

**CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH, AHMEDABAD**
Original Application No.131 of 2018
with MA 100/2018

This the 1st day of October, 2020

Reserved on: 11.09.2020
Pronounced on: 01.10.2020

CORAM :

**HON'BLE SHRI JAYESH V BHAIRAVIA, MEMBER (J)
HONBLE DR A K DUBEY, MEMBER (A)**

Smt Sunita Sureshchandra Vaidya,
Female, age:75 years,
Residing at: "Datta Krupa",
17-Panchnath Plot, Rajkot-360001. ... Applicant

By Advocate Shri P H Pathak

v/s

- 1 Bharat Sanchar Nigam Ltd.,
Through its Chairman/Managing Director,
"Sanchar Bhavan", New Delhi – 110 011.
- 2 Chief General Manager,
Bharat Sanchar Nigam Ltd,
Gujarat Circle, CG Road, Ahmedabad – 380 006.
- 3 General Manager,
Rajkot Telecom District,
Loha Nagar, Gondal Road, Rajkot – 360 002.
- 4 Union of India,
Notice to be served through
Secretary, Government of India,
Ministry of Communication & IT,
Department of Telecommunication,
915, Sanchar Bhavan, 20 Ashoka Road,
New Delhi – 110 001. ... Respondents.

By Advocate Shri Joy Mathew – R 1 to 3
Shri H D Shukla – R-4.

ORDER

Per Dr A K Dubey, Member (A)

- 1 In this OA, the applicant seeks grant of higher scale of pay under 10% BCR provision and in that, parity in granting 10% BCR upgradation

with retrospective effect, on the plea that one Mr B M Mare, an official junior to her got this upgradation under 10% BCR w.e.f. 13.12.1995. The applicant also seeks payment of arrears upon re-fixation of her pay and retiral benefits with 12% interest once the prayer is allowed.

2 The counsel for the applicant submitted that one Mr B M Mare who was junior to the applicant was granted upgradation under 10% BCR rule w.e.f. 13.12.1995 and hence, the applicant being senior, should also get the same benefit. The applicant, who joined service on 15.04.1968, received the financial upgradation under BCR w.e.f. 01.07.1994. On 13.12.1995, her junior who was granted BCR on 30.11.1990 was given further upgradation under 10% BCR. The counsel for the applicant averred since he was junior, the applicant should also get the same w.e.f. that date and for this prayer, he was relying on the Apex Court judgement in State of U.P. v/s Arvind Kumar Srivastava & Ors 2015(1) SCC 347.

3 The counsel for the respondents 1 to 3 (BSNL) Shri Joy Mathew submitted that the applicant had retired prior to 2000 (i.e. before BSNL came into existence) and hence BSNL had nothing to do with it. He also submitted that when Mr B M Mare was given this scale, applicant was in service but did not raise the issue at that time, or immediately after her retirement. Now it was inordinately delayed to raise this matter so many years after the applicant's retirement.

4 Responding to the issue of delay, the counsel for the applicant submitted that similarly placed employees had preferred OA 467/97 before this Tribunal which, at that time, ordered as under:-

“The respondents are directed to extend the benefit of 10% BCR promotion as per their basic grade seniority as per the BCR Scheme in force and they shall also be entitled to all consequential benefits, for example pay etc. However, the amount of arrears on this count shall be restricted to one year prior to filing of this O.A. This order shall be complied with within a period of three months from the date of receipt of a copy of the same. No order as to costs. The respondents are further directed to extend the similar benefits to the similarly situated persons who might have not approached the Court of law so as to avoid multiplicity of litigation.”

5 The counsel for the applicant further submitted that the respondents approached the Hon'ble High Court of Gujarat by Special Civil Application No.11696/2002 and the High Court upheld the Tribunal's order. But, respondents approached Hon'ble Apex Court in SLP No.4527/2006 which was disposed off on 07.04.2014. Even after Hon'ble Apex Court's order, the employees didn't get justice and hence, they filed Contempt Application – C-18/2015. That case was represented by Pensioner's Association. This was disposed of on 06.08.2015 on the ground that it was not maintainable because it was not filed by the person concerned of the OA. The learned counsel for the applicant also argued that after the sequence of litigation ended, the applicant approached the Tribunal and hence there was no inordinate delay in preferring this OA.

