

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.N.RAMACHANDRAN NAIR

&

THE HONOURABLE MR.JUSTICE. P.S.GOPINATHAN

THURSDAY, THE 12TH DAY OF APRIL 2012/23RD CHAITHRA 1934

OP (CAT).No. 175 of 2010 (S)

OA.16/2009 of CENTRAL ADMINISTRATIVE TRIBUNAL,ERNAKULAM
BENCH

PETITIONERS:

1. BOBAN LAL.V.,
OFFICE OF THE (SDE) EXTERNAL, BSNL, PARUTHIPARA
THIRUVANANTHAPURAM.
2. LEENA ROSE THOMAS,
(SDE) D TAX, BSNL, THIRUVANANTHAPURAM.
3. S.SURENDRAN NAIR, SDE, STAFF,
BSNL, M.S. THIRUVANANTHAPURAM.
4. K.P.RAJAN, SDE, (B.S.S.), M.S.
BSNL, ERNAKULAM.
5. MANOJ KRISHNAN K.,, A.D. WI-MAX,
BSNL, THIRUVANANTHAPURAM.
6. VALSA PHILIP S.D.E., (C.S.C),
BSNL, THIRUVANANTHAPURAM.

BY ADVS.SRI.P.RAVINDRAN (SR.)
SMT.SHEEJA KUMARI S.
SMT.APARNA RAJAN

RESPONDENT(S):

1. BHARAT SANCHAR NIGAM LIMITED,
REPRESENTED BY ITS CHAIRMAN AND MANAGING DIRECTOR

CORPORATE OFFICE, 6TH FLOOR STATESMAN HOUSE
NEW DELHI - 110001.

2. THE CHIEF GENERAL MANAGER (BSNL),
KERALA TELECOM CIRCLE, BHARAT SANCHAR NIGAM LIMITED
THIRUVANANTHAPURAM. 695001.

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3. UNION OF INDIA, REPRESENTED BY THE
CHAIRMAN, TELECOM COMMISSION
DEPARTMENT OF TELECOMMUNICATIONS, SANCHAR BHAVAN
ASHOKA ROAD, NEW DELHI - 110001.

4. THOMAS ZACHARIAH, MUNJATTU,
KARINGATTIL, PERISHERI P.O., CHENGANNUR - 687 107.

BY ADV. SRI.MATHEWS K.PHILIP,SC, BSNL
BY ADV. SRI.K.BABU RAJAN
BY ADV. SRI.T.A.SREE KUMAR
BY ADV. SRI.R.RAJEEV
BY ADV. SRI.K.P.DANDAPANI (SR.)
BY ADV. SRI.MILLU DANDAPANI
BY SRI.T.P.M.IBRAHIM KHAN,ASST.S.G OF INDI

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 12-04-2012, ALONG
WITH OPCAT. 335/2010, OPCAT. 2248/2011, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

OP (CAT).No. 175 of 2010 (S)

PETITIONERS EXTS:

EXT.P1: COPY OF RECRUITMENT RULES DTD.22.7.1996

EXT.P2: COPY OF RELEVANT EXTRACTS OF THE LIST DTD.15.12.2003

EXT.P3: COPY OF PROVISIONAL SENIORITY DTD.28.7.2004

EXT.P3(a): COPY OF PROVISIONAL SENIORITY DTD.2.12.2004

EXT.P4: COPY OF REPRESENTATION DTD.3.3.2008

EXT.P5: COPY OF OA FILED BEFORE THE TRIBUNAL

EXT.P6: COPY OF REPLY STATEMENT FILED BY R2.

EXT.P7: COPY OF ORDER OF THE TRIBUNAL DTD.23.2.2010

EXT.P8: COPY OF JUDGMENT IN WP(c) NO.20979/10 DTD.12.7.10.

EXT.P9: COPY OF REVIEW APPLICATION WITHOUT ANNEXURES

EXT.P10: COPY OF ORDER IN RA NO.22/10 DTD.7.9.2010.

