

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 22.07.2019

% **Judgment delivered on: 24 .07.2019**

+ **W.P.(C) 2853/2015**

DIRECTOR GENERAL, E.S.I.C.Petitioner

Through: Ms. Biji Rajesh and Mr. Diwankar
Sethi, Advocates for Mr. Gaurang
Kanth, Advocate

versus

SAURABH KUMAR & ANR Respondents

Through: Mr. L.R. Khatana, Adv. for R-1.
Mr. Avadh Kaushik, Advocate for R-
3 to 7.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE A.K. CHAWLA

J U D G M E N T

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:

“2(d) “Director General” means the Director General of the Corporation.

2(g) “Post” 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 – 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.”

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

Computer) Recruitment Regulations, 2006. (“ESIC LDC Recruitment Regulations” for short)

4. Respondent No. 1 – 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 – 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 – 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 LDC's. Even though, there had been a long standing practice in the respondent's organization of having Regional cadre of LDC's 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 practice in the respondents organization of having regional cadre of LDCs with different appointing authorities. This practice is obviously not in accordance with the Statutory Regulations. The Hon’ble Delhi Court judgment relied upon by the respondents is not of any help to them because in that case the Recruitment Rules permitted Zonal Cadre whereas, in the instant case Statutory Rules provide only one All India Cadre. Thus, the practice followed by the respondents in treating the LDCs cadre as Regional Cadre is unsustainable being contrary to their Statutory Regulations.

3. The respondents had argued that the applicant was appointed on the basis of All India Exam and assigned to the office of Director Medical Delhi. When provisional seniority list of LDCs was circulated by Director Medical in the year 2004, he did not raise any objection. He also did not challenge the final seniority that was issued in the same year. Therefore, the applicant has no right to question this seniority now. The applicant’s counsel, on the other hand, argued that the applicant never received the provisional seniority list that was issued by Director Medical. Moreover, he argued that even if this contention of the respondents is accepted, there cannot be any estoppels against following Statutory Rules and Regulations.

4. We have considered the arguments of both sides. In our opinion, the argument of the applicant’s counsel has merit. This is because the respondents were duty bound to act in accordance with the Statutory Rules and Regulations and there cannot be estoppels against the same. In the case of

Commissioner of Income Tax, Calcutta vs. B.N. Bhattacharjee and Another, AIR 1979 SC 1725, Hon'ble Supreme Court observed as follows:-

“The soul of estoppels is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty.”

5. On the basis of above analysis, we are of the view that this O.A. deserves to be allowed. The respondents are directed to prepare a seniority list of the LDC cadre in the light of observations made above within a period of three months from the date of receipt of a certified copy of this order. They shall also consider applicant for promotion in his turn as per his position in the seniority list. No costs.”

11. Thus, the question which falls for our consideration is whether the *ESIC LDC Recruitment Regulations* provide for a unified cadre, or for separate/ region-wise/ decentralized cadres of LDCs in the ESIC. If the cadre of LDCs is unified on All-India basis, a common seniority list of the said cadre would be required to be maintained for the purpose of consideration of promotion to the posts of UDC. On the other hand, if there was no single/ unified cadre of LDCs on All-India basis, separate Region-wise seniority were rightly maintained for making promotions as UDC in respect of the vacancies arising in the promotional posts, Region-wise.

12. To deal with issue, it would be appropriate to extract the relevant Regulations contained in the *ESIC LDC Recruitment Regulations* notified

vide the Gazette of India Notification 12(11)-1/2002-Estt.I dated 13.03.2006:

“2) They shall come into force on the date of their publication in the Official Gazette.

Number of post, classification and scale of pay: - The number of posts, their classification and the scale of pay attached thereto, shall be as specified in columns 2 to 4 of the Schedule Annexed to these Regulations.

