

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 1268/96

DATE OF DECISION 06.01.1999

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Shri Vijay Kumar & Ors. Applicants

(Shri R.Venkataranai with Advocate for the
Shri T.C.Agarwal) Petitioner(s)

VERSUS

Union of India Respondent

(Shri V.K.Mehta) Advocate for the
Respondents

CORAM

The Hon'ble Shri T.N.Bhat, Member (J)
The Hon'ble Shri S.P.Biswas, Member (A)

1. To be referred to the Reporter or not? *yes*
2. Whether it needs to be circulated to other
Benches of the Tribunal? *yes*

6.1.99.
(T. N. BHAT)
Member (J)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1268/96

New Delhi, this the 6th day of January, 1999.

Hon'ble Mr. T.N. Bhat, Member (J);
Hon'ble Mr. S.P. Biswas, Member (A)

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1. Shri Vijay Kumar,
S/o Shri B.R. Patyal,
R/o C-4/87, Indian Airlines Colony,
Vasant Vihar,
Delhi-110057.
2. Shri R.K. Dua,
S/o Shri K.K. Dua,
R/o D-245, Vivek Vihar,
Delhi.
3. Shri A.K. Sachdeva,
S/o Shri B.K. Sachdeva,
R/o G(P) - 101, Pitam Pura,
Delhi-110034.Applicants

(By Senior Counsel Shri R. Venkataramani with
Shri T.C. Aggarwal, Advocate)

-Versus-

Union of India, through,

1. Director General,
All India Radio,
Akashvani Bhawan,
Parliament Street,
New Delhi-110001.
2. Chief Engineer,
Civil Construction Wing,
P.T.I. Building,
Parliament Street,
New Delhi-110001.Respondents

(By Advocate Shri V.K. Mehta)

ORDER

HON'BLE MR. T.N. BHAT, MEMBER (J):

We have heard the learned counsel for the parties and have also perused the material on record as well as the written submissions of the parties.

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2. The applicants, who were working as Junior Engineers under the Chief Engineer, Civil Construction Wing of All India Radio, were promoted as Assistant Engineers by the order dated 10.5.88, as at Annexure A-2. They were placed on probation for two years, on the expiry of which an order was issued confirming them on the posts of Assistant Engineers. It appears that the relevant recruitment rules were amended some time early in the year 1988. There were some more promotions effected by the respondents after the promotion of the applicants and aggrieved by those promotions some Junior Engineers approached the Calcutta Bench of the Tribunal by filing OA-1078/89. The plea taken by the applicants in that OA, who were diploma holders, was that the respondents Nos. 7-19 in that OA were junior to those applicants and had wrongly been promoted before them. The contention was based upon the provisions contained in the amended recruitment rules which came into force on 29.3.88 and under which a Junior Engineer holding degree in engineering was eligible for being considered for promotion if he had five years regular service in the grade, while diploma holders Junior Engineers would be eligible only if they had completed 8 years regular service. It was the contention of the applicants in that OA that private respondents therein had not completed the requisite five years regular service after acquiring the degree in engineering. According to them while considering the question of eligibility the entire period of service as Junior Engineer could not have been counted but only that service which was rendered

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after acquiring of the degree in engineering would only entitle the degree holders to seek promotion after putting in five years of service. After hearing the parties in that OA the Calcutta Bench of the Tribunal upheld the contention raised by the applicants therein and relying upon the judgement of the Hon'ble Supreme Court in N. Suresh Nathan & Another vs. Union of India (AIR 1992 SC 564) the Calcutta Bench held that the relevant rules must be construed to mean that five years service envisaged under the rules would commence from the date of obtaining the degree. The Apex Court had further held in N. Suresh Nathan (supra) that this was also the past practice followed by the department consistently.

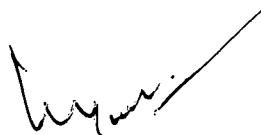
3. After the decision rendered by the Calcutta Bench of the Tribunal the respondents passed an order dated 27.6.95 by which the seniority position was drawn afresh and all the three applicants herein were downgraded in the seniority and were shown to have been promoted to the posts of Assistant Engineer from the dates later than the actual dates of their promotion. While Vijay Kumar and Ashok Kumar Sachdeva applicants were shown to have been promoted w.e.f. 22.6.90 the third applicant, namely, R.K. Dua was shown to have been promoted w.e.f. 9.6.89. Some of the persons who were actually promoted after the applicants, were shown senior to the applicants.

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4. Aggrieved by the aforesaid order dated 27.6.95 the applicants have filed this OA.

