

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.86/09

Friday, this the 5th day of February 2010

C O R A M :

HON'BLE Dr. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K. NOORJEHAN, ADMINISTRATIVE MEMBER

1. V.Govindan,
Divisional Engineer (Transmission),
Bharat Sanchar Nigam Ltd. Palakkad.
2. K.D.John,
Divisional Engineer (BSS), Mobile Services,
Bharat Sanchar Nigam Ltd. Palakkad.
3. Baby Peter,
Divisional Engineer,
Bharat Sanchar Nigam Ltd.
Trivandrum Telecom District,
Kerala Circle, Thiruvananthapuram.
4. K.L.Ruby,
Divisional Engineer Telecom,
Kallambalam Division,
Near Telephone Exchange,
Bharat Sanchar Nigam Ltd.,
Kallambalam - 695 605.
5. N.James Roy,
Divisional Engineer,
Bharat Sanchar Nigam Ltd. Palakkad.
6. D.James Sagaya Raj,
Assistant General Manager (I.T.),
Office of the Chief General Manager,
Telecom, Kerala Circle,
Bharat Sanchar Nigam Ltd.



Thiruvananthapuram.

7. Smt.Jalaja,
Divisional Engineer (Indoor),
Neyyattinkara Telephone Exchange,
Bharat Sanchar Nigam Ltd.,
Neyyattinkara, Thiruvananthapuram District.
8. P.Mohan,
Assistant General Manager (Wimax),
Office of the Chief General Manager,
Telecom, Kerala Circle,
Bharat Sanchar Nigam Ltd.
Thiruvananthapuram.
9. H.Shathick Ali,
Assistant General Manager (NWP),
Office of the Chief General Manager
Telecom, Kerala Circle,
Bharat Sanchar Nigam Ltd.
Thiruvananthapuram.
10. S.Muthuvelu,
Divisional Engineer (BB),
Telephone Exchange,
Bharat Sanchar Nigam Ltd.
Kaikamuku, Thiruvananthapuram.
11. N.S.Muralikrishnan,
Divisional Engineer, Telecomlicants,
Bharat Sanchar Nigam Ltd.
Cherplassery, Palakkad.Applicants

(By Advocate : Mr.P.Chandrasekhar)

V e r s u s

1. Union of India
represented by Secretary to Government of India,
Department of Telecommunications,
Ministry of Communication & Information Technology,
421, Sanchar Bhavan, 20 - Ashoka Road,

New Delhi - 110 001.

2. Bharat Sanchar Nigam Ltd.,
represented by its Chairman & Managing Director,
102B, Statesman House, 148,
Barakhamba Road, New Delhi - 1.
3. The Chief General Manager Telecom,
Kerala Telecom, Thiruvananthapuram.
4. A.Vijayan,
S/o.late Sivaraman,
Sree Geham, Puthiyangam,
Alathur P.O., 678 545, Palakkad District.
5. K.V.Vinodkumar,
Assistant General Manager (Marketing),
Office of the General Manager Telecom,
Malappuram. ...Respondents

(By Advocates : Mr.George Joseph,ACGSC [R1],
Mr.George Kuruvilla [R2&3] &
Mr.T.C.Govindaswamy [R4&5])

This application having been heard on 13th January 2010 the
Tribunal on ~~5th February~~ 2010 delivered the following :-

O R D E R

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The applicants, who are at present serving as Divisional Engineer/Asst. General Managers in the B.S.N.L. were all initially recruited as Junior Engineers prior to 1982 and their earlier promotions as Sub Divisional Engineer, on their qualifying (prior to 1990) the departmental examination were all against pre 1994-95 vacancies. As

