

Central Administrative Tribunal
Principal Bench

(7)

OA No. 732/2004
OA No. 735/2004
OA No. 944/2004

New Delhi, this the 5th day of August, 2004

Hon'ble Shri V.K. Majotra, Vice Chairman (A)
Hon'ble Shri Shanker Raju, Member (J)

OA No. 732/2004

Amrit Lai
Income Tax Officer,
Deoband (UP).

...Applicant

-versus-

1. Union of India through
Secretary,
Ministry of Finance,
North Block,
Central Secretariat,
New Delhi.
2. Central Board of Direct Taxes,
Through its Chairman,
North Block, Central Sectt.,
New Delhi.
3. Chief Commissioner of Income Tax,
(C.C.A., Kanpur, Uttar Pradesh.)
4. Shri D.C. Mishra,
Income Tax Officer Ward - II,
Firozabad (Uttar Pradesh).
5. Sh. R.K. Gupta,
Income Tax Officer,
Aaykar Bhawan,
Civil Lines, Kanpur. ... Respondents

OA No. 735/2004

1. Arkender Singh
Income Tax Officer,
Ghaziabad (UP).
2. Lalji Singh Yadav,
Income Tax Officer,
Ghaziabad (UP).
3. Saras Kumar,
Income Tax Officer,
Meerut (UP).
4. O.P. Pathak,
Income Tax Officer,
Uttar Pradesh. ... Applicants

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-versus-

1. Union of India through
Secretary,
Ministry of Finance,
North Block,
Central Secretariat,
New Delhi.
2. Central Board of Direct Taxes,
Through its Chairman,
North Block, Central Sectt.,
New Delhi.
3. U.P.S.C. through its
Chairman,
Shahjahan Road,
New Delhi.
4. Chief Commissioner of Income Tax,
(C.C.A., Kanpur, Uttar Pradesh.)
5. Shri D.C. Mishra,
Income Tax Officer Ward - II,
Firozabad (Uttar Pradesh) Respondents

OA No. 944/2004

Ms. Lilly Kutty,
Income Tax Officer,
Ghaziabad (UP). ... Applicant

-versus-

1. Union of India through
Secretary,
Ministry of Finance,
North Block,
Central Secretariat,
New Delhi.
2. Central Board of Direct Taxes,
Through its Chairman,
North Block, Central Sectt.,
New Delhi.
3. Chief Commissioner of Income Tax,
(C.C.A., Kanpur, Uttar Pradesh.)

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4. Shri D.C. Mishra,
Income Tax Officer Ward - II,
Firozabad (Uttar Pradesh)

5. A.N.Mishra,
Income Tax Officer-II,
Agra (Uttar Pradesh) ... Respondents

Presence: Shri Narender Kaushik, counsel for applicants.

Shri R.R. Bharti, counsel for official respondents. *Sh. V. P. Uppal for official Respondents.*

Shri M.L.Ohri, counsel for private respondent
Shri D.C. Mishra.

Shri P.P. Khurana, senior counsel with Ms.
Seema Pandey, counsel for private
respondent Sh. R.K. Gupta in OA No. 732/2004.

Shri K.C. Mittal, counsel for private
respondent Sh. A.N. Mishra in OA No. 944/04.

O R D E R

By Shri Shanker Raju, Member (J):

1. All these OAs are being disposed of together by this common order as grounded on same set of facts involving common question of law.
2. Basically applicants, who are Income Tax Officers, have assailed respondents' order dated 28.2.2003 whereby on a representation made by one Shri D.C. Mishra his seniority position has been revised, which has an impact over the seniority of the applicants. Also impugned is an order passed by the respondents on 23.12.2003 in consideration of the representation preferred by the affected parties regarding relegation of the seniority.
3. To facilitate proper adjudication, brief factual matrix is necessary to be reflected.

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4. Applicants in all these OAs are direct recruit Income Tax Inspectors in pursuance of an examination conducted by the Commission. Their appointments had taken place in the year 1986-87.

5. Seniority in the cadre of Income Tax Officer (I.T.O. for short) was to be maintained on the basis of rotation of quota in the ratio of 2:1.

6. At the time of assignment of seniority, as the recruitment rules do not provide for assignment of seniority, DoP&T instructions issued vide OM dated 22.12.1959 was the only mode. Subsequently vide OM dated 7.2.1986, the inter-se seniority of Income Tax Inspectors was revised and circulated.