RESPONDENTS EXTS:

EXT.R4(a): COPY OF JUDGMENT IN TA NO.6/2009 DECIDED ON 25.11.2010
PASSED BY THE BOMBAY BENCH OF THE HON'BLE TRIBUNAL

/TRUE COPY/

P.A.TO JUDGE

C.N.RAMACHANDRAN NAIR & P.S.GOPINATHAN, JJ.'CR'

O.P.(CAT) Nos.175 of 2010,
335 of 2010 & 2248 of 2011

Dated this the 12th day of April, 2012

COMMON JUDGMENT

P.S.GOPINATHAN, J:

The order dated 23.2.2010 in O.A.No.16 of 2009 on the file of the Central Administrative Tribunal, Ernakulam is assailed in these petitions. O.P.(CAT)No.335 of 2010 is filed by the respondents in the above O.A. The respondent is the applicant before the Tribunal. He was working as Junior Telecom Officer (JTO) under the petitioners. As per the special rules, 75% of the post as Sub Divisional Engineers (SDE) are to be filled up by promotion from JTOs on the basis of seniority and fitness. Remaining

25% is to be filled up on the basis of the departmental competitive examination. Though the special rules came into force with effect from 22.7.1996 no departmental competitive examination was conducted till 2002 for the so-called administrative reasons. As per proceedings dated 28.12.2001, a copy of which was produced as Annexure-AI before the Tribunal, more than 6000 Junior Telecoms Officers (JTOs) were promoted and posted. Thereafter, a departmental competitive examination was conducted in 2002. Many of the JTOs promoted as Sub Divisional Engineers by Annexure-AI also applied for the competitive examination

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including the respondent in O.P(CAT) No.335 of 2010. But he did not qualify. On the basis of the result of the examination, the department published provisional seniority lists on 28.7.2004 and 2.12.2004. The respondent in OP (CAT) 335 of 2010 did not file any objection though some of the officers junior to him as per Annexure-AI were found place above the respondent. According to the respondent, no final seniority list was published. However, on 3.3.2008 he made a representation to the Chief General Manager stating that some of the juniors to the respondent were given seniority above the respondent. Alleging that there was no response to the representation made by the respondent he filed the Original Application before the tribunal seeking an order to quash the provisional seniority lists, copies of which were produced as

Annexures-A5 and A6 before the tribunal and for a direction to the petitioners in the above OP to recast the impugned provisional seniority lists. The plea of the respondent is that the seniority as per Annexure-A1 is not liable to be disturbed on the basis of the result of the departmental competitive examination. The tribunal below allowed the application and set aside Annexures-A5 and A6 provisional seniority lists and the petitioners herein, who were the respondents were directed to recast the seniority lists. Before the tribunal, the decision of the Chandigarh Bench in Dewan Chand v. Union of India (TA 84 & 85-HR-2009 dated O.P.(CAT) Nos.175 of 2010, 335 of 2010 & 2248 of 2011 3

25.8.2009) were also relied upon by the applicant. By the above order the Chandigarh Bench allowed the application with similar plea and the petitioners herein were directed to recast the seniority list on the basis of the above decision.

2. Some of the Sub Divisional Engineers, who were aggrieved by the order of the tribunal approached this court by WP(C) No.20979 of 2010. By judgment dated 12.7.2010, a copy of which is produced as Ext.P8 in OP(CAT) No.175 of 2010 dismissed the petition with liberty to the petitioners to move the tribunal for review of the impugned order. Accordingly, they preferred review application as R.A.No.22 of 2010. The tribunal by order dated 7.9.2010, a copy of which is produced as Ext.P10 in O.A.No.175 of 2010 dismissed the Review Application. Some of the

review applicants are the petitioners in OP(CAT) No.175 of 2010. The petitioners in OP(CAT) No.2248 of 2011 are yet another batch of review applicants. In OP(CAT) Nos.175 of 2010 and 2248 of 2011 the order in review is also assailed. Hereinafter the parties are referred with reference to their status in the O.A as the applicant, respondents and review applicants.

