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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.1214/2004

New Delhi, this the 19th day of July, 2005

**Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. M.K.Misra, Member (A)**

1. Sh. A.N. Thakur
Superintending Engineer (P&A)
O/o Pr. Chief Engineer (Civil) BSNL
4th Floor, Yogayog Bhawan, Kolkata-12.
 2. Sh. Bishnu Swaroop
Executive Engineer (C)
BSNL Civil Division-I
7th Floor, Taher Mansion
8, Bentinck Street, Kolkata-1.
 3. Sh. Vinod Sharma
Executive Engineer (HQ)
O/o Chief Engineer (Civil) BSNL
Meerut.
 4. Sh. Parmeshwari Dayal
Executive Engineer (HQ)
O/o Chief Engineer (Civil) BSNL
Telecom Administrative Building
Lalkothi, Jaipur.
 5. Sh. Sanjeev Kr. Kansal
Executive Engineer (P&D)
O/o Pr. Chief Engineer (Civil) BSNL
4th Floor, Yogayog Bhawan, Kolkata - 12.
 6. Sh. Sunil Bhandari
Executive Engineer (A&P)
O/o Chief Engineer (Civil) BSNL
Telecom Administrative Building
Lalkothi, Jaipur.
- .. Applicants

**(By Advocate: Sh. Vikas Singh, Senior Counsel with Ms.
Amrita Narain)**

Versus

1. Union of India
Through Secretary
Department of Telecommunications
20, Ashoka Road, Sanchar Bhawan
New Delhi - 110 001.
2. The Member (Production)
Department of Telecommunications
20, Ashoka Road, Sanchar Bhawan
New Delhi - 110 001.

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3. The Chairman
Union Public Service Commission
Dholpur House
Shahjahan Road, New Delhi.
4. Sh. R.K.S. Yadav
Working as Chief Engineer (BW)
MTNL, R/o Qtr. No.4, Type V
Ganga Telecom Premises
Juhu Danda, Sant Cruz (W)
Mumbai - 400 054.
5. Sh. S.C.Srivastava
Working as Superintending Engineer
R/o 201 'A' Wing Vaishali Tower CHS
Vaishali Nagar, Mulund (W)
Mumbai - 400 080.
6. Sh. S.C. Arora
SE (P&A)
Office of Chief Engineer (Civil)
BSNL, Sri Tirath Niwas
Phase-I, Sector-II
New Shimla - 171 009.
7. Sh. Amlesh Bhattacharya
Superintending Engineer (P&A)
O/o Chief Engineer (Civil) BSNL
3rd Floor Unit IX
Bhubaneswar - 751 022.
8. Ramesh Chandra Gupta
Executive Engineer (Civil)
B-13, Transit Quarters
P.K. Road, Mulund (W)
Mumbai - 400 080.
9. Sh. A.M. Deshpande
Executive Engineer (P&D)
O/o Chief Engineer (Civil)
BSNL Nagpur Zone
Old CTX Building, C.T.O. Compound
Nagpur - 440 001.
10. Sh. S.P. Ram
Executive Engineer (C),
Postal Civil Division-I
Post Office Building
Aliganj, Sector-C
P.O. Aliganj, Lucknow-21.

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11. Sh. N.K.Singh
Executive Engineer (C)
Postal Civil Division
39/24, Stanley Road
Opp. CMO Office
Allahabad-2.
 12. Sh. C.S. Satpute
Executive Engineer (C)
BSNL Civil Division
Usha Bakery, Station Road
Tarapur, Silchar - 788 003.
 13. Sh. A.K.Ram
Executive Engineer (P&D)
O/o Superintending Engineer (Civil)
BSNL Civil Circle
5th Floor, Doorsanchar Sadan
Shah Najaf Road, Laplace
Lucknow - 1.
 14. Sh. Himkar Khosla
Executive Engineer (P&D)
O/o Chief Engineer (Civil)
BSNL North Zone
ARA Centre, First Floor
E-2, Jhandewalan Extension
New Delhi - 55.

... Respondents

**(By Advocate: Sh. D.S.Mahendru for Respondents No.1 and 2
and Sh. M.M.Sudan for Respondents No.4, 6, 10 and 11)**

ORDER

By Mr. Justice V.S.Aggarwal:

Applicants belong to Assistant Executive Engineers (Civil Cadre). By virtue of the present application, they seek that Rule 4B(2) as amended in 1980 to the Recruitment Rules of 1976 is ultra vires and further a declaration that the respondents should modify the list from Sl. No.55 onwards in the inter-se seniority list of Executive Engineers. They should first include the names of all those 36 Assistant Engineers who have officiated/worked as

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Executive Engineer from 1978 onwards while intermixing with the 72 Assistant Executive Engineers and further direction to include in the seniority list all Assistant Engineers who held the post of Executive Engineer as and when vacancy arose. They further seek a direction to pass an order directing the respondents to calculate the year to year vacancies at Executive Engineer level correctly in conformity to their sworn affidavit in the Delhi High Court.