7. Applicants, on qualifying the eligibility examination, were promoted in 1994-95 to the post of I.T.Os and a seniority list of 1999 was circulated showing their seniority position, which had attained finality.

8. One of the respondents no. 4 Shri D.C. Mishra, being aggrieved with the seniority list of 1999 relating to ITOs, sought interpolation at seniority no. 2090 on the basis of qualifying the examination earlier to the applicants, preferred a representation to the respondents. As the same was not responded to, OA No. 1089/2002 was filed before the Allahabad Bench of the Tribunal which was disposed of on 25.9.2002 directing the respondents to consider representation of the applicant by passing a detailed and speaking order.

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9. In the meanwhile vide Notification dated 24.12.2002, a proposal has been made by the respondents to revise inter-se seniority of ITIs i.e. direct recruits and promotees as per OM dated 22.12.1959 showing the applicants senior to Shri Mishra in the proposed list. It was stipulated that if effected persons failed to respond by way of representation/objection by 30.12.2002, the proposed seniority list shall assume finality.

10. In compliance of the directions in OA No. 1089/2002 (Supra) the respondents by an order dated 28.2.2003 passed the following order:-

"The representation of Shri D.C.Mishra, ITO and the issues raised therein has been carefully considered. In the light of the order of Hon'ble CAT, Allahabad dated 25.09.2002, in OA. No. 1089 of 2002 and also in terms of Board's directions received from time to time, his seniority in the post of Income Tax Inspector has been re-fixed and consequentially he has been placed above Shri O.P. Tripathi and below Shri Keemat Rai in the cadre of Income Tax Inspector."

Further, as a result of this re-fixation of seniority in the cadre of Income Tax Inspector and subsequently revision in the panel of ITOs he has now been placed below Shri N.C. Tomar and above Shri Chotelal Meena."

11. Being aggrieved by revision of seniority in ITI & ITO Cadres, Shri Gaya Prasad and Amrit Lal preferred a representation, which remained un-answered leading to filing

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of OA No. 1064/2003 before Allahabad Bench of the Tribunal.

By order dated 9.9.2003, the following directions have been issued:

" By this O.A. filed under Section 19 of Administrative Tribunal Act, 1985, the applicants have challenged the order dated 28.2.2003 (Annexure V) by which the seniority of respondent no. 4, who was junior to applicants, has been changed and he has been put above O.P. Tripathi and Keemat Rai. It appears that the impugned order has been passed in pursuance of the order of this Tribunal dated 25.9.2002 passed in O.A. No. 1089 of 2002. It may be mentioned that in the above O.A. applicants were not party. This Tribunal disposed of the OA with the following directions:

...in view of aforesaid, the OA is finally disposed of with direction to respondents that the representation of the applicant dated 11.01.2002 (Annexure A-IV) be decided by the competent Authority by a reasoned and speaking order within four months from the date of communication of this order."

It is true that in the order of this Tribunal direction was not given to hear those who were likely to be affected by the order of the Chief Commissioner i.e. respondent no. 3, but Chief Commissioner on his own should have taken care to give opportunity to those, who were likely to affect by his order while altering, the seniority of respondent no. 4 i.e. Shri D.C. Mishra. In our opinion, as the applicants of the present OA have also filed representations before respondent no. 2 (Annexure III & IV), in our opinion, interest of justice would be served, if respondent no. 2 is directed to consider and decide the representations of the applicants within a specified time and by a reasoned order after hearing all the concerned parties.

2. The OA is accordingly disposed of finally with the direction to respondent no. 2 to consider and decide the representations of the

applicants by a reasoned and detailed order within a period of three months, after hearing the applicants, Shri D C Mishra (respondent no. 4) , Shri Keemat Rai, Shri N.C. Tomar and Shri Chottey Lal Meena, who have been affected by order dated 28.2.2003. It is further provided that the respondent no. 2 shall take care that the interest of the applicant is not prejudiced in the matter of promotion, which accordingly to applicants is scheduled to be taken into consideration on 14.09.2003. For this purpose applicants shall make an application separately. No costs.

The copy of the order shall be issued to the parties within 24 hours."

12. As a consequence thereof by an order dated 23.12.2003 representations of applicants for revision of seniority and maintaining their seniority position in the seniority list of ITOs issued in 1999 was turned down. The above act of respondents has led to the filing of these OAs.

13. At the outset, amongst other grounds one of the contentions raised by Shri Narender Kaushik in all the cases, is that by revision of the seniority of D.C.Mishra and others, the seniority position of the applicants has been adversely affected and is relegated. This has been done without affording a pre-decisional hearing to the applicants. Hence, a post-decisional hearing is not a valid compliance of the principles of natural justice. Accordingly, this relegation in seniority has adversely affected the applicants in the matter of their further promotion to the post of Assistant Commissioner of Income Tax in the DPC to be held shortly.

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14. By the interim order, promotion of D.C. Mishra has been kept in abeyance and vacancies in the quota category of the applicants, were ordered not to be filled up.

15. In these OAs impleadment applications filed by the affected parties have been allowed. Shri M.L. Ohri, learned counsel represents respondent no. 4 Shri D.C.Mishra in all the cases, whereas learned senior counsel Shri P.P.Khurana with Ms. Seema Pandey represent impleaded respondent Shri R.K.Gupta in OA No. 732/04 and Shri K.C. Mittal represents Shri A.N.Mishra in OA No. 944/04.

16. Shri R.R.Bharti, learned counsel for official respondents vehemently opposed the contentions and stated that through office letter dated 24.12.2004, the process of re-fixation of seniority in ITI cadre in terms of OM dated 22.12.1959 was initiated which had ensued a change in the eligibility for promotion and as a result of which re-fixation of seniority was undertaken. Seniority of ITOs, who had been promoted by DPCs conducted from various dates i.e. 1992 onwards panel of 1992 was taken as a panel of base panel and number of vacancies as per reserved point were re-arranged on the basis of [evised eligibility]. The names were moved into a panel of concerned year or out of panel for the concern year based on revised seniority. Basically qualifying departmental examination of ITO was the criteria and whosoever had passed the departmental examination was moved in the panel accordingly.

17. Learned counsel states that OM of 1992 issued by DoP&T which provides confirmation as the criteria for seniority has been declared as ultra-vires and the seniority has been arranged strictly in accordance with OM of 1959. The DoP&T OM of 7.2.1986 would have no application on direct recruit of 1985. The seniority revised in case of D.C. Mishra was applying OM of 1959 and in its quota which does not alter the position of the applicants as per rota quota.

18. Learned counsel Shri Bharti states that in compliance of the directions of the Tribunal in OA No. 1089/2002, the seniority of D.C. Mishra was revised in ITI cadre which necessitated revision of the seniority in ITOs cadre. While complying with the directions in OA No. 1064/03 the contentions raised by the applicants had been taken care of and an opportunity was afforded which was in consonance with the principles of natural justice.

19. Shri M.L. Ohri, counsel for Shri D.C. Mishra contended that assignment of seniority was as per the rota quota in accordance with OM dated 22.12.1959. As Shri Mishra had appeared earlier in the examination, his seniority of rotation has been rightly fixed, who is admittedly senior to the applicants. Accordingly the assignment of seniority cannot be faulted with.

20. The private respondents in OA No. 732/2004 defended the action of the official respondents and contended that the seniority of the similarly circumstance direct recruits had been rightly assigned and revised as per DoP&T OM of 1959.

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21. Whereas Shri Khurana, learned senior counsel defended the action of the respondents and stated that OM dated 22.12.1959 necessitated re-fixation of seniority of ITOs as on re-fixation of seniority in Inspector grade and by virtue of passing examination earlier to the applicants, respondent R.K. Gupta is to be assigned seniority above them.

22. In the rejoinder, contentions raised by the respondents are controverted.

23. At the outset, the concept of seniority has taken a somersault. Seniority is no more a fundamental right but is a mere civil right. The Apex Court in Constitution Bench's decision in the case of Prafulla Kumar Das v. State of Orissa, 2004 SCC(L&S) 121, held as [B]lows:-

"33. Under Article 309 of the Constitution of India, it is open to the governor of the State to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the legislature. As has been rightly pointed out by the Court in Nityananda Kar Case, the legislature, or the Governor of the State, as the case may be, in its discretion, bestow or divest a right of seniority. This is essentially a matter of policy, and the quest[on of a vested right would not arise, as the State may alter or deny any such ostensible right, even by way of retrospective effect, if it so chooses (sic) in public interest."

24. It is also settled that seniority once settled and not objected to attains finality and cannot be disturbed after long lapse of time. This would create administrative chaos and would amount to unsettling the settled position. In B.S.Bajwa and Another v. State of Punjab & Ors., by the Apex Court in a three judges bench decision's has held as follows:-

"7. Having regard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the Single Judge and, therefore, the judgments of the Single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance was made by B.S. Bajwa and B.D. Gupta only in 1984 which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to[have been reopened after the lapse of such a long period. At every stage others were promoted before B.S. Bajwa and B.D. Gupta and this position was known to B.S. Bajwa and B.D. Gupta right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

25. In so far as seniority is concerned, a Bench of four Judges of the Apex Court in Maloom Lawrence Cecil D'Souza vs. Union of India & ors., observed as under:-

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9. The matter can also be looked at from another angle. The seniority of the petitioner qua respondents 4 to 26 was determined as long ago as 1956 in accordance with 1952 rules. The said seniority was reiterated in the seniority list issued in 1958. The present writ petition was filed in 1971. The petitioner, in our opinion, cannot be allowed to challenge the seniority list after lapse of so many years. The fact that a seniority list was issued in 1971 in pursuance of the decision of this Court in Karnik's case (supra) would not clothe the petition with a fresh right to challenge the fixation of his seniority qua respondents 4 to 25 as the seniority list of 1971 merely reflected the seniority of the petitioner qua those respondents as already determined in 1956. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants because of state claims made after lapse of 14 or 15 years. It is essential 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. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay in approaching the Court. It is no doubt true that he made a representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress.

10. Although security of service cannot be used as a shield against administrative action for lapses of a Public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Backing up old matters like seniority after a long time is likely to result in

administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

26. As regards pre-decisional hearing and a reasonable opportunity before an adverse action is taken affecting the concerned employee on revision of the seniority is concerned, the Apex Court in Vinod Kumar Sharma vs. State of U.P., (2001) 4 SCC 675, observed as under:-

"Thereafter this Court held that the services rendered by the appellant in that case should be counted from the year 1962, that is, on the date when he was appointed on a temporary basis. Further, the High Court ought to have considered the GO dated 19-10-1968 entirely, which specifically provides that "such officers are deemed to have been transferred from one department to another after the reallocation in accordance with the aforesaid GO". Thereafter it also provides for fixation of pay in identical scale of pay in that department. It appears that the High Court has overlooked the first part which provides that such officers are transferred from one department to another. If the High Court had referred to para 13 of Shrotriya case, it would have been clear that the stand and the policy of the State Government was also to the effect that the appellants' services were required to be counted for the purpose of seniority.

12. Hence, these appeals are required to be allowed. The respondent Government is directed to fix the seniority of the appellants in the light of the above findings. While refixing seniority, if any person is affected, it shall fix the seniority after giving an opportunity to the person concerned. Consequent promotions and benefits flowing thereunder will also be granted to the appellants, if they are otherwise eligible."

27. A Co-ordinate Bench of this Tribunal at Madras in P. Joel Kerunagarun vs. Chairman, Railway Board, New Delhi and Ors, 1987 (II) ATC 862 in so far as modification of seniority is concerned, observed as under:-

"8. From the counter-affidavit it is clear that the impugned order was passed as a result of a revision of the existing seniority list. If that be so before the list was revised to the prejudice of the applicant a chance should have been afforded to him to put forward his stand, and the failure to do so being violative of the principles of natural justice is also a ground for quashing the impugned order."

28. If one has regard to the above it is no more res integra that a settled position in the matter of seniority has to be maintained and any action detriment and/or adversely effecting the seniority of any government servant in the same cadre shall be preceded by a prior reasonable opportunity to show cause. A settled seniority cannot be unsettled by re-opening it after long lapse of time.

29. In the light of above, probing into the admitted facts, the applicants on direct recruitment as ITIs, their seniority having been finalised on qualifying examination, were promoted as ITOs. The seniority of ITOs was finalised in 1999.

30. The genesis of the present OA is a direction issued by the Allahabad Bench of this Tribunal in OA No. 1089/02 where being aggrieved with his seniority position as ITO, Shri D.C. Mishra, who represented again[B it, directions were issued to the respondents to dispose of his



representation by a detailed and speaking order. Meanwhile, the respondents, who had earlier revised the seniority of post 1986 officers in the light of OM dated 7.2.1986, proposed revision of the seniority in terms of OM of 22.12.1959 by office order dated 24.12.2002 which seniority list shows the applicants senior to the respondents. It was stipulated in the order that after having heard or objected to by the affected persons, the seniority shall assume finality. Accordingly on 1.1.2003 this seniority had attained finality.

31. Order passed by the respondents on 28.2.2003 allowing the representation of D.C. Mishra and re-fixing his seniority along with others on the basis of examination for the post of ITI which had a consequence of alteration of seniority of these persons in the cadre of ITO as well. Once the proposed seniority has been finalized on 1.1.2003, any order passed to alter that seniority on [B direction of the Tribunal, which was only to dispose of the representation, does not discharge the respondents from their onerous duty and obligation to put on notice the effected persons as a pre-decisional hearing.

32. In OA No. 1064/03 the Tribunal vide its order dated 9.9.2003, which is subsequent to the order dated 28.2.2003, where the affected persons assailed the order dated 28.2.2003 and the representation preferred was not disposed of, directed only to dispose of the representation by a reasoned and detailed order with hearing to the affected persons. Some of the applicants had also not been given hearing as stipulated. Moreover, once the seniority

has already been altered by a decision dated 28.2.2003 any hearing subsequently would be a post-decisional hearing. The disposal of the representation is nothing but to justify their action of revision.

33. Having finalised the seniority in the ITI cadre, the seniority in the Cadre of ITO assigned to the applicants in the seniority list of 1999, after a lapse of 4 years, would amount to disturbing the seniority and to unsettle the settled position. Now at this stage, when the seniority in ITO cadre is a determining factor for further promotion to the post of Assistant Commissioner of Income Tax, the applicants by relegation of their seniority have been adversely affected.

34. As regards post-decisional hearing is concerned, as an essence of fair play and in consonance of principles of natural justice in a matter where every consequence ensued upon a Government servant, he has to be afforded an opportunity before such an adverse action is taken. If an action has already been taken, an opportunity to justify it by no stretch can be a justification or reflects want of arbitrariness or unreasonableness in the action.

35. Apex Court in Three Judges Bench's decision in H.L. Trehan & Ors. vs. Union of India & Ors. (1989) 1 SCC 764, in so far as necessity of pre-decisional hearing is concerned, observed as under:

" 12. It is, however, contended on behalf of CORIL that after the impugned circular was issued, an opportunity of hearing was given to the employees with



regard to the alterations made in the conditions of their service by the impugned circular. In our opinion, the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional opportunity. In this connection, we may refer to a recent decision of this Court in K.I. Shephard vs. Union of India. What happened in that case was that the Hindustan Commercial Bank, the Bank of Cochin Ltd. and Lakshmi Commercial Bank, which were private banks, were amalgamated with Punjab National Bank, Canara Bank and State Bank of India respectivley in terms of separate schemes drawn under Section 45 of the Banking Regulation Act, 1949. Pursuant to the schemes, certain employees of the first mentioned three banks were excluded from employment and their services were not taken over by the respective transferee banks. Such exclusion was made without giving the employees, whose services were terminated, an opportunity of being heard. Ranganath Misra, J. speaking for the court observed as follows: (SCC pp.448-49, para 16).

We may now point out that the learned Single Judge for the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could not represent and their case could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that

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they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.

13. The view that has been taken by this Court in the above observation is that once a decision has been taken, there is a tendency to uphold it and a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the impugned circular, that would not be any compliance with the rules of natural justice or avoid the mischief of arbitrariness as contemplated by Article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular."

36. If one has regard to above, action of the respondents offends fair play and is denial of reasonable opportunity to the applicants, which cannot be countenanced in the wake of cardinal principles of natural justice. A fair pre-decisional hearing is sine quo non for an action undertaken on executive side by the Government or in a quasi judicial action.

37. In the result, OA is partly allowed. Impugned orders are set aside. However, this shall not preclude the respondents to afford a reasonable opportunity to the applicants to show cause before revision of the seniority in the cadre of ITI as well as ITO. However, till this process is completed, the interim order is made absolute. Other legal grounds taken are not adjudicated upon. No costs.

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(Shanker Raju)
Member (J)

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(V.K. Majotra)
Vice Chairman (A)

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