6 The counsel for 4th respondent (DoT) Shri H D Shukla argued that apart from the fact that there was no justifiable explanation of such an inordinately long delay, it had also to be borne in mind that the process of granting up-gradation under 10% BCR involved DPC procedure and assessment of suitability of the employee. In its reply, the respondent no.4 had submitted the background of the issue. He stated that on the issue of reservation in promotion to upgraded posts, this Tribunal vide its order dated 11.04.1997 in OA 623/1996 had ruled that such up gradation was to be done without applying any roster. This decision of this Tribunal was

challenged in Hon'ble High Court of Gujarat which dismissed it. Then by a circular dated 08.09.1999, those who got upgraded through reservation were reverted which set in the second round of litigation which eventually went upto Hon'ble Supreme Court. But Hon'ble Supreme Court upheld the validity of the circular dated 08.09.1999 though it also upheld the reservation of employees. The Counsel for respondent no.4 submitted that if an up-gradation was there on the basis of reservation or mis-interpretation that could not become a precedent to follow. In this matter, the learned counsel relied on BSNL v/s R Santhakumar Velusamy (Civil Appeal 5286-87 of 2005). Specifically on the issue of delay, learned counsel for respondent no.4 relied on Union of India v/s Durairaj [(2011) 2 SCC (L&S) 542 whereunder, Hon'ble Apex Court had observed that in the matter of non promotion or non selection, one must approach Courts/Tribunal as early as possible; belated approach to Court would lead to serious administrative complications and could upset the settled position of seniority and promotions; belated challenge would be liable to be dismissed.

7 The counsel for respondents 1 to 3 also submitted that this OA suffered from two impairments. First impairment was the inordinate delay for which there was no cogent or satisfactory explanation and hence, that was unjustifiable; that by itself rendered this OA liable to dismissal. He contended that in this matter, reference to OA 457/1997 was ill founded as the applicant was not a party to it. In that OA, the matter dealt with was the issue of parity with one Mr Baria and there was no reference to or similarity with the applicant's case. Hence, that case was not comparable to the present one. Vide Annexure A/2, all except 8 (including the applicant here)

were given the up gradation on indicated dates. The applicant did not get “10% BCR up-gradation” till her superannuation. When Mr B M Mare was given up-gradation under “10% BCR”, the applicant and other seven were in service but chose to remain fence sitters and do nothing. Hence the observation of Hon’ble Apex Court in Durairaj case (supra) would apply and thus, on the issue of delay, the MA for condonation of delay was liable to be rejected. Second impairment was that the respondents had clarified that the grant of ‘10% BCR’ to Mr Mare was a wrong or mistaken step which the respondents sought to correct by his reversion. But then Mr Mare went to Court and Court ruled in his favour. Although it was a wrong decision, Respondents honoured the orders of the Court and created a supernumerary post to comply with the Court order. When Mr Mare’s turn came, he got his regular promotion on 01.01.2005 and superannuated on 31.05.2005. The counsel argued that a wrong decision could never be acceptable as a precedent to follow in general.

8 The Counsel for Respondents 1 to 3 relied on Apex Court judgment in Union of India v/s Tarsem Singh (CA No.5151/2008) averring that it was not a continuing cause of action. He argued that considering the request at such distance of time could never be justifiable because issues involving seniority, promotion and related parity would create third party interest, unlike issues such as pay fixation and pension, where delay would not create any third party interest as it was confined to the affected person alone. Hence the OA was liable to be dismissed on this count also.

9 Heard Shri P H Pathak, learned counsel for applicant, Shri Joy Mathew, learned counsel for respondents 1 to 3 (BSNL) and Shri H D Shukla, learned counsel for respondent no.4 (DoT).

10 The applicant's case is that she should get up-gradation by way of placement in higher grade under "10% BCR" provision and that should be w.e.f the date her junior got it.

10.1 On this issue we would like to refer to the communication no.27-4/87-TE.II(I) dated 16.10.1990 of the Department of Telecom, Government of India (Annexure R/3) that stipulates the Scheme: Biennial Cadre Review (in short, BCR). As per this communication, Cadre review was stipulated every two years, for those employees who were in service as on 01.01.1990 and not later. Its para 2 reads as under:-

"2 However, with a view to provide relief from stagnation in the grade, government have accepted the need for a biennial cadre review i.e. (Once in two years) under which posts would be upgraded on the basis of functional justification. The following instructions are accordingly issued:-

- (i) Biennial cadre reviews will be applicable for only those cadres in group C & D for which scheme of "One Time Bound Promotion" on completion of 16 years of service in the basic grade is already in existence.
- (ii) This scheme of "Biennial Cadre Reviews" will be applicable only to those regular employees who were in service as on 01.01.1990 & not later entrants.
- (iii) Biennial Cadre Reviews will be conducted in respect of the eligible cadres at the level of circles who controls these cadre.
- (iv) At the time of review the number of officials who have completed/would be completing 26 years of service in the basic grades (including time spent in higher scales/OTBP) will be ascertain. The persons will be screened by the duly constituted review committee to assess the performance and determine their suitability for advancement.
- (v) In the Biennial reviews, suitable number of posts will be created up gradation based on functional justification.
- (vi) Creation of posts by up gradation will be in the scale indicated below.

Basic Scale of the Cadre	Scale after OTBP after 16 years of service in basic grade	Scale after Biennial Cadre. Review on completion of 26 years or more.
750-940	800-1150	950-1400
825-1200	950-1400	1200-1800
975-1540	1320-2040	1400-2600
975-1660	1400-2300	1600-2660

(10% of the post in the payscale of 1600-2660 will be in the payscale of Rs.2000-3200).