2. The back-drop of the litigation is that Posts and Telegraphs, Civil Wing had been constituted with effect from 01.07.1963. Upto the year 1969, Assistant Engineers (Group 'B') and Assistant Executive Engineers (Group 'A') were appointed by direct recruitment through the Combined Engineering Service Examination held by the Union Public Service Commission (for short 'UPSC'). Persons ranking higher in the merit list prepared by the UPSC were appointed as Assistant Executive Engineers and those ranking lower in the same merit list were selected as Assistant Engineers (Group 'B').

3. Government of India decided to frame Recruitment Rules for the Group 'A' posts which included the post of Assistant Executive Engineers, Executive Engineers, Superintending Engineers and above and for Group 'B' posts which included post of Assistant Engineer (Civil). Accordingly, two separate sets of Recruitment Rules, one each for Group 'A' posts and Group 'B' posts were prepared prior to the year 1969 known as Communication Civil Engineering Service Class-I Recruitment Rules applicable to Assistant Executive Engineers and

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Communication Civil Engineering Service Class-II Recruitment Rules applicable to Assistant Engineers. Thus there existed Draft Recruitment Rules for both the posts of Assistant Executive Engineers and Assistant Engineers in 1969. According to the draft rules of Group 'B' posts of Assistant Engineers, 50% of the appointment as Assistant Engineer was to be made by direct recruitment through UPSC and rest by promotion from amongst Junior Engineer (Civil), Section Officer (C), Building Overseers, etc. According to the draft recruitment rules for Group 'A' posts, Assistant Executive Engineers were to be appointed 100% by direct recruitment. The draft Rules further provided that $\frac{2}{3}$ rd of the vacancies in the grade of Executive Engineers were to be filled by promotion from amongst Assistant Executive Engineers with five years of service and $\frac{1}{3}$ rd of vacancies of Executive Engineers were to be filled by promotion from amongst Assistant Engineers with eight years service.

4. These sets of Draft Rules were operated by the department since 1969. It is further alleged that the said Draft Recruitment Rules were processed by the department for finalization and ultimately they were merged into a single Recruitment Rule for both Assistant Executive Engineers and for Assistant Engineers. The Rules were framed in the year 1976 under the name "Post & Telegraph Civil Engineering (Civil Gazetted Officers) Recruitment Rules of 1976". After the promulgation of Rules of 1976, it is contended that 36 promotee Assistant Engineers were promoted on ad hoc basis as Executive Engineers (Civil). These Assistant

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Engineers promoted in 1978 were so promoted by virtue of the different judicial pronouncements in their favour for being considered to be regular Executive Engineers. The applicants contend that in accordance with the said Rules and as per the quota and rota rules, against 36 appointments as Executive Engineers from Assistant Engineers, 72 Assistant Executive Engineers were also to be appointed as Executive Engineers and were to be rotated. Further more, according to the applicants, during the period from 25.9.1976 upto 1990, the year in which service was declared as organized service, only four direct recruit Assistant Engineers were promoted on ad hoc basis. In contrast, 93 Assistant Executive Engineers were promoted as Executive Engineers. These Assistant Executive Engineers were promoted against the 21 slots meant for balancing the imbalance of their share prior to 1976 and 72 against the slots of their share corresponding to 36 Assistant Engineers promoted in 1978.

5. The Recruitment Rules of 1976 were amended in 1980. The plea is that the purpose of the amendment was to regularize the appointments made for different posts prior to the notification of Recruitment Rules in the year 1976. According to the amendment, the initial constitution clause, i.e., Rule 4 was brought in, vide which, any appointment made prior to the commencement of the rules was deemed to be appointment made under the rules to the respective posts on regular basis.

6. Rule 4B(2) further provided that if an officer is considered for promotion to a higher post under this rule, all persons senior to



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him in the grade shall also be considered notwithstanding that the senior has not rendered the requisite period of service. The applicants' plea is that the said rule is illegal. It has been framed solely to benefit the direct recruit Assistant Engineers. Even UPSC had pointed that amendment has been made contrary to their advice.