no such departmental examination was conducted during 1992-96, some of the junior engineers filed OA No. 1497/1996 and the same was allowed by the Tribunal vide Annexure A-18 order dated 01st May 1998, directing the respondents to hold a combined Departmental examination, both qualifying as well as competitive for the years 1992-96 (precisely up to 22nd July 1996) within a stipulated period. A clear mention was made in the said order that those who had qualified in the departmental examination prior to 1991 would all rank seniors to those who qualify after them in the departmental qualifying examination, for the purpose of promotions to vacancies in TES Group B Cadre arising up to 22nd July 1996. This order of the Tribunal, when challenged before the High Court, was affirmed vide judgment dated 13th July 2006 in OP No. 37134/2001, at Annexure A-19. In the wake of the above judgment, qualifying and competitive examination was scheduled to be held, vide Annexure A-20. The said annexure clearly stated that the examination proposed to be held would be supplemental to earlier examination held in 2000 in respect of vacancies that had arisen during the years 1994-95, 1995-96 and up to 22nd July 1996. In the very same communication in respect of two individuals who had already qualified in the earlier examination and promoted against the 1993-94 vacancies, it was mentioned that they having already been promoted, would not be

permitted to participate in the examination to be conducted. Earlier too, there were certain individuals who were declared as ineligible to appear for the examination, presumably for the same reason as given in Annexure A-20. Annexures A-21 and 22 refer.

2. It is pertinent to mention at this juncture that passing the departmental qualifying examination is compulsory for all and certain quota had been prescribed whereby amongst such qualified individuals, those who come meritorious in the competitive examination would be promoted in the order of their merit, while others would be promoted on the basis of their seniority.

3. Such of those individuals who had come out successful in the competitive examination held in the year 2000/2003, claimed re-fixation of their seniority and accordingly, seniority of as many as 147 candidates who were so promoted, was revised by giving notice to vide Annexure A-23. It was apparent from the seniority list that there had been interpolation of the names of such competitive exam qualified persons in slots for the years of the past, which affected the seniority of the applicants, as for example, vide Annexure A-24, the seniority of applicant No. 6 had been pushed down by virtue of interpolation of at

least three individuals whose names appear in seniority No. 5763.1, 5769.1 and 5781.1, while that the said applicant No. 6, who qualified in the qualifying examination prior to the above remained in Seniority No. 15585. (This applicant was one who was declared to be ineligible to appear in the competitive examination for the reason of his having been already promoted vide Annexure A-21). Hence there were objections against such interpolation of the competitive exam qualified candidates in the seniority list, vide Annexure A-24 to A-30. However, the respondents have retained the same seniority list as the final seniority list, vide Annexure A-27. Further promotion as Executives (STS) was based on the said seniority list, vide Annexure A-32. These are being impugned in the instant O.A. on the following grounds:-

- (a) The orders were passed by the DOT which had no jurisdiction as by the time these orders had been passed, BSNL came into existence.
- (b) When the applicants desired to participate in the competitive examination, they were prohibited from such participation on the ground that they were already positioned in the higher post and hence, the respondents are estopped from contending that those who had passed the competitive examinations per the directions of the Court are entitled to seniority above the applicants.
- (c) Assigning of higher seniority to the later qualified individuals is against the direction given in the order of the Tribunal, vide Annexure A-18.
- (d) Rules do not provide for such intermingling of officers belonging to different recruitment years and to steal a

march over the already promoted officers in seniority.

(e) Annexure A-27 does not reflect that there has been an application of mind by considering the objections raised by the applicants.

4. The applicants have impleaded certain private respondents.
5. Official respondents had filed their reply and so did the private respondents too.
6. In their reply the respondent No. 1 had contended as under:-
 - a) As per order of this Tribunal dated 1.5.1998 an examination was held for filling up of vacancies for the year 1994-95, 1995-96 and 1996-97 and JTOs appointed for the vacancies up to the year 1993 were eligible for appearing in the examination. In the said examination Scheduled Caste/Scheduled Tribe officers were allowed to appear in both the qualifying as well as competitive parts of the examination while OC officers who have already qualified in the qualifying examination were allowed to appear in the competitive part of the examination. Thereafter, a special supplementary departmental qualifying-cum-competitive examination was conducted in the month of October, 2003 in continuation of one already held in the month of November, 2000. A total of