3. The short question now before us is that whether the Sub

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Divisional Engineers, who are successful under the departmental competitive examination subsequent to Annexure-A1 promotion order are entitled to seniority over those who were appointed earlier as per Annexure-A1 order towards 75% promotion quota.

4. It is not in dispute that Annexure-A1 order whereby the applicant and the review applicants were promoted is an unconditional regular promotion order on the basis of seniority and fitness as per the special rules which came into effect from 22.7.1996. For a correct appraisal of the facts of the case, it would be appropriate to read Annexure-A1 order, which is produced as Ext.P8 in OP(CAT) No.2248 of 2011.

"The following JTOs promoted to the grade of TES group-B in the Pay scale of Rs.7500-250-12000 and

allotted to Kerala Circle as per BSNL, New Delhi order No.1-16/2001-Pers.II dated 19.12.2001 are posted as SDEs in Kerala Telecom Circle as indicated against each against existing/installation post from the date they take over the charge of the post and until further orders, provided no vigilance/disciplinary case is pending or any punishment is current against any of the officials mentioned in the list. In case any disciplinary/vigilance case in terms GOI(D.O.P&T) OM No.22011/4/91-Estt(A) dated 14.9.1992 is pending/initiated against any of the officials mentioned in the list after the issue of these orders but before joining of the officials on promotion, the fact should be reported to this office immediately and the concerned officer should not be promoted or relieved for posting without specific orders from this office."

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5. The above order would show that it was a regular appointment by promotion and that the only condition is the pendency of the vigilance/disciplinary cases/current punishment against the officials mentioned in the list. There is no mention that appointment is subject to any quota rota rule relating to the appointment by departmental competitive examination. There is also no mention that any of the candidates appointed by Annexure-A1 order is towards 25% quota to be appointed by departmental competitive examination. Therefore, on a plain reading of Annexure-A1 order appointing the applicant and some of the review applicants would show that the order of seniority is as per the list annexed and it is not liable to be changed in pursuance to any sort of appointment.

6. Now, we can examine the precedents submitted before us. In

addition to some of the reported decisions, an unreported decision of the Karnataka High Court in WP No.37322 of 2010 and connected cases and another in WP No. 3725 of 2011 of the High Court of Bombay were also relied upon. The following are the reported decisions: A.Janardhana v. Union of India [(1983)3 SCC 601], Ashwani Kumar Singh v. U.P.Public Service Commission & others [(2004 SCC (L&S) 95]; Central Provident Fund Commissioner & another v. N.Ravindran & others [(1995 Supp(4) O.P.(CAT) Nos.175 of 2010, 335 of 2010 & 2248 of 2011 6 SCC 654]; Kuldip Chand v. Union of India & others (AIR 1996 SC 706), M.R.Gupta v. Union of India & others (AIR 1996 SC 669), Nirmal Chandra Sinha v. Union of India & others [2008(5) SCJ 593], Satpal Antil v. Union of India and another [(1995)4 SCC 419], State of Uttaranchal and another v. Dineshkumar Sharma [(2007)1 SCC 683]; V.P.Shrivastava & Others v. The State of M.P & Others (1996(1) Service Law Judgment 253).

7. In the case before the Karnataka High Court the challenge was against the order of the Administrative Tribunal directing to give notional promotion with effect from the date of appointment made on the basis of the departmental competitive examination. Though the Writ Petition was dismissed, the finding of the Bench is that the service benefits cannot be given with retrospective effect and that there was no provision for giving

notional promotion. In the Writ Petition before the Bombay High Court the challenge was against the order of the tribunal whereby it was found that the seniority ought to be reckoned from the date of assuming duty in the promoted post. By the impugned judgment, the Writ Petition was dismissed. In M.R.Gupta's Case (AIR 1996 SC 669), the dispute was relating to the limitation for filing the application before the tribunal.

That decision was relied upon because the respondents and the review

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petitioners had taken a contention that the provisional seniority list was published as early as 28.7.2004 and 2.12.2004 and that the applicant had not filed any objection to the provisional seniority list within the time limit prescribed. Therefore, the O.A filed in 2009 is beyond the time limit prescribed under Section 21 of the Administrative Tribunals Act and the application should have been rejected on that ground. Going by the facts of the case, we find that, in this case also, the issue is regarding the position of applicant in the seniority list and are affecting the applicant throughout his service. Therefore, we are of opinion that it is not just and appropriate to non suit the applicant on plea of limitation.

8. In A.Janardana's case [(1983)3 SCC 601] at paragraph 28 it is held thus:

"28. It is a well recognised principle of service jurisprudence that any rule of seniority has to satisfy the test of equality of opportunity in public service as enshrined in Article 16. It is an equally well recognised canon of service jurisprudence that in the absence of any other valid rule for determining the inter se seniority of members belonging to the same service, the rule of continuous officiation or the length of service or the date of

entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16."

Further at paragraph 32 it is held thus:

".....Therefore, the promotions were regular promotions, may be to the temporary posts which was a temporary addition to the strength of the service. But to all intents and purposes, the promotion of and promotees during this period was the regularar promotion uninterruptedly for the these years meaning thereby that it all promotees have held posts could never be said that posts were not available."

9. In Satpal Anthil's case (1995)4 SCC 419 at paragraph 11 it is held thus:

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"...in the absence of any specific rule indicating inter se seniority to be observed with reference to the date of passing the qualifying examination and promotion to be given on the basis of such inter se seniority, general principle of length of service as a basis for promotion amongst eligible candidates with qualifying service should be made applicable."

10. In Central Provident Fund Commissioner's Case [1995 Supp(4)

SCC 654] the finding of the Tribunal quoted in paragraph 1 is as follows:

"The Tribunal came to the conclusion that both those categories must be treated as belonging to one single class of promotees and, therefore, they must be promoted to the next higher post by first satisfying the 75% quota of those entitled to promotion by virtue of the seniority-cum-fitness rule and the 25% quota of those who become entitled to promotion by virtue of having passed the prescribed examination must take their position below the said 75%."

That finding was upheld by the Apex Court. In Ashwani Kumar Singh's

case (2004 SCC (L&S) 95 at paragraph 14 it is held thus:

"...Persons who have been appointed on the basis of the subsequent examination have to give way to appellant Ashwani Kumar Singh."

11. In Dinesh Kumar Sharma's case (2007)1 SCC 683 at paragraph

28 it is held thus:

"It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact

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situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can only get promotion and seniority from the timeLikewise,been he has substantivelyalso appointed i.e. from 1999. the seniority promotion/appointment inthe cadre fromagainstdate of will counted the issuance of order of substantive appointmentthe the said in cadre i.e. from 19-11-1999."

In Nirmal's case (2008(5) SCJ 593) at paragraph 10 it is held thus:

"It is settled law that the date of occurrence of vacancy is not relevant for this purpose."

12.The applicant had also canvassed our attention to paragraph 3

an Office Memorandum No.35014/2/80-Estt(D) dated 7th February,1986

of the Ministry of Personnel, Public Grievances and Pensions. Paragraph 3
of the above O.M. Reads thus:

"3. This matter, which was also disposed in the national Council has been engaging the attention of the Government for quite some time and it has been decided that in future, while the principle of rotation of quotas will still be followed for determining the inter-se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits of later years, thereby giving them unintended seniority over promotees who are already in position, would be dispensed with.(rest omitted)."

13. Our attention was also canvassed to the general principles of
determination of seniority in the Central Services except the Government

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of India, Ministry of Homes Affairs OM No.9-11/55, RPS, dated 22nd
December, 1959. (Quoted from Swamy's news). Referring to the direct
recruits and promotees paragraph 5 reads thus:

"5.Promotees- (i) The relative seniority or persons
promoted to the various grades shall be determined in the
order of their selection for such promotions."

14. The general principle 5(i) & (ii) to the explanatory memorandum
reads as follows:

on the "General of selection by a Departmental Promotion
Principle 5.(i)- Where promotions are made

basis

Committee, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered unfit for promotion and is superseded by a junior, such person shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior person who had superseded him.