7. Some of the other facts are that some direct recruit Assistant Executive Engineers had filed Civil Writ Petition No.1648/1982 in the Delhi High Court. They had challenged the large scale promotion of Assistant Engineers. In the said Writ Petition, the respondents through the Assistant Director (General), P&T had filed a reply affidavit informing the Court that against the ad hoc promotion of Assistant Engineers, the Assistant Executive Engineers were being given their quota and shall be promoted. It was mentioned in the affidavit that Assistant Engineers who were appointed on ad hoc basis as Executive Engineers were still continuing and occupying the post and therefore, they had to be considered towards the quota of Assistant Engineers. Thereafter, in the year 1998, in a dispute of seniority amongst promotee and direct recruit Assistant Engineers, the department filed an affidavit in the Supreme Court in the case of **Abraham Jacob vs. Union of India** informing the Court that the Draft Recruitment Rules were in existence since 1969 and that they were being operated since the year 1969. In the absence of statutory recruitment rules, the executive instructions hold the field. The applicants' plea is that

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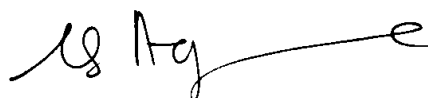
the quota between direct recruit Assistant Engineer and promotee Assistant Engineer was not being maintained.

8. Further more, it has been pleaded that in 2001, some of the applicants had filed Original Application in the Principal Bench, i.e., OA No.3020/2001 contending that the judgement of **Abraham Jacob** would apply to all the categories of officials. On 22.11.2001, the Principal Bench allowed the OA and directed the respondents to consider the case of the applicant as per the ratio deci dendi in the case of **Abraham Jacob** while revising the seniority list. Thereafter, it is pleaded that the Draft seniority list was published followed by a final seniority list dated 12.4.2004.

9. The respondents are stated to have not taken into consideration the relevant facts. In the said seniority list, new faces of direct recruit Assistant Engineers who did not actually held the post of Executive Engineer replaced the promotee Assistant Engineers who were actually holding the post of Executive Engineers at the relevant time.

10. It is in this backdrop that the above said reliefs are being claimed.

11. The applicants contend that the amendments which are being given retrospective effect are illegal. There cannot be retrospective application of the Rules without due legislation. The persons i.e. Assistant Engineers who held the post of Executive Engineers when the vacancy arose, till their retirement have found place in the seniority list. This affected the rights of the applicants.



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12. Needless to state that application has been contested.

13. We have heard the parties' counsel and have seen the relevant record.

14. On 25.5.2005, learned counsel for the applicants stated that so far as the private respondents 4, 5 and 6 were concerned, they in any event would be senior to the applicants. Therefore, the applicants did not press their claim qua these respondents. Keeping in view the said fact, the application qua respondents 4, 5 and 6 is dismissed as withdrawn.

15. So far as the plea that rules could not have been given retrospective effect is concerned, when the amendments to the Rules were made in the year 1980, we do not dispute that normally the retrospective effect to the amendment cannot be governed unless it is in exercise of the legislative powers or such a power exists to frame such rules, regarding which we are not at the moment concerned. However, our attention was drawn to the explanatory memorandum which clearly explains that while giving retrospective effect to the provisions contained in the initial constitution of these posts, it would not affect the interest of any person already in service. That being so, if it is not affecting those persons already in service, the net result would be that rules though couched in the language that they would be effected retrospectively, in fact, are only having prospective effects and it would, therefore, be an idle formality to go into the legal nicety in this respect to which we have referred to above briefly.

16. Rule 4B(2) is being assailed. The same reads:

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"B. Method of recruitment, age limit, qualifications, etc:- The method of recruitment to the said posts, age limit, qualifications and matters connected therewith shall be specified in columns 5 to 13 of the said schedule.

(2) If an officer is considered for the purpose of promotion to a higher post under this rule all persons senior to him in the post shall also be considered notwithstanding that they have not rendered the requisite period of service."

17. The learned counsel for the applicants relied upon the decision of the Supreme Court in the case of **R. PRABHA DEVI AND OTHERS v. GOVERNMENT OF INDIA, THROUGH SECRETARY, MINISTRY OF PERSONNEL AND TRAINING, ADMINISTRATIVE REFORMS AND OTHERS**, (1988) 2 SCC 233. The ratio deci dendi of the said decision is that Rule prescribing minimum length of service must be strictly adhered to, when there is a condition precedent for being considered for promotion. It must be satisfied and even if the senior does not qualify, the junior could be so considered. But herein the position is that there is a specific rule that has been so incorporated. It prescribes a uniform number of years to which we have referred to above that for being considered for promotion to any service, inter-se seniority has a meaning. If the rules so prescribe that a senior, who has not even acquired the requisite length of service, can always be considered, it is neither arbitrary nor would be illegal.

18. On behalf of the respondents, it was pointed that the applicants joined services in the year 1989. They cannot litigate

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on behalf of others and otherwise also there is an inordinate delay in this regard.

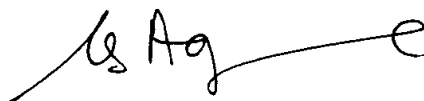
19. We are aware of the Supreme Court judgement in the case of **MALCOM LAWRENCE CECIL D'SOUZA v. UNION OF INDIA AND OTHERS**, 1976 SCC (L&S) 115 which prescribes that any one who feels aggrieved with an administrative decision affecting one's seniority should act with due diligence and promptitude and not sleep over the matter.

20. Two other decisions of the Supreme Court can always be taken note of. In the case of **A. SAGAYANATHAN AND OTHERS v. DIVISIONAL PERSONNEL OFFICER, S.B.C. DIVISION, SOUTHERN RAILWAY, BANGALORE**, 1992 SCC (L&S) 665, the Supreme Court held that matter should have been considered on merits. The relevant paras are:

"4. It is not disputed that the juniors of the appellants had been promoted. However, respondent's counsel submits that the juniors were promoted for justifiable reasons. Whatever may be the reasons which prompted the respondent to promote the juniors in preference to the appellants, the fact is that the appellants had a genuine grievance insofar as they had been superseded by their juniors. This was precisely the dispute which the Tribunal ought to have considered, but unfortunately it did not do so by reason of the delay.

5. Having heard counsel on both sides and perused the records, we are of the view that, despite the delay, this is a matter which requires investigation.

6. Accordingly, we direct the Tribunal to re-hear the parties after giving them an opportunity to implead the necessary parties, file fresh affidavits and adduce any other evidence which they may wish to adduce. The Tribunal



shall dispose of the matter on the merits as urgently as possible. The appeals are accordingly allowed. No costs."

21. Same view again prevailed with the Apex Court in the case of **KULDIP CHAND v. UNION OF INDIA AND OTHERS**, 1996(1) AISLJ SC 113. The Supreme Court held that cause of action to challenge the seniority will arise when it affects a person and delay should not stand in the way. The findings are:

"3. It is next contended by Mr. M.M. Kashyap, learned counsel for the appellant, that Ashok Kumar disputed the correctness of the authority list made on December 23, 1982 in his representations dated January 10, 1983 and August 1, 1983 which were duly considered and rejected. He allowed it to become final as he did not challenge the same till post of accountant became vacant. When it was rejected, he filed the writ petition in the high Court. There is a considerable delay in claiming his seniority over the appellant. It is true that the seniority list was prepared as early as on December 23, 1982 but no vacancy had arisen thereafter and, therefore, the mere rejection of the claim for seniority does not disentitle him to claim his seniority over the appellant for consideration by the respondent-Union."

22. It is in the light of the aforesaid that the present controversy has to be necessarily looked into. Since seniority list has been issued in the year 2004, we find that in the peculiar facts, it cannot be held that delay would defeat the applicants.

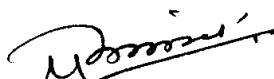
23. However, the learned counsel had contended that while promotions were made, the Assistant Executive Engineers were not given the quota. It is further alleged that Assistant Engineers holding the posts of Executive Engineers should find their place in



the seniority list and merely because they have retired, should not deprive them of holding of the post and affecting the seniority.

24. We have gone into this controversy but as already pointed above, the applicants have joined in the year 1989. Indeed they cannot litigate on behalf of others because if we go into that controversy, settled position would also become unsettled. Persons, who are not even before us, would be affected immediately. Their seniority may take a turn and, therefore, what is settled would be unsettled. The applicants in this regard, therefore, cannot be permitted to put the clock behind and start litigating on behalf of certain other persons who have not even taken care to challenge that seniority. Since such a Public Interest Litigation necessarily cannot be allowed like a proxy litigation, we, therefore, do not intend to go into the said controversy.

25. On this short ground, therefore, we do not intend to go into the controversy. The application must fail and is dismissed.


(M.K. Misra)
Member (A)


(V.S. Aggarwal)
Chairman

/NSN/