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Central Administrative Tribunal
Principal Bench
New Delhi

O.A. No. 977/93

Decided on 28.6.99

S. D. Saxena Applicant

(By Advocate: Sh. G. D. Gupta with
Shri G. S. Lobana.)
Versus

Uoi & Ors. Respondents

(By Advocate: Shri R. P. Agarwal for)
Official Respondents.
CORAM Shri Vikramjit Sen for R-5.

HON'BLE MR. S.R. ADIGE, VICE CHAIRMAN (A)

1. To be referred to the Reporter or Not? YES
2. Whether to be circulated to other outlying
benches of the Tribunal or not? No.

Adige
(S.R. ADIGE)
VICE CHAIRMAN (A)

Central Administrative Tribunal
Principal Bench

O.A. No. 977 of 1993
New Delhi, dated this 28-JUNE 1999

HON'BLE MR. S.R. ADIGE, VICE CHAIRMAN (A)
HON'BLE MRS. LAKSHMI SWAMINATHAN, MEMBER (J)

Shri S.D. Saxena,
Financial Adviser, MTNL,
S/o late Shri M.L. Saxena,
R/o A-146, Pandara Road,
New Delhi. ... Applicant

(By Advocate: Shri G.D. Gupta with
Shri G.S. Lobana)

Versus

1. Union of India through
the Chairman, Telecomm Commission,
Dept. of Telecommunications,
Sanchar Bhawan, New Delhi-110001.
2. Member Finance,
Telecom. Commission,
Sanchar Bhawan,
New Delhi.
3. Chairman,
Union Public Service Commission,
Dholpur House,
Shahjahan Road, New Delhi.
4. Secretary,
Dept. of Personnel & Training,
North Block,
New Delhi.
5. Smt. Suchitra Mukherjee,
Dy. Director General (Finance),
Telecom. Directorate,
Dept. of Telecom.
Sanchar Bhawan,
New Delhi-110001. ... Respondents

(By Advocate: Shri R.P. Aggarwal for
official respondents
Shri Vikramjit Sen for pvt.
respondent No. 5)

O R D E R

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BY HON'BLE MR. S.R. ADIGE, VICE CHAIRMAN (A)

Applicant impugns the seniority list dated 27.11.92 (Ann. A-1) and dated 20.1.93 (Ann. A-11), as well as the order dated 7.8.92 (Ann. X) and seeks a declaration that the seniority list dated 29.12.84 [Ann. XVI(a)&(b)] is final.

2. Admittedly applicant as well as Respondent No.5 appeared in CSE, 1973 as direct recruits. Applicant does not deny that he secured 191 rank while Respondent No.5 secured 137 rank in the final merit list. Both officers were appointed to Indian P&T Accounts and Finance Service. Respondent No.5 joined on 21.7.74 while applicant joined on 15.1.75. Admittedly a two years probation period is prescribed during which the officers are required to pass certain departmental examination.

3. Applicant's case is that he completed the probation period satisfactorily within the prescribed two years period, and passed the prescribed departmental examination in the first attempt and was, therefore appointed substantially to the aforesaid Service w.e.f. 15.1.77. After completing 5 years service in JT~~S~~, he was promoted to STS w.e.f. 6.2.80 and was further promoted to JAG on ad hoc basis w.e.f. 2.4.83 and was subsequently appointed on regular basis to JAG w.e.f. 1.2.85. He was further promoted to JAG (Selection Grade) w.e.f. 1.7.87 and was appointed on ad hoc basis as Dy. Director General ~~1 1 1~~

basis in SAG w.e.f. October, 1991 and subsequently on regular basis w.e.f. 4.8.92. He has emphasised that his appointment in JAG as well as SAG was through selection based on merit.

4. He states that R-5 failed to pass the departmental exam. within the prescribed two year period and in fact did not pass it till 20.3.81, that is nearly 7 years after her appointment and five years beyond the prescribed period of probation. He states that by Memo dated 13.4.81 (Ann. A-XII) her probation was extended from 21.7.76 upto 30.4.81, which was subsequently curtailed upto 20.3.81 by Memo dated 30.5.81. It is contended that the extension of this probation upto nearly 7 years was violative of Rule 19 Indian P&T Accounts & Finance Service Rules, as well as Home Ministry's O.M. dated 15.4.59 as well as Para (a) of the Annexure in the offer of appointment dated 19.11.74 (Ann A III) 1.

5. In this connection it is further averred that R-5 proceeded to U.K. in January, 1977 without completing her probation and without passing the departmental examination by taking extraordinary leave and half pay leave for 98 days w.e.f. 15.1.77. She was further granted extraordinary leave upto 31.12.77, and was thereupon granted even further extraordinary leave upto 31.8.78. Applicant states that R-5 was asked on 27.9.78 by cable whether she was joining the department or not, but she expressed her inability

to return by sending a reply on 24.11.78 and requested for further extraordinary leave upto end of April, 1979. Applicant states that R-5 sent a resignation letter on 27.4.79 which became effective in case an employee was absent without leave, and in any case after expiry of the period of notice. She sent a cable withdrawing her resignation on 28.3.80 even though her resignation had become effective, but the resignation letter was treated by Respondents as withdrawn under Rule 26(4) CCS (Pension) Rules, but in spite of withdrawal of the resignation letter she did not join till 20.9.80 and thus the total period of absence during probation was from 15.1.77 to 20.9.80. Applicant states that R-5 finally passed the Departmental Exam. held in February, 1981, the result of which was declared in April, 1981 which entailed her probation being extended till March, 1981. He states that R-5 was appointed substantially to JTS w.e.f. 21.2.81 and was promoted to STS on ad hoc basis vide order dated 12.6.81 and joined on 13.7.81.

6. Applicant emphasises that R-5 failed to pass the departmental examination during the prescribed probation period of two years and the extended period of probation, upto the time she was promoted to STS. She availed of all the chances during the prescribed probation period of two years and thereafter absented herself from 15.1.77 to 30.9.80 and did not ^{appear in} ~~attend for~~ the examinations during this period purely on personal grounds, as in fact

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she had decided to leave service. Applicant avers that on her rejoining the dept. the case relating to her seniority in service was referred to DP&T on 10.8.81, and considering the fact that she had failed to pass the departmental examination during the prescribed period of two years, and had thereafter not appeared in the examination purely on personal grounds, decided that her ~~seniority~~ ^{seniority} in STS earlier than her, having passed the departmental examination and been found fit for promotion, acquire seniority above her. Applicant asserts that the case was again referred to DP&T on 28.7.82, but they reiterated their opinion on 20.8.82 and again on 2.9.82.

7. Applicant asserts that on 4.4.84 a provisional gradation list as on 1.1.83 was published giving one month's notice for making representations. On a representation, DP&T, who consulted UPSC on 14.9.~~84~~ gave a final decision on 14.12.84 (Ann. A-XV) confirming their earlier decision and stating that UPSC had since agreed to the stand taken by DP&T. Accordingly the gradation list as on 1.1.83 circulated on 4.4.84 was declared as final vide Memo dated 29.12.84. Applicant asserts that thereafter till 1992, before issue of the impugned orders, promotions were made on the basis of the seniority indicated in the said gradation list. That thereafter three gradation lists were issued [Ann. XVI(a) to (c)] and in accordance with the seniority indicated in their gradation lists applicant was promoted to JAG on

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ad hoc basis w.e.f. 2.4.83; was regularised in JAG w.e.f. 1.2.85 and was further promoted to JAG (Selection Grade) on 1.7.87; and to SAG.

8. Applicant asserts that his seniority remained unchanged, without challenge, till it has been changed arbitrarily by impugned order dated 27.11.92. He emphasises the disparity in the level of seniority between R-5 and himself and the dates of promotion to the various grades on the date of issue of the impugned order, i.e. R-5 was 27th rank below him in JTS and 18th rank below him in STS as per gradation lists at Ann. XV(a) and XV(b), but contends that R-2 did not take any cognizance of these facts and issued the impugned order arbitrarily and illegally. He states that aggrieved by this impugned order he submitted representations to R-2, 3 & 4 and also submitted a petition to the President of India, but receiving no reply, he was compelled to file this O.A.

9. Respondents 1 & 2 in their reply in continuation of the admitted position outlined in Para 2 above, aver that Respondent No.5 passed ^{the first} ~~the~~ Departmental Examination during her probation period, but the second departmental examination could not be held during the normal period of two years when she remained on probation, because the service to which she had been recruited was in the initial stage of its formulation and she was the first officer to join the service. The second departmental examination was held in December, 1976

in which she could not qualify. They state that the normal period of probation in which the probationers are imparted various types of training was for a period of two years and on the expiry of her training she was posted as ACAO (Probation) vide order dated 23.7.76. After working as ACAO for some time she proceeded on extraordinary leave and went to U.K. to join her husband. From there she submitted her resignation, but before it could be accepted by the appointing authority she requested that she be allowed to withdraw it, which request was allowed by the competent authority. After expiry of her leave she resumed her duties w.e.f. 23.10.80. She appeared in a departmental examination held in February, 1981 and was declared qualified. By order dated 30.5.87 her period of probation was retrospectively extended from 21.7.76 to 20.3.81. Incidentally we find that this retrospective extension of probation beyond 21.7.76 has subsequently been cancelled by O.M. dated 27.11.92 a copy of which is taken on record.

10. Respondents 2 & 3 in their reply admit that the confirmation of R-5 in JTS got delayed and her seniority was also lowered and she was placed below the direct recruits from the 1977 examination. They state further that R-5 submitted several representations over the year against the lowering of her seniority and the matter was examined in consultation with UPSC and DP&T. While UPSC was of the view that her seniority should not be altered, DP&T was of opinion that she should be lowered in

seniority. In the reply it is stated that in order to justify their stand, DP&T distinguished between officers who made attempts to pass the departmental examination but could not do so, and those who for some reason or another did not sit for the examination. In the reply it is stated that finally her seniority was lowered on the advice of DP&T, but it subsequently came to light that the stand adopted by DP&T had not been approved by UPSC, who even went to the extent of recording that it would be included in their Annual Report as one of the cases where UPSC's advice had not been agreed to.

11. In the reply it is stated that R-5 continued to represent against the lowering of her seniority and the issue was under protracted correspondence with DP&T, who finally in August, 1992 gave a decision in consultation with UPSC and Law Ministry that the distinction drawn between those who appeared and could not qualify at the departmental examinations, and those who could not appear for one reason or the other was not based on any reasonable justification. It is stated that in view of the above advice of UPSC and Law Ministry and view of the contents of DP&T's own letter dated 9.7.65 (Ann. R-2) DP&T advised for refixation of seniority as per her merit position in CSE, 1973 and accordingly by impugned order dated 27.11.92 her seniority was restored. It is emphasised that the dispute in fact is not the revision of seniority of R-5, but the restoration of her

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seniority, who by virtue of her merit position in CSE, 1973 was senior to applicant and whose seniority was lowered for no fault of hers.

12. In the reply it is stated that applicant has himself admitted that by order dated 7.8.92 (Ann. A-X), he had been intimated in advance about correction of his seniority in JAG/SAG, and he thus cannot deny the fact that he was aware that the representation of R-5 for restoration of her seniority was under consideration. In the reply it has been emphasised that before issue of impugned order dated 27.11.92 applicant had given repeated representations that her seniority position should not be reconsidered, the last one before issue of the corrected seniority list, being dated 21.10.92 [Ann. XVIII(c) of O.A.].

13. In the reply it has been stated that the extension of probation of R-5 from 21.7.76 to 20.3.81 was itself in contravention of MHA's Circular dated 15.4.59 (Ann. A III and A IV) and we have already noticed that this retrospective extension of probation has subsequently been cancelled by O.M. dated 27.11.92.

14. In so far as the grant of extraordinary leave to R-5 is concerned, in the reply attention has been drawn to Rule 32(6) CCS (Leave) Rules which permits the authority competent to grant leave, to commute retrospectively periods of absence without leave, into extraordinary leave. It

is stated that in the case of R-5 the period of absence was regularised by grant of extraordinary leave by the competent authority.

15. As regards the submission by R-5 of her resignation letter, in the reply it is emphasised that she submitted the same while on leave, but before the same was accepted by the appointing authority she sought permission in writing to withdraw the same, which was allowed in accordance with Govt. of India instruction No. 3 below Rule 26 CCS (Pension) Rules and hence no favour was shown to her.

16. Respondent No.5 has filed a short reply in which after reiterating the facts noticed in Para 2 above, she has invited attention to Para 4 of the Annexure to MHA's O.M. dated 22.12.59 (Ann. R-1) on the general principles for determination of seniority in the Central Services, which reads as follows:

4. Direct Recruits

Notwithstanding the provisions of Para 3 above, the relative seniority of all direct recruits should be determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection.

It has been stressed that the aforesaid principle has been reiterated in Para 4 of MHA's letter dated 9.7.65 (Ann. R-2).

17. In her reply R-5 has stated that she successfully qualified in one departmental examination held in 1975. No other departmental examination was administered to her in the course of her two years training. Upon completion of her two years training, she was posted as ACAO (Prob.) vide order dated 23.7.76. She states that for personal reasons she was constrained to avail of leave from 15.1.77 to 22.10.80 and rejoined duty on 23.10.80. Subsequently the D.G. P&T regularised the leave availed of from 15.1.77 to 22.10.80 vide order dated 19.11.81 (Ann. R-4) and meanwhile she appeared in the second departmental examination in February, 1981 and passed the same. She states that in June, 1981 she was promoted to STS with regular promotion on 20.2.85.

18. She further states that meanwhile the Department on 4.4.84 published a gradation list as on 1.1.83 in which her seniority was shown as S1. 28 i.e. her seniority was reduced by batches on account of passing the 2nd Departmental Examination late. She states that thereupon she made repeated representations to DP&T and UPSC. The UPSC in their letter dated 6.2.85 (Ann. R-5) recommended that it would not be in order to depress her seniority in JTS of P&T Accounts and Finance Service on the ground that her confirmation was delayed due to delay in passing the second departmental examination, UPSC therefore advised that her representation against lowering of her

seniority be accepted and that she be assigned her due seniority position with attendant benefits. She states that thereafter on 2.7.86 she was promoted to JAG w.e.f 1.7.91.

19. She further states that UPSC in its letter dated 5.2.88 (Ann. R-6) asked the Communications Ministry to indicate the circumstances under which its advice had not been accepted and requested the Communications Ministry to reply to its letter failing which it would be treated a non-acceptance of UPSC's advice. Thereafter the UPSC in its letter dated 27.1.92 (Ann. R-7) addressed to DP&T pointed out that DP&T had not applied the criterion of delay in passing the departmental examination to other candidates for fixation of seniority. It pointed out that in its letter dated 21.10.83, it had already clarified that the inter se seniority of probationers based on the orders of merit could not be upset by the order of confirmation even if the period of probation was extended in the light of O.M. dated 22.12.59. She further avers that the UPSC in its letter dated 27.1.92 had stated that it had not agreed to the depression of her seniority, and subsequently by impugned order dated 27.11.92 the Dept. rectified its mistake and restored her original seniority to her. She emphasises that as it was only correction of a mistake, it did not require granting of a way to other officers who were admittedly lower in the order of merit, the established law bring that

seniority would be dependant on the merit position at the time of appointment, a position that was well known to applicant.

20. Applicant has filed his rejoinder to the reply filed by R-1 & 2.

21. We have heard applicant's counsel Shri G.D. Gupta and Shri R.P. Aggarwal for official respondents. Ms. A. Banerjee and Shri Vikramjit Sen appeared for respondent no. 5 and were also heard.

22. Shri Gupta has emphasised the grounds taken in the pleadings, namely that whereas applicant completed the period of probation satisfactorily within the prescribed 2 years period and also passed the prescribed departmental examination in the first attempt and thereafter rose progressively up the administrative ladder in JTS, STS, JAG (selection grade) and SAG much before respondent no. 5, ^{when} ~~she~~ failed to complete her probation within the prescribed period of two years and did not pass the prescribed departmental examination upto 20.3.1981 i.e. five years beyond the period of probation. Our attention has specifically been invited by him to Rule 19 (3) of the P & T Accounts & Finance Service Class-I Recruitment Rules which provide for extension of the period of probation and Rule 19 (4) which provides that if the Government is of the opinion that the candidate is not fit for permanent appointment or if at any time during such period of probation or extension itself specified that the candidate will not be fit for permanent appointment on the expiry of

the period of probation or of extension, they may discharge or revert such candidates to its substantive post or pass such orders as it may think fit. Attention has also been invited to para (a) of Annexure - I to the appointment letter dated 19.11.1974 issued to applicant as well as respondent no. 5, in which it was stated that appointment would be made on probation for a period of two years provided that this period may be extended if the officer on probation did not qualify for confirmation by passing the prescribed departmental examination, and repeated failure to pass the departmental examination within the prescribed period would involve loss of appointment. On this basis it has been suggested that the retention of respondent no. 5 in service itself was questionable, ~~more~~ so after she herself sent a resignation letter, and what was much worse was the fact that she has been placed above the applicant in seniority, and that too after granting her a long spell of extra-ordinary leave to which she was not entitled as a probationer. Emphasis has also been placed on the fact that the question of seniority of respondent no. 5 having been finally settled by order dated 29.4.1984 it could not be altered to the applicant's disadvantage nearly 8 years later in 1992.

23. We have considered the matter carefully.

24. At the outset it needs to be emphasized that the question of the retention of respondent no. 5 in Government service despite her not completing the probation within the prescribed period of 2 years, or not

clearing the departmental examination for whatever reason within that period, or indeed the non-acceptance of her resignation and her being granted extra-ordinary leave are not the core issues requiring adjudication. If applicant was aggrieved by any or all these issues, it was open to him to raise them within the limitation period from the date the cause of action initially arose. Not having done so then, he is barred from raising them now, as the same are hit by limitation under section 21 of A.T.Act.

25. Even otherwise, in so far as the resignation of respondent no. 5 from government service is concerned, Govt. of India decision No. 3 below Rule 26 of CCS Pension Rules makes it clear that a resignation becomes effective when it is accepted and the Government servant is relieved of his duties. If a Government servant who had submitted a resignation, sends an intimation in writing to the appointing authority withdrawing his earlier letter of resignation before its acceptance by the appointing authority the resignation will be deemed to have been automatically withdrawn and there is no question of accepting the resignation. As nothing has been shown by applicant to establish that the resignation of respondent no. 5 had been accepted before she withdrew the same, it cannot be said that the respondents acted illegally or arbitrarily in permitting her to withdraw her letter of resignation. Similarly, as regards grant of extra ordinary leave to her Rule 33 (2) of CCS (Leave) Rules permits a person appointed to a post on probation to

be entitled to leave under these rules as a temporary or a permanent Government servant according as his appointment is against temporary or permanent post, and it is not denied that applicant was appointed as a probationer against a permanent post. Furthermore, Rule 32 (6) of CCS (Leave) Rules permits the authority competent to grant leave, to commute retrospectively periods of absence without leave into extra ordinary leave. Under the circumstances it cannot be said that respondents have acted illegally or arbitrarily in granting her extra ordinary leave.

26. The main point for adjudication is whether official respondents acted illegally or arbitrarily in restoring the seniority of respondent no. 5 to her, by the impugned orders issued in 1992, after her seniority had been determined vide order dated 29.12.1994.

27. Admittedly applicant as well as respondent no. 5 were directly recruited to the Indian P&T Accounts & Finance Service through CSE 1973 conducted by the Union Public Service Commission in accordance with the provisions of the Indian P & T Accounts & Finance Service Class-I Recruitment Rules, 1972 promulgated under Article 309 of the Constitution (Annexure A-IV). Rule 21 thereof relates to seniority. While Rule 21(1) provides that a list of members of the Service shall be maintained separately for each grade in the order of their seniority. Rule 21(2) lays down that the seniority of the members of

the Service in each grade shall be determined in accordance with the general orders regulating seniority of government employees issued by Govt. from time to time.

28. We have already seen in para 16 that Govt. by MHA's OM dated 22.12.1959 had formulated general principles for determination of seniority in Central Services (the Indian P & T Accounts & Finance Service being one such Service), and in para 4 of the annexure to that OM containing those principles, it has specifically been laid down that in case of direct recruits, their relative seniority would be determined by the order of merit in which they were selected for such appointment. Applicant as well as respondent no. 5 both having appeared in CSE 1973 and selected as direct recruits, and respondent no. 5 having secured 137 rank in the merit position as against 191 rank secured by applicant, manifestly respondent no. 5 was senior to applicant at the time of their induction into Indian P & T Accounts & Finance Service. No rule or instruction has been shown to us to establish that this position would undergo a change merely because applicant cleared the departmental examination within the prescribed probation period of two years and after being made substantive in JTS was promoted successfully to STS, JAG, JAG (Selection Grade) and SAG, while respondent no. 5 did not clear her departmental examination within the prescribed probation period of 2 years; and was absent from duty from 17.1.1977 to 22.10.1980 which period was subsequently regularised by granting her extra-ordinary leave, resulting in delay in

her confirmation. In fact the contents of para 4 to the Annexure in MHA's OM dated 22.12.1959 are reconfirmed by the contents of para 4 of MHA's letter dated 9.7.1965 addressed to U.P.S.C. wherein it is specifically laid down that in respect of probationers appointed against permanent posts (it is not denied that applicant as well as respondent no. 5 were probationers appointed against permanent posts) their inter-se seniority based on the order of merit would not be upset by the order of confirmation i.e. even if in any case the period of confirmation was extended and the probationer was confirmed from a later date, the original order of merit in which he/she was selected would determine the inter-se seniority.

29. In this connection Shri Gupta has asserted that because in the last para of the aforesaid letter, the Home Ministry had sought for the comments of UPSC on the position stated in paragraphs 3 & 4 of that letter, the same cannot be treated as final. Even if by the last para of the MHA's letter dated 9.7.1965, the comments of UPSC were sought for on the position stated in the preceding paragraphs 3 & 4, we note that the aforesaid letter dated 9.7.1965 is on the subject of clarification on the general principles of seniority contained in MHA's OM dated 22.12.1959, and in the aforesaid OM dated 22.12.1959 the position has been clearly set forth that seniority of direct recruits in Central Services would be determined by the order of merit in which they are selected, ~~irrespective~~

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of the dates of the date of the completion of their probation; the date of their clearing departmental examinations; or indeed the dates of their conformation.

30. Under the circumstances we have no hesitation in holding that the seniority position of respondent no. 5 as shown in the seniority list dated 29.12.1984 which applicant seeks to be declared as final, was not in accordance with law, and if upon repeated representations by respondent no.5, and protracted correspondence and consultation between the Communication Ministry, Department of Personnel & Training, UPSC and Law Ministry the error was corrected, and her rightful seniority position was restored to her by impugned order dated 27.11.1992, respondents cannot be said to have acted illegally, irregularly, improperly or arbitrarily. Furthermore as applicant was continually representing against any correction in the seniority position of respondent no. 5 as is clear from his last representation dated 20.10.1992 just before the impugned order dated 27.11.1992 issued, he cannot claim that the seniority of respondent no. 5 was restored behind his back as rightly pointed out by official respondents.

31. For the reasons discussed above, we see no reason to interfere in the matter. The O.A. is dismissed. No costs.

Lakshmi Swaminathan
(Smt. Lakshmi Swaminathan)
Member (J)

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Adige
(S.R. Adige)
Vice-Chairman(A)