of Appraiser is a natural consequence of such balancing of chances of promotion between EOs in their own channel and POs in an additional channel provided to them keeping in view their larger cadre strength. On behalf of the appellants much emphasis has been laid on the observation of the Second Pay Commission in which uniform scale of pay had been recommended for POs and EOs on the ground that their duties are somewhat similar and sometimes in certain custom offices of big cities, overlap. Need or desirability for parity in the pay scales of posts turn on different and ever so many other considerations and it cannot be indicative of any identity among such posts or suggestive of need for parity of treatment in all and every respect, too. It cannot, however, be seriously denied that the essential function of EOs is to assist the Appraisers in assessment of custom duties whereas POs have duties mainly in the field for checking smuggling and evasion of duties. It is open to the department to treat and consider EOs as more suitable for the post of Appraisers and yet consider for a limited number of those posts POs, who also occasionally and in certain offices do the work of Appraiser. It is also found desirable to augment their chances of promotion to Group 'B' posts by considering them for 20% of post of Appraiser which is outside their own line. From the nature of duties, functions and availability of two channels of promotion to POs as compared to EOs, the two cadres constitute two different and distinct classes which can be given different treatment by providing dissimilar quota for their promotion to higher Group 'B' post. See the following observations in the case of Kuldeep Kumar Gupta vs. HP State Electricity Board [2001 (1) SCC 475 at page 484-85 (para 6):

"Providing a quota is not new in the service jurisprudence and whenever the feeder category itself consists of different category of persons and when they are considered for any promotion, the employer fixes a quota for each category so that the promotional cadre would be equilibrated and at the same time each category of persons in the feeder category would get the opportunity of being considered for promotion. This is also in a sense in the larger interest of the administration when it is the employer who is best suited to decide the percentage of posts in the promotional cadre, which can be earmarked for different category of persons. In other words this provision actually effectuates the constitutional mandate engrafted in Article 16(1), as it would offer equality of opportunity in the matters relating to employment and it would not be the monopoly of a specified category of persons in the feeder category to get promotions."

Learned Senior Counsel arguing for the POs submits that the most typical feature of this case is that although below Group 'B' post EOs & POs constitute two different cadres but once they are promoted to Group 'B' post either as Superintendent (Customs) in the line of POs or Appraisers in the joint channel available to POs and EOs, for the purpose of next higher promotion of Group A, they again join in one feeder post. It is therefore contended that because of this typical feature of

their conditions of service, the holders of two posts of POs and EOs deserve just and similar treatment. This contention also is unacceptable. As has been pointed out, in Group 'B' posts POs have two channels of promotion; 100% to the post of Superintendent Group 'B' and 20% for the post of Appraiser, EOs have only one channel of promotion with quota of 75% for promotion to Group 'B' post. Thus the holders of two posts constitute two distinct classes with different conditions of service and nature of duties. It is open to the promoting authority to treat them differently in the matter of providing avenues of promotion to Group 'B' posts. In the case of *State of Rajasthan vs. Rajendra Kumar Godika* [1993 Suppl. (3) SCC 150 at 167, this Court relied and quoted with approval the following passage from constitutional law by Prof. Willis and repelled similar contention on grievance of discrimination:-

"Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

Articles 14 & 16 of the Constitution of India cannot be pressed into service to describe the fixation of lower quota for POs as discriminatory. It is well established in law that the right to be considered for promotion on fair and equal basis without discrimination may be claimed as a legal and a fundamental right under Article 14 & 16 of the Constitution but chances of promotion as such cannot be claimed as of right (see *Ramchandra Shankar Deodhar vs. State of Maharashtra* AIR 1974 SC 259 para 12 at page 267). The decision relied on behalf of the appellants in the case of *All India Federation of Central Excise vs. UOI* [1977 (1) SCC 520] is of little assistance to the appellant's case. In that case, this Court has considered the proposals made by the department for re-fixation of quota to redress the grievance of the petitioners to some extent. In the other case between the same parties reported in 1999 (3) SCC 384, the Court could not be persuaded to issue any direction for alteration of the quota fixed. None of the two decisions therefore is helpful in supporting the contention advanced on behalf of the appellants.

We do not find any legal or constitutional infirmity in the lower quota fixed for POs as compared to EOs for the post of Appraiser Group 'B'. In view of our above conclusion it is not necessary for us to go into the other alternative prayer that department having itself upgraded certain number of posts of POs, and future imbalance in chances of promotion to POs, to some extent having been set right, this Court should direct pushing back the benefit of upgradation from a back date for reconsideration of appellants' case for notional promotion and fixing their seniority in the promotion cadre with consequent monetary benefit and future chances of promotion to higher posts. If at all, the said upgradation has also extended further relief prospectively no doubt, but that is no ground to make it operative retrospectively and disturb the status quo in vogue for long, unsettling thereby things which got settled for considerable time.

In the result, both the appeals fail and are hereby dismissed but in the circumstances we will leave the parties to bear their own costs.