5. The main grounds taken by the applicants are two-fold. Firstly, the plea raised is that before issuing the aforesaid impugned orders the respondents ought to have issued a show cause notice to the applicants and only then they could have downgraded the applicants in their seniority. The second contention is that the judgement of the Calcutta Bench had wrongly been passed as the Apex Court judgement in N. Suresh Nathan (supra) had later been over-ruled by another Bench of the Apex Court in M.B. Joshi & Others Vs. Satish Kumar Pandey & Ors., reported in (1993) 24 ATC 688. It is further contended that the applicants not having been impleaded as party-respondents before the Calcutta Bench the judgement of the Tribunal could not bind the applicants nor could the respondents have issued orders adversely affecting the applicants.

6. The respondents have filed a detailed reply in which while admitting that according to the past practice followed by them the entire period of service put in as Junior Engineer was taken into account while considering the eligibility of those diploma holders Junior Engineers who had later acquired degree in engineering, the respondents have taken the plea that it was only in pursuance to the judgement of the Calcutta Bench in OA-1078/89 that a review DPC was later held. The further contention of the respondents is that they were within their rights



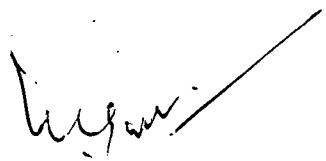
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to review even the earlier promotion orders if an error in those orders was discovered. According to the respondents since the views of the applicants were already available, it was not legally necessary for the competent authority to issue a show cause notice or obtain the views of the applicants afresh before implementing the judgement dated 6.5.94 in OA-1078/89. The respondents have also annexed to their counter, as Annexure R-1, a copy of the amended recruitment rules dated 28.3.88.

7. The applicants have filed a rejoinder in which they have reiterated the contentions raised in the OA. Emphasis has also been laid on the point that the judgement of the Calcutta Bench was a judgement per *in curiam* and could not have been applied to the past cases.

8. In the written submissions the same points have been raised.

9. Before we proceed to give our findings on the main controversy in this case, we may first notice the judgements of the Apex Court in Suresh Nathan and M.B. Joshi (*supra*). The former case related to the recruitment for the posts of Assistant Engineer in the Public Works Department, Pondicherry. According to the applicable recruitment rules the qualifications prescribed for direct recruitment was a degree in Civil Engineering of a recognised university or diploma in Civil Engineering from a recognised institution with three years professional



experience. For recruitment by promotion of Section Officers (Junior Engineers) the qualification prescribed was either a recognised degree in Civil Engineering or equivalent with three years service in the grade or diploma in Civil Engineering with six years service in the grade. A dispute arose whether a diploma holder Junior Engineer who obtains a degree while in service becomes eligible for appointment as Assistant Engineer by promotion on completion of three years service including therein the period of service prior to obtaining the degree or three years service as a degree holder for this purpose is to be reckoned from the date he obtains the degree. The diploma holder Junior Engineers who had obtained degree in Engineering later, contended that they were entitled to include the earlier period for counting three years service and would become eligible for promotion if the total period of service before obtaining the degree and after obtaining degree is three years. This position was contested by the degree holders. The Central Administrative Tribunal in that case allowed the OA filed by the diploma holders by upholding their claim and directed the respondents in that case to consider the diploma holders to the posts of Assistant Engineers on par with other degree-holder Junior Engineers taking due note of their total length of service rendered in the grade of Junior Engineer.

10. Allowing the appeal filed by the opposite party the Apex Court held as follows:

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"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."

11. As regards the judgement in M.B. Joshi (supra) we find that the controversy in that case revolved round the provisions contained in M.P. Public Health Engineering (Gazetted) Service Rules, 1980 according to which 50% of posts of Assistant Engineers could be filled by direct recruitment while the remaining 50% by promotion from the lower cadre of sub-Engineers and Draftsmen. 10% of the promotion quota was given to Sub-Engineers who during the continuance of their service also obtained a degree in engineering or equivalent and in that case the requisite period of service was reduced from 12 years to 8 years. The question that arose was whether the seniority for the purpose of promotion to the posts of Assistant Engineer in 10% quota of Graduate Sub-Engineers completing 8 years of service should be

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considered from the date of obtaining the degree or from the date of appointment as Sub Engineers. The Tribunal in that case held that seniority should be determined from the date of acquiring degree of engineering. This view of the Tribunal was based upon the judgement in N. Suresh Nathan's case (supra). Upsetting the judgement of the Tribunal a two member Bench of the Apex Court after explaining the import of the judgement in N. Suresh Nathan, held as follows:

"Determination of seniority from the date of acquiring the degree would defeat the very scheme and the purpose of giving incentive to adding educational qualification by diploma holders while continuing in service. The rules do not contemplate any equivalence of any period of service with the qualification of acquiring degree of graduation in engineering as was provided in express terms in N. Suresh Nathan's case. The Government itself had been adopting the practice and making promotion by taking into account entire period of service as Sub Engineers. In N. Suresh Nathan's case also the 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."