147 officers were declared successful in the said examinations and they were promoted to TES Group 'B'. The Hon'ble High Court of Kerala in its order dated 13.7.2006 directed the respondents to assign the vacancies (seniority) in respect of the passed candidates in the said examination and a provisional seniority list of 147 officers was issued. Thereafter, the respondents have decided to revise their seniority as per their eligibility for appearing in the competitive examination for the respective vacancy years as per the relevant recruitment rules. A provisional revised seniority list has been issued for inviting objections thereon and after considering all the objections received in this regard, final seniority list of the 147 competitive quota officers has been issued vide office letter dated 28.7.2008 with the approval of the competent authority. For smooth transition of administration and operations of BSNL, it was decided to deal with the matters of seniority, promotion, court cases etc., related to these absorbed TES Group 'B' officers by the DOT as an interim and time being arrangement.

7.

In their reply the official respondents 2 and 3 had contended as

under:-

a) The respondents have submitted that all the parties who are likely to be affected are not made parties to the OA. Annexures A-18 and A-19 judgments have no bearing on the case of the applicants. For promotion to the TES Gr.B posts from the feeder category of Junior Engineers, pre-1996 recruitment rules prescribes a combined departmental examination consisting of two parts. One part of the examination called the qualifying examination and the other part called the competitive examination. 66 2/3% of the said promotional posts were to be filled up from among persons who qualify in the qualifying examination and the remaining 33 1/3% to be filled up from those who qualify not only in the qualifying examination but also in the competitive examination. Only those who qualify in the qualifying examination can appear in the competitive examination.

b) They have further submitted that the various observations of the Tribunal are with respect to the seniority of those who have already qualified in the departmental qualifying examination. It is only the seniority of those who

passed the departmental qualifying examination prior to 1991 has been referred to and discussed in Annexure A-18 order. Annexure A-18 order does not say about the determination of inter-se seniority between those who promoted under the qualifying examination quota and those who promoted under the competitive examination quota. At any rate, the applicants cannot have any right of seniority over those persons who were selected against the said competitive examination quota. As the applicants have not satisfied the eligibility conditions as laid down in the said notification, their candidature were rejected vide Annexures A-21 and A-22. Annexures A-21 and A-22 were in fact issued in the year 1999 prior to the supplementary qualifying cum competitive examination held in pursuance to the order of this Tribunal in OA 91 of 1999 and the interim order of the Hon'ble High Court. The seniority of the applicants cannot be modified at par with the seniority of 147 officers as the applicants have been promoted under the promotion quota against the relevant vacancy years up to 1993-94. Further A-24, A-25 and A-26 objections generally are against assigning of seniority to their respective juniors and not on any legal aspects. Annexure A-27 is perfectly in order and



in accordance with law.

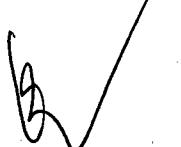
8. In their reply the party respondents had contended as under:-

a) The Original Application is not maintainable in so far as all the persons likely to be affected have not been impleaded in the party array. The observations of the Tribunal extracted in paragraph 12 had lost its value in the light of the decision of the Hon'ble Supreme Court reported in Union of India Vs. Madras Telephone SC & ST Social Welfare Association [(2000) 9 SCC 71]. The applicants cannot have any right of seniority over these respondents who were selected against the competitive examination quota based on the observation aforementioned. The contention of the applicants that the Annexure A-18 has been confirmed by Annexure A-19 judgment of the Hon'ble High Court of Kerala is incorrect. The applicants have no case that they were denied consideration for participation in the examination conducted as per the directions in OA No. 91 of 1999, read with the interim directions in OP No. 21656 of 2001 and that after the decision in OA 91 of 1999 they had applied for the supplementary examination conducted or that their cases accordingly were rejected. Annexure A-19

judgment which is binding upon the official respondents has not been challenged by the applicants nor have the applicants sought review of the relevant directions in Annexure A-19 based on which Annexure A-23 was issued. Annexures A-24, A-25 and A-26 objections are against assigning of seniority to their respective juniors and not on any legal aspects. Annexure A-32 is perfectly in order and the same is based on Annexure A-27. There is no illegality in Annexure A-32.