10.2 A plain reading of para 2(iv) of the communication dated 16.10.1990 quoted above makes it clear that those employees who had completed 26 years of service in basic grades including OTBP would be screened by a duly constituted review committee to assess the performance and suitability for advancement. Creation of suitable number of posts was permitted in para 2(vi) of the said communication dated 16.10.1990. It also prescribed in the same para 2 (vi) that 10% of the post in the BCR scale Rs.1600-2660 would be in the pay scale of Rs.2000-3200. And this too is subject to further instructions under para 2(xi) which is quoted as under:-

“(xi) Creation of posts by up gradation under the Biennial Cadre Review will be by matching savings to the extent of 1% cut on basic cadre and 5% cut on supervisory cadre. These cuts (under biennial cadre review) are addition to the existing cuts of 5% in basic cadres and 15% in supervisory cadres under the OTBP scheme.”

11 We have carefully gone through the records and documents presented before us, and the details of the scheme as explained in the communication dated 16.10.1990 (Annexure R/3) and the related record, as also the arguments discussed above. In this case, we find a few facts established beyond any shadow of doubt. First and foremost, admittedly the applicant had already received the up-gradation admissible upon 26 years or more of service, under the Biennial Cadre Review Scheme (BCR). But as the details at Annexure A/2 reveal the applicant did not receive further up gradation under clause 2(vi) of the BCR scheme which is commonly referred to as “10% BCR”, even till retirement. Secondly, Mr Mare was granted the up-gradation under reserved quota. However, respondents cancelled it when they found it wrong. None the less, when protected by Court, department complied with the Court’s order and created a supernumerary post for the period until he got his upgraded scale

under 10% BCR in normal course. This example cannot be taken as normal valid ground for seeking parity. Even as per instructions contained in the Respondents' communication dated 16.10.1990 (Annexure R/3) quoted hereinbefore, there is a process of review for grant of "10% BCR" after which, it is given.

A plain reading of para 2(vi) of the communication dated 16.10.1990 (Annexure R/3) makes it clear that those who had basic scale of the cadre as 975-1660 and later got OTBP scale of 1400-2300, would qualify for the scale 1600-2660 on 26 years or more of service. And 10% of the posts in the pay scale of 1600-2660 will be in the pay scale of 2000-3200. It is this scale of 2000-3200 which is referred to as "10% BCR" scale which would be admissible after due process of review. In the seniority list presented before us (Annexure A/2), we see that the earliest up-gradation under "10% BCR scheme" was given on 01.06.1996 but Mr B M Mare was given w.e.f. 13.12.1995. We also see that the earliest date of BCR for first batch of employees was 30.11.1990 and the applicant got it on 01.07.1994. Annexure A/2 reveals that though Mr B M Mare is last in seniority, his date of BCR also is 30.11.1990.

12 On the issue of delay, the applicant's contention is that the rounds of related litigation protracted till 2017 and hence, it could not be called inordinate delay. Against this plea, the counsel for respondents, have argued that since the litigation quoted by the applicant wasn't related to him, it was not a valid or acceptable ground for the delay. They also submitted that such an inordinate delay was not fit for condonation and hence the OA was liable to be dismissed.

13 We see that the respondents have stated in their reply that the upgradation to Mr Mare was a mistake which they corrected but had to comply with protection extended to Mr Mare by the Court. Counsel for respondents also argued that such wrong and unreliable precedent could not be followed.

14 Apart from the issue of wrong precedent, the issue of delay too needs clear appreciation. The applicant has not been able to establish what stopped him from approaching this Tribunal immediately or within reasonable time after the creation of precedent that he has quoted or during his service period or immediately after his superannuation. Although the applicant has contended that owing to the sequence of litigation arising from OA 457/1997, there was no inordinate delay, the fact remains that the applicant was neither a party to that litigation nor there is any parity issue. Therefore we find that the plea of litigation arising from OA 457/1997 is of hardly any help to him.

It is clear that the inordinate delay of several years remains unacceptable and in light of the observations in the Hon'ble Supreme Court judgment in Durairaj (*supra*) we do not find any justification for such an inordinate delay. Any discrimination or discrepancy in dealing with her case or any infringement of terms of service is not the applicant's case here at all.

15 In view of the aforementioned discussions, factual matrix of the case and records and documents presented before us, we are of the opinion that the applicant, who remained a mute fence sitter for so long and allowed this case to drift along for inordinately long time and after his prolonged slumber, seeks parity with an admittedly wrong precedent, has not been

able to establish any procedural omission or violation of terms of service; his case lacks merit. Further, the unexplained, unjustifiable delay that occurred solely due to the applicant's own indolence and inability to take up the issue in time can't be condoned. Accordingly, the OA and the MA are dismissed. No costs.

(Dr A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

abp