General Principle 5.(ii)-illustration-Where 75% of the vacancies in the grade of Head Clerks are reserved for promotion from the grade of Upper Division Clerks and 25% from the grade of Storekeepers, the eligible Upper Division Clerks and Storekeepers shall be arranged in separate lists with reference to their relative seniority in those grades. The DPC will make selection of three candidates from the list of UDCs and one from the list of Storekeepers. Thereafter the selected persons from each list shall be arranged in a single list in a consolidated order of merit assessed by the DPC which will determine the seniority of the persons on promotion to higher grade."

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15. The review applicants had canvassed our attention to the decision in Union of India and another v.J.Santhanakrishnan and others (2007)15 SCC 694. It was a case relating to the seniority of 33-1/3 % quota employees. The Administrative Tribunal, Madras Bench, restoring balance between two sets of employees by holding that 33-1/3% quota employees deemed to have been promoted notionally on 12.9.1982 i.e, six months after the examination held in March, 1982. However,

Chandigarh Bench determining notional date as 11.5.1981. It was held that notional date determined by Madras Bench, reasonable and having sound basis, and therefore to be preferred to the Chandigarh Bench decision.

16. Evaluating the facts of the case with reference to Annexure-AI order and the precedents referred before us, we find that Annexure-A1 order promoting 6000 JTOs to the post of Sub Divisional Engineer is a regular promotion order and the seniority of the officers promoted therein shall be as per the list appended. There is no mention that the promotions were subject to the quota rota rule or that the seniority therein would be subject to any change in consequent to the departmental competitive examination. Therefore,

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the applicant is entitled to give his seniority in pursuance to Annexure-A1. It is not subject to any change. Though the departmental competitive examination was conducted calculating the number of vacancies for the previous years, none of the persons who were successful therein are entitled to have their seniority counted from a date before which they joined duty, especially in the light of the 3 bench decision in Central Provident Fund Commissioner's case (1995 Supp(4) SCC 654). Therefore, we find that the order of the tribunal requires no interference.

17. The learned counsel for the petitioners in OP(CAT)No.2248 of 2011 canvassing our attention to Ext.P2 Office Memorandum dated 7.2.1990 produced in that petition argued that there is quota rota rule. Going by the Office Memorandum we find that Ext.P2 is applicable only when appointments are made from different streams simultaneously and not in a case of later appointments from any one stream.

18. A contention was advanced before us by the review applicants that they were not made parties before the tribunal and therefore, the tribunal was not justified in disturbing the seniority list without hearing the affected parties. That dispute is covered by the decision of the Apex Court in V.P.Shrivastava & Others v. The State of M.P & Others (1996(1)

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Service Law Judgment 253). Referring to various decisions it was held that:

by the "where Government is under challenge.
principle of determination of seniority made
State Only State
Government is the necessary party to be impleaded--
Tribunal's conclusion that non inclusion of the affected
parties is fatal to the appellants quashed."

Following the above decision we find that the application before the tribunal is not liable to be defeated for non-joinder of necessary parties.

19. To sum up, we declare that there is no rule entitling an

employee of the respondents to claim service benefits from the date of arising vacancy. Service benefits can be claimed only from the date of joining duty. When appointments are made from different streams one after another, those who are subsequently appointed are not entitled to seniority over those who are appointed earlier so long as no such condition is stated in the earlier appointment order. Resultantly, we further find that the applicant before the tribunal is entitled to have his seniority settled in pursuance to Annexure-A1 promotion order. The review applicants who were later appointed towards 25% quota under departmental competitive examination are not entitled to have their seniority fixed with retrospective effect against the applicant. The review

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applicants are not entitled to claim service benefits from the date of arising of vacancy. They are entitled to count their seniority reckoned from the date of joining duty in the promoted post.

The Original Petitions are devoid of merits. Accordingly, these Original Petitions are dismissed.

C.N.RAMACHANDRAN NAIR,
JUDGE

P.S.GOPINATHAN,
JUDGE

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