9. Applicants have filed rejoinder to the reply filed by respondents 4 and 5 wherein they had reiterated that they were prohibited from participating in the competitive examination as they already stood promoted. They have also relied upon a decision by Madras High Court on the subject matter, vide Annexure A33.

10. Counsel for the applicant argued that the preliminary objection by the private respondents and the BSNL as to non-joinder of parties has no substance as some private parties have been arrayed as respondents and the issue is based on legal aspect inasmuch as when the applicants stood promoted much earlier than the competitive examination qualified candidates, notwithstanding the fact that such competitive exam might

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have been conducted against any of the vacancies of the previous years, the subsequently promoted individuals cannot steal a march over the applicants. In addition, the fact of the applicants not having been permitted to participate in the competitive examination cannot be lost sight of. The clear observation in Annexure A-18 about the seniority of those who qualified in the earlier years examination to be kept in tact gives clear security to the seniority of the applicants and the same cannot be stultified.

11. Counsel for the official respondents as well as that of the private respondents had taken us through their respective reply and reiterated the contents of the same. Counsel for the party respondents has relied upon the following decisions of the Apex Court:-

- (a) 2000 SCC (L & S) 835
- (b) 2006 SCC (L & S) 1523

12. Arguments were heard and documents perused.

13. First as to the technical objection. The applicants have challenged the proposed seniority list and at least two individuals have been impleaded. The objection by the official as well as party respondents is that the OA is bad due to non-joinder of parties. The



applicants have no claim against any particular individual. The challenge is only as to the method adopted by the respondents in fixation of seniority. As such, the question is whether the applicant has to implead all the individuals whose seniority has been fixed above them. Such an issue arose in the case of A. Janardhana v. Union of India, (1983) 3 SCC 601, wherein the Apex Court has held as under:-

36. *It was contended that those members who have scored a mark over the appellant in 1974 seniority list having not been impleaded as respondents, no relief can be given to the appellant. In the writ petition filed in the High Court, there were in all 418 respondents. Amongst them, first two were Union of India and Engineer-in-Chief, Army Headquarters, and the rest presumably must be those shown senior to the appellant. By an order made by the High Court, the names of Respondents 3 to 418 were deleted since notices could not be served on them on account of the difficulty in ascertaining their present addresses on their transfers subsequent to the filing of these petitions. However, it clearly appears that some direct recruits led by Mr Chikkara appeared through counsel Shri Murlidhar Rao and had made the submissions on behalf of the direct recruits. Further an application was made to this court by nine direct recruits led by Shri T. Sudhakar for being impleaded as parties, which application was granted and Mr P.R. Mridul, learned Senior Counsel appeared for them. Therefore, the case of direct recruits has not gone unrepresented and the contention can be negatived on this short ground. However, there is a more cogent reason why we would not countenance this contention. In this case, appellant does not claim seniority over any particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing up the impugned seniority list are invalid and illegal and the relief is claimed against the Union*

Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents. We may in this connection refer to G.M., South Central Railway, Secunderabad v. A.V.R. Siddhanti⁷. Repelling a contention on behalf of the appellant that the writ petitioners did not implead about 120 employees who were likely to be affected by the decision in the case, this court observed that [SCC para 15, p. 341 : SCC (L&S) p. 296] the respondents (original petitioners) are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of government servants is assailed. In such proceedings, the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the court. Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even if technically the direct recruits were not before the court, the petition is not likely to fail on that ground. The contention of the respondents for this additional reason must also be negated.