The method of recruitment, age limit, qualification, etc:- The method of recruitment, age limit, qualifications and other matters relating thereto shall be as specified in columns 5 to 14 of the said Schedule.

x x x x x x x x x x

The relevant extract of the Schedule reads as follows:

“SCHEDULE

<i>Name of the Post</i>	<i>Number of Post</i>	<i>.....</i>	<i>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</i>
<i>1</i>	<i>2</i>	<i>3....10</i>	<i>11</i>

<u>Lower Division Clerk/ Adrena Operator/ Telephone Operator/ computer</u>	<u>*2321 (2006)</u> <u>*Subject to variation dependent upon work load</u>		(i) 75% by direct recruitment on the basis of written competitive examination. (ii)(a) 10% by promotion on the basis of seniority subject to rejection of unfit from Group D employees provided they have rendered five years of regular service in the Group D cadre and possess the minimum qualification of Matriculation (10 th Standard pass) or equivalent. (b) 15% by promotion through Limited Departmental Competitive Examination from among the Group D employees. They should possess minimum qualification of Matriculation (10 th Standard pass) or equivalent and have rendered the minimum service of two years in Group 'D' cadre on regular basis.
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.....	<u>Departmental Promotion Committee exists, what is its composition</u>
12	13
.....	Group 'C' Departmental Promotion Committee consisting of: Director (Medical) Delhi/ <u>Regional Director/</u> Joint Director Incharge- Chairman Deputy Director/ Deputy Director (Medical)/ Deputy Director (General) Member

”

(emphasis supplied)

13. The submission of Ms. Biji Rajesh, learned counsel for the petitioner is that the Tribunal has not applied its mind to the Statutory Regulations placed before it. It has not considered the fact that the composition of Department Promotions Committee (DPC) for the LDC cadre consists of

Director (Medical) Delhi/ Regional Director/ Joint Director Incharge-Chairman Deputy Director/ Deputy Director (Medical)/ Deputy Director (General) Member, as the case may be – and, thus, the DPC is constituted at the Regional level, and not at an All India level. She further submits that even as per the latest Recruitment Regulations for LDC and UDC cadre, the DPC for LDC cadre, as well as DPC for UDC cadre is not constituted at All-India level, but at Regional level only. In this regard, she places reliance on the *ESIC (Lower Division Clerk, Adrema Operator, Telephone Operator and Computer Recruitment Regulations, 2011*, issued vide Notification No. A-12(11)/10/2000-E.I.(A) dated 14th November, 2011 and *ESIC (Upper Division Clerk or Upper Division Clerk- Cashier Recruitment Regulations, 2011*, issued vide Notification No. A-12(11)/10/2000-E.I.(A) dated 14th November, 2011.

14. She submits that the advertisement issued by ESIC invited applications for recruitment of LDC/ stenographers against specified posts which existed in particular States and Regions, and not on All-India basis. The applications against the advertisement had to be submitted to the concerned States and Regions in respect whereof the applicant/ candidate desired to apply.

15. She further submits that the ESIC has always had separate sanctioned strength of LDC's in separate States and Regions. In this regard, she referred to the communication dated 08.08.2012 issued by the H.Q. Office, ESIC to the Regional Director/ Director (Medical) Delhi/ Regional Office/ D(M)D, showing the sanctioned strength of officers and staff in the ESIC in various States. She further submits that the LDCs are not transferrable from one

State/Region to another State/ Region, as transfers are affected only upon promotion at All-India level. In this regard, reference is made to the letter of appointment dated 14.08.2003 issued to Respondent No.1/ Original Applicant, wherein Clause 'D' reads:

“D. He can be deployed in any unit of the Directorate {Medical} Delhi i.e. Administration Unit, Employees State Insurance Hospital and Employees State Insurance Pharmacy, Delhi/ New Delhi and can be transferred anywhere in India on promotion at the All India level.” (emphasis supplied)

16. She submits that the Tribunal erred in upsetting the well settled position with regard to the structure of the cadres of LDCs, UDCs and Superintendents, which have always existed at Regional levels only, and there is nothing in the Regulations to suggest that a unified Cadre of LDCs existed, or that separate seniority in the said cadres could not be maintained Region/ State wise. She placed reliance on the decisions in *N. Suresh Nathan and Anr. v. Union of India*, AIR 1992 SC 564 and *M.B. Joshi and others v. Satish Kumar Pandey and ors*, AIR 1993 SC 267 in support of her submission.

17. On the other hand, Mr. Khatana, learned counsel for the respondent No.1 and Mr. Avadh Kaushik, counsel for the respondent Nos. 3 to 7 supports the view of the Tribunal in the impugned judgment. He submits that the *ESIC LDC Recruitment Regulations* show that there is only one cadre of LDCs having a unified strength of 2321 posts at All India level. All the appointments, to all posts in the ESIC, are made by the Director General. He submits that the cadre of LDCs is not further sub-divided into sub-cadres

or regional cadres. Thus, the promotion of respondent 2 based on local seniority is contrary to the statutory Rules and Regulations.

18. Mr. Khatana sought to place reliance on the appointment letter of respondent No. 1, to argue that his terms and conditions of appointment stipulated that he was liable to be transferred anywhere in India on promotion at the All India level. Thus, he submitted that a single All-India seniority list was required to be mandatorily prepared by the ESIC, and promotions could not be given based on local/ regional seniority.

19. He further submitted that once the Employer frames statutory Rules/ Regulations pertaining to seniority and promotion, they are bound by the said Rules and Regulations in respect of matters covered by the Rules/ Regulations, and any decision contrary to the said Rules/ Regulations would be bad in law. In this regard, reliance was placed on the decision in **A.K. Bhatnagar and ors. v. Union of India and ors.**, (1991) 1 SCC 544 and **Ranajit Kumar Meher v. State of Orissa & Ors.**, (2017) 4 SCC 568.

20. He relies on **P.U. Joshi v. Accountant General**, (2003) 2 SCC 632 to submit that it is for the government to lay down the rules for merge or demerge the cadres. The cadre of LDC has not been demerged region wise. Thus, it has to be treated as a unified all- India cadre.

21. We heard learned counsels for the parties, and reserved judgment on 29.11.2018. However, the same could not be pronounced earlier and, therefore, we listed the matter for re-capitulation of arguments on 22.07.2019.

22. Both the parties have heavily relied upon the Schedule to the ESIC LDC Recruitment Regulations. However, the said Schedule to these Regulations cannot be read in isolation, and they have to be read as a whole, along with other relevant documents.

23. Learned counsel for the petitioner submits that the posts of LDC are to be filled 75% by direct recruitment, and 25% by promotion (which is further split up as 10% on the basis of seniority, and 15% on the basis of LDCE) from amongst Group “D” employees. He has referred to column 13 of the Schedule to the Regulations to argue that the DPC for promotions to LDC consists of the Director (Medical) Delhi/ Regional Director/ Joint Director Incharge- Chairman Deputy Director/ Deputy Director (Medical)/ Deputy Director (General) Member, as the case may be and, thus, DPC only exists at the regional level, and not at the All India Level.

24. On the other hand, respondent No. 1 has referred to column 2 of the Schedule to the Regulations to argue that the number of sanctioned posts is on All India basis, and the Schedule does not specify any sub- cadre or Regional cadre. Thus, the LDC cadre is a unified cadre having all India Seniority.

25. We have perused the entire scheme of the LDC Recruitment Regulations and other relevant documents referred to by learned counsels. The documents placed on record show that the ESIC has always maintained separate cadres for LDCs, Region-wise. The advertisement issued by the Petitioner for recruitment of LDCs/ Stenographers in 2007 shows that the 600 vacancies for the post of LDCs had separate sanctioned strength for

every State and Union Territory. The relevant extract from the said advertisement reads as follows:

*Employees' State Insurance Corporation
Panchdeep Bhawan: CIG Road : New Delhi*

Recruitment of Lower Division Clerk/ Stenographers

A. Applications in the prescribed format are invited to fill up 600 vacancies in Lower Divisions Clerk and 53 vacancies in Stenographer, Grade- D in the following regions of ESI Corporation as shown below. The break-up of the vacancies is as follows:-

State/UT	SC	ST	OBC	General	Total	Out of which			
						OH	HI	VI	EXSM
Gujarat	05	16	12	12	45	-	01	-	04
Karnataka	18	09	27	66	120	01	01	01	12
Orissa	02	03	01	13	19	01	-	-	-
West Bengal	27	06	-	-	33	01	01	-	-
Punjab	18	-	12	23	53	-	01	-	01
Delhi	30	23	74	100	227	01	03	03	21
Haryana	04	-	13	19	36	01	01	01	03
Andhra Pradesh	08	02	11	15	36	-	01	-	04
Uttar Pradesh	05	-	08	03	16	-	01	-	01
Maharashtra	-	08	-	-	08	01	-	-	-
Goa	01	-	01	02	04	-	-	-	-
Puducherry	-	-	01	02	03	-	-	-	-
Total vacancies	118	67	160	255	600	06	10	05	46

26. Clause 'C' and 'G' of the said advertisement further provided that recruitment would be on Region/ State- wise basis, and that the application forms for the post of LDCs had to be sent to the respective State/ Region for

which the candidates were applying. The relevant extract from the Advertisement reads as follows:

“A.

Note:

(A)

(B)

(C) *The recruitment would be on Regional/ State-wise basis. Candidates can apply for vacancies in one State only and have to appear for the examination from a center of that particular State/ UT and shall be liable to be posted anywhere in the State/ Region.*

(D) xxxxxxxxxxxxxxxx

B.

C.

D. **Fee & Mode of Payment:-**

A Demand Draft/ Banker's Cheque should be drawn on State Bank of India in favour of concerned Regional Director, Regional Office, ESI Corporation, payable at the respective centres. i.e. Candidate applying for the post of L.D.C. from Punjab State has to submit the D.D. in favour of Regional Director, ESIC, Punjab State payable at Chandigarh.

E.

F.

G.

The application form is to be sent by registered/ speed post to the respective State/ region for the post of which the candidates have applied. The addresses of the regions/ states where the posts are existing along with the centres of the examination are given below:-

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

H. General Conditions:

1.

2. ***The recruitment is against vacancies on a local/ regional basis. Hence anyone selected/ appointed on local/ regional basis shall be liable to posted anywhere in the State/ Region.***” (emphasis supplied)

27. We may also refer to the communication dated 08.08.2012 addressed by the Headquarters Office of the ESIC to the Regional Director/ Director (Med.), Delhi, Regional Office/ D(M)D, ESI Corporation on the subject of Sanctioned Strength Officers & Staff (as on date)- reg. This communication reads as follows:

Sir,

I am directed to invite your attention towards the letter under reference wherein sanctioned strength excluding posts sanctioned for Medical Education Division on 09.01.2012 and 24.01.2012 which are pooled posts to be released on start of functioning of their institution were communicated, in respect of your Regional Office/ Sub Regional Office/ PGIMSR/ SSMC/ SMC & Model Hospitals etc and comments/ views were desired in that respects.

In connection, it is informed that based on the strength furnished by the concerned Regional Director and records available with this office, the Sanctioned strength (excluding posts sanctioned for Medical Education Division on 09.01.2012 and 24.01.2012 which are pooled posts to be released on start of functioning of their institution) in respect of your Regions (including SRO/SMC/ESIH/ ZTI/ ZVI/ ZDI/ PMD/ MDDC/ PGIMSR etc) is being communicated. It is to further intimate that the sanctioned strength which is annexed herewith

will supercede all earlier Sanction/ apportionment and is final in all respect.

All the concerned are requested to update their records accordingly for future reference/ recruitment/ transfers etc.

The issues with the approval of Commissioner (P&A).

28. The said communication contained a Region/ State wise index. We may refer to the State wise position of the sanctioned posts, in the hierarchy of posts, in respect of certain States/ Regions by way of illustrations. In respect of Andhra Pradesh, the State/ Region wise sanctioned posts in the hierarchy was stated as follows:

ANDHRA PRADESH

NAME OF POST	RO	VIJAYWADA	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/ OPERATOR	LIFT								0
OTHER	6								6
TOTAL	50 9	128	82	14	53	32	18	14	850

(emphasis supplied)

29. Similarly, for Delhi, for the State/ Region, Delhi, the sanctioned posts of LDC were disclosed in the tabulation as follows:

DELHI

NAME OF POST	RO	ROHINI	OKHLA	ZTI	ICT DIV.	PMD	TOTAL
LDC	18	5	5				28

30. In relation to the Directorate (Medical), Delhi, the number of sanctioned posts of LDC were disclosed as follows:

DIRECTORATE (MEDICAL) DELHI

NAME OF POST	D(M)D	DENTAL ROHINI	PGIMSR BASAIDARA PUR	TOTAL
LDC	48	2	7	57

31. Thus, it is evident that not only the recruitment of LDCs was undertaken on Regional basis, even the sanctioned strength, inter alia, for the posts of LDC was maintained Region/ State wise.

32. As noticed hereinabove, the appointment letters issued to the LDCs, including respondent No.1, stipulated that he would be liable to transfer on All India basis “*on promotion at the All India level*”. Consequently, in respect of posts for which separate cadres were maintained State/ Region wise, the employees were not liable to transfer. Pertinently, the contesting respondents have not been able to point out any general policy for transfer of LDCs from one Region/ State to another by the Corporation in the exigencies of service.

33. Pertinently, the office memorandum No. A.33/19/89- Estt.-I dated 25.05.1990 provides for voluntary transfer of Group ‘C’ and Group ‘D’ employees from one region/ State to another. However, the said memorandum, which has been issued in consultation with the ESIC employees federation, provides that such voluntary/ on request transfer would lead to the transferred Group ‘C’ and Group ‘D’ employee being placed at the bottom of the seniority in the cadre to which he is transferred. This also clearly shows that the post of LDCs/ UDCs/ Assistants do not carry inter regional/ State transfer liability.

34. Heavy reliance has been placed by Mr. Khatana on the Schedule to the ESIC LDCs Recruitment Regulations which enlists the post of LDC/ Adrema Operator/ Telephone Operator/ Computer, and also discloses the number of sanctioned posts as 2321 (in the year 2006), subject to variation depending upon the workload. In our view, reliance placed on the said Schedule to the ESIC LDC Recruitment Rules is misplaced.

35. It is evident that even though Region/ State wise cadres of LDC have been maintained by the petitioner, in so far as the Recruitment Rules for the

post of LDC are concerned, they are the same and have been uniformly framed for all the States/ Regions. Merely because the Schedule to the ESIC LDC Recruitment Regulations discloses the consolidated number of sanctioned posts of LDCs on All India basis, it does not mean that the cadre of LDCs is unified on All India basis. As submitted by learned counsel for the petitioner, the DPC for promotion to the post of LDC in respect of 25% promotion quota (10% on the basis of seniority and 15% through LDCE) is constituted on Regional/ State basis. Thus, each Region/ State invites applications from eligible candidates, and considers promotions to the posts of LDC on Regional/ State level, depending upon the number of vacancies available, and on the basis of the seniority / merit position in the LDCE from amongst employees in the Group 'D' cadre who meet the eligibility norms set out in the Schedule to the ESIC LDCE Recruitment Rules.

36. ESIC (Staff and Conditions of Service) Regulations, 1959 may also be referred to. The post of LDC is classified as a Group 'C' 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 'A', Group 'B', Group 'C' and Group 'D' posts. In respect of Group 'C' and Group 'D' 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 – 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, Employees' State Insurance
Corporation.*

- Chairman

- 2) *Deputy Director, Employees State Insurance
Corporation.*

- Member

- 3) *An Officer of appropriate rank from Employees'
Provident Fund Organisation.*

- Member

39. On the other hand, it clearly emerges from the ESIC (Insurance Inspector/ Manager Grade – 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 – 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 'D' and 'C' 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:

“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.***

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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."

(emphasis supplied)

42. Similar view was taken by the Supreme Court in ***M.B. Joshi and ors.*** (supra), wherein it observed:

"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.”

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.

(VIPIN SANGHI)
JUDGE

JULY 24, 2019

(A.K. CHAWLA)
JUDGE