12. Thus the judgement in N. Suresh Nathan's case was held to have been passed in the peculiar circumstances of that case where admittedly the practice followed in the department concerned for a long time had been to reckon only that service for purposes of three years' experience which would start from the date of obtaining degree in engineering. In the latter case before the Apex Court it was found that the Government in that case had itself been adopting the practice of making promotion by taking

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into account the entire period of service as Sub Engineers which was not the case in N. Suresh Nathan (supra).

13. A comparative reading of the two judgements (supra) would make it clear that the interpretation of the relevant recruitment rules in such matters as the one present before us would depend upon the practice that was being adopted by the concerned department. In the instant case the respondents have admitted in so many words that they had been following the practice taking into account that service also which had been rendered by the Junior Engineers prior to obtaining degree in the engineering. We, therefore, find much force in the contention of the applicants that N. Suresh Nathan's judgement (supra) would not be attracted in their case.

14. However, in stating as above, we should not be taken to have interfered in any manner with the judgement of the Calcutta Bench in N.C. Burman & Ors. vs. Union of India & Ors., (OA-1078/98) as we are not competent to sit in appeal over the aforesaid judgement, though we find that an important judgement of the Apex Court rendered in M.B. Joshi (supra) has escaped notice of the learned members constituting the Bench which rendered the above judgement. But we are firmly of the view that the judgement is not a judgement in rem and cannot be applied universally to all cases even relating to the same department, namely, the engineering wing of the All India Radio.

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The judgement is clearly per in curiam and would cover only those persons who were actually before that Bench as parties to the litigation. It is not disputed that the applicants had not been impleaded as party-respondents in that OA. Therefore, the judgement could not have been extended to cover the cases of the applicants.

15. The action of the respondents becomes even more arbitrary and unsustainable on the ground that promotions of the applicants were not at all the subject matter of the OA before the Calcutta Bench. In that case (OA-1078/89) the promotion orders under challenge were those which had been issued sometime in the year 1989 and by which respondents Nos. 7-9 and 10-19 in that OA had been promoted to the posts of Assistant Engineers. The promotion orders in respect of the applicants, as already indicated, had been issued much earlier viz. 10.5.88 were not at all under challenge in that OA. Therefore, the action of the respondents in refixing the seniority so as to adversely affect the applicants herein was manifestly wrong.

16. That leads us to the question as to whether the applicants could have validly reviewed the promotion orders in respect of the applicants even though they were not parties in the OA before the Calcutta Bench, the judgement in which case has been made the basis for issuing the impugned order dated 27.6.95. The answer to this question must be in the negative, for the simple reason that according



to their own admission the respondents had been following the practice of adding the service rendered before acquiring of degree in engineering also to the service rendered after acquiring that degree for the purpose of reckoning the total period of service rendered as Junior Engineer. This fact has been admitted by the respondents in their counter. Therefore, merely on the ground that some diploma-holders engineers had successfully assailed the promotion of some other persons similarly situated could not by itself render the promotion orders relating to the applicants as erroneous. We may in this regard take note of the fact that as late as 5.4.95 the respondents had passed a specific order (Annexure A-2 to the OA) allowing the applicant Vijay Kumar to cross the efficiency bar in the pay scale of Assistant Engineer. Prior to that on 30.6.93 the respondents had issued an order terminating the probationary period of the applicants thus confirming them as Assistant Engineers. In such circumstances it was incumbent on the respondents to afford a reasonable opportunity to the applicants to show cause why their seniority should not be downgraded in pursuance to the judgement of the Calcutta Bench.

17. Normally, the net result of the aforesaid discussion would have been for us to quash the impugned order and restore the earlier seniority position of the applicants, but for the fact that the applicants have not impleaded as parties those persons who are likely to be affected by such an order by us. By the impugned order dated 29.6.95

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some persons might have got the benefit of higher seniority and the applicants ought to have impleaded those persons as party-respondents. We would, therefore, direct the respondents to pass an appropriate order only after giving such persons the opportunity to show cause why the earlier seniority of the applicants should not be restored in view of the fact that the judgement of the Calcutta Bench would not apply to the applicants herein.

18. In the result, we partly allow this OA and direct the respondents to issue fresh orders restoring to the applicants the earlier seniority based upon their orders of promotion issued in the year 1988, but only after issuing show cause notices to those who might be adversely affected by such restoration. The final order in this respect shall be passed within a period of four months from the date of receipt of a copy of this order.

19. We leave the parties to bear their own costs.

S. P. BISWAS
(S. P. BISWAS)
MEMBER(A)

T. N. BHAT
(T. N. BHAT)
MEMBER(J)

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