14. The above dictum of the Apex Court applies in all the four to the facts of the present case and thus, the technical objection as to non-joinder of parties is overruled.

15. Before going into the merit of the case, it is appropriate to refer to the mandate as directed by the High Court: Vide para 6 of the

Annexure A-19 judgment of the High Court, it has been held as under:-

6. Even during the pendency of these two Original petitions, this court passed an interim order on 21.8.01 directing the writ petitioners to conduct the examination as directed in the impugned orders. The said examination had already been conducted in November, 2003. Later by yet another order dated 11.2.2005, this court directed to effect promotions of the candidates who had come successful in the examination depending upon the vacancies. Pursuant to this Ext. R3 order dated 22.3.2005 had been passed stating that certain incumbents named therein were entitled for promotion. Accordingly, they were promoted but no seniority has been assigned. None has so far challenged this. It is not pointed out to us. Now the administration is taking a stand that they had been absorbed with effect from 1.10.2000 and will be given seniority only from the date of absorption or only from the date of taking charge. This contention cannot any more be countenanced in the light of the order of the Supreme Court and the order in OA No. 1497/96 and connected cases, because the direction therein was to fill up the vacancies that had arisen before 22.7.1996 based on Annexure-A1. Necessarily, assignment of vacancies based on the examination now conducted shall be to those arisen before 22.7.1996, placing the incumbents concerned over those who had been promoted to the vacancies occurred later than 22.7.1996. Merely because such placing would affect others in the matter of seniority, the petitioners cannot avoid its implementation. They have to give sufficient notice by publication in the news papers inviting the objections if any from the concerned incumbents and shall have to give effect to the order of the Supreme Court and as well as the earlier order of the Supreme Court and as well as the earlier order of the tribunal in OA No. 1497/96 giving proper ranking to the incumbents promoted as per Ext. R3(d) in OP No. 37134/01 assigning them proper vacancies that had occurred before 22.7.1996. In this regard, we make a time bound direction that, assigning of vacancies shall be done within 2 months from the date of receipt of the copy of this judgment and the publication there of shall be effected inviting objections in news papers having vide circulation within two weeks, giving three weeks to file objections. The final order of assignment vacancies shall be given to the incumbents

promoted as per Ext. R3(d) mentioned above, at any rate within 4 months from the date of such publication."

16. The direction as extracted above, "They have to give sufficient notice.... and shall have to give effect to the order of the Supreme Court as well as the earlier order of the Tribunal in O.A. No. 1497/96, giving proper ranking to the incumbents promoted as per Ext. R3(d) in O.P. No. 37134 assigning them proper vacancies that had occurred before 22-07-1996." has to be duly implemented.

17. The order of the Supreme Court referred to in the High Court Judgment is the one passed on 26-10-1996 in SLP(C) No. 26071/96 referred to in para 14 of the order dated 1st May 1998 in OA No. 1497/96. Though the said full text of the order of the Supreme Court is not available in the pleadings in the instant case, para 14 of the order in OA 1497/96 goes to state, *"The present stand taken by the Department in these O.As is that in view of the above position and in compliance with the order of the Hon'ble Supreme Court in SLP(C) No. 26071/96 dated 26-10-96 available in Annexure A-7 in O.A. 1497/96, where the Hon'ble Supreme Court disposed of the said appeal quoting the submission made by the department that they would fill up the vacancies existing up to the date of the notification of 1996 Recruitment Rules only in terms of the*



provisions of the earlier Recruitment Rules, there is no need to hold the Qualifying Examination from 1992 onwards."

18. And, the order in OA 1497/96 vide para 23 thereof reads as under:-

"We are, therefore, constrained to strike a balance between the technical requirement of the pre-1996 Recruitment Rules and what is feasible administratively for achievement of the limited and residual objectives of those Rules in these circumstances. In our considered view, such a balance can be achieved if for the entire period between 1992 and 1996, the Combined Departmental Examination is held for enabling the SC/ST quota in the TES Group B cadre and the 1/3rd quota in that cadre earmarked for the competitive officers to be filled, before further regular promotions are thereafter effected in terms of the amended Recruitment Rules for the TES Group B brought into effect from 22-7-1996 without the requirement of any such examination, except for the Competitive quota.

24 In other words, only one combined Departmental Examination need be held for the year 1992 to 1996, following the spirit of the order of the Gleason's Supreme Court in SLP(C) No. 26071/96 dated 25-10-96 which has become final and considering the fact that the Department cannot legally be permitted to contravene the statutorily prescribed Recruitment Rules of 1981, 1986 and 1987, which incorporated the requirement of holding this combined Departmental Examination, while, at the same time, recognizing the fact that the JTOs already qualified are to be treated, in any case as senior to those who will now qualify, merely at the Qualifying part of the combined Departmental Examination. We, therefore, answer the first issue directing that the Department must hold one Combined Departmental Examination comprising both the Qualifying and Competitive Examination for the years from 1992 onwards upto 1996 for the vacancies existing upto

(A)

22.7.1996 within six months from the date of receipt of a copy of this order. "

Recruitment Rules provide for filling up of the post of Assistant Engineers by promotion by the following mode:-

66-2/3 per cent of the promotion quota:

By selection on the basis of Departmental Qualifying Examination conducted in accordance with provisions laid down in Appendix I, Appendix II and Appendix III to these rules.

33-1/3 per cent of the promotion quota:

By selection on the basis of Limited Departmental Competitive Examination conducted in accordance with provisions laid down in Appendix I, Appendix II and Appendix III to these rules.

(Later on the above ratio had been varied, with which we are not concerned in this O.A.)

19. For becoming eligible to appear in the Limited Competitive Examination, one has to clear the qualifying examination as well.

20. The applicants had cleared the said qualifying examination in 1984, 1985, 1994 as the case may be. They were all promoted under the seniority quota in 1994 or earlier.

21. When the department decided to hold the competitive

examination in 2000 and the applicants desired to participate in the examination, they were informed that since they are already in the promotional post, they would not be permitted to sit in the competitive examination. When the 2000 examination was followed by the supplemental examination in 2002, certain other individuals were denied the opportunity to sit for the examination on the ground that they had already been promoted. Annexure A-20 refers. The same ratio is to be applied to the applicants also, notwithstanding the fact that they would not have specifically applied to sit for the examination. As stated earlier, in the 2000 examination, some of them were held as ineligible vide Annexure A-21 (Serial No. 8).

22. When the competitive examination took place, the same was for a number of years together and as many as 147 individuals were successful. Of them some would have cleared the qualifying examination along with some of the applicants or and some later. Nevertheless, their promotion in the wake of their success in the competitive examination has been much after the promotion of the applicants. This is the admitted fact.

23. Coming to the issue relating to seniority, evidently, the

respondents tried to accommodate on the basis of merit in the slots of 1/3rd quota for the previous years. Thus, a 1980 recruitee, having passed the qualifying exam in 1988, on passing in the competitive examination seems to have been afforded seniority far ahead of the applicants who stood promoted much earlier. The legal validity of the same is in question in this O.A.

24. Such a situation arose in the case of *R.P.F. Commr. v. G. Latchumi*, 1999 SCC (L&S) 1070 and the Apex Court has held as under:-

1. The short question involved in these appeals relates to the date with effect from which the seniority of Respondents 1 to 3 in the post of Head Clerk is to be reckoned.
2. There are two methods of promoting Clerks to the post of Head Clerk. 75 per cent are promoted by selection and 25 per cent are promoted on the basis of a departmental examination. In the instant case, the examination for clearing the backlog of the vacancies for Scheduled Castes and Scheduled Tribes was specially held and results were declared and Respondents 1 to 3 were appointed in the year 1991. The Tribunal, on an OA being filed by the said respondents, had directed that these respondents will reckon their seniority with effect from 3-4-1990 on a notional basis and would be entitled to all consequential benefits legally eligible to them.
3. It appears that prior to the holding of the present examination limited to Scheduled Caste and Scheduled Tribe candidates, the Department had issued circulars dated 26-7-1989, 8-8-1989, 31-10-1989, 3-4-1990, 1-11-1990 and 27-2-1991. Pursuant to the circulars earlier than 3-4-1990, the Scheduled Castes and Scheduled Tribes were not

selected and that is what necessitated the holding of a special limited departmental examination for them pursuant to the said circular of 3-4-1990. It appears to us to be only proper that their seniority must be reckoned in the higher post of Head Clerk with effect from the date when they are promoted to the said post after being successful in the limited departmental examination and that they be given promotion from the retrospective date cannot arise.

4. For the aforesaid reasons, the appeals are allowed and the order of the Tribunal is set aside.

25. Though both the two-third quota by way of seniority and one-third quota by way of competitive examination fall under 'promotion' while considering fixation of seniority, the two are comparable to promotion and direct recruitment quota. In that event, *inter se* seniority would be only on the basis of actual promotion/recruitment as held in the case of *Suraj Parkash Gupta v. State of J&K*, (2000) 7 SCC 561, wherein the Apex Court has held as under:-

"Point 4

Direct recruits cannot claim appointment from date of vacancy in quota before their selection

80. We have next to refer to one other contention raised by the respondent direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment



quota.

81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In N.K. Chauhan v. State of Gujarat Krishna Iyer, J. stated:

Later direct recruits cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.

Again, in A. Janardhana v. Union of India it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in A.N. Pathak v. Secy. to the Govt. that slots cannot be kept reserved for direct recruits for retrospective appointments.

26. This was affirmed in a later case of Subba Reddy vs A.P.SRTC (2004) 6 SCC wherein the observation of the Apex Court reads as under:-

32. It is trite that a direct recruit is considered to be borne in the cadre from the date of his recruitment. This aspect of the matter has been considered by a Division Bench of this Court in Suraj Parkash Gupta v. State of J&K wherein almost all the decisions operating in the field including State of W.B. v. Aghore Nath Dey and N.K. Chauhan v. State of Gujarat were noticed.

27. Again, in Arvinder Singh Bains v. State of Punjab, (2006) 6 SCC 673, it has been held as under:-

(1) Ajit Kumar Rath v. State of Orissa, SCC at paras 13 and 14 (2 Judges):

✓

"13. It was also contended on behalf of the respondents before the Tribunal, and is also reiterated here, that the respondents are entitled to reckon their seniority from 1970 and 1971 as they were appointed against the vacancies of those years. It is pointed out that the advertisement in 1970-71 for direct recruitment on the posts of Assistant Engineer was issued by the Public Service Commission on 6-12-1971 and the result was thereafter published which indicated that all the respondents had been selected. They were also directed to appear before the Medical Board. The order of appointment was, however, passed on 3-1-1972. The respondents, therefore, claim seniority with effect from 1970 and 1971 on the ground that they were appointed against the vacancies of 1970 and 1971. They claim that their seniority may be antedated.

14. This plea is wholly unfounded and is liable to be rejected as without substance and merit. The law on this question has already been explained by this Court in Jagdish Ch. Patnaik v. State of Orissa and it was categorically held that the appointment does not relate back to the date of vacancy."

(2) Suraj Parkash Gupta v. State of J&K, (2 Judges):
"Point 4

Direct recruits cannot claim appointment from date of vacancy in quota before their selection"

(emphasis in original)

28. In M. Subba Reddy vs APSRTC (2004) 6 SCC 729, the decision in Suraj Parkash Gupta was not endorsed by the majority, while the dissenting judge had relied upon the same. While referring to the said case in AFHQ/ISOs SOs (DP) Assn. v. Union of India, (2008) 3 SCC 331, the Apex Court through a three judges Bench has held as under:-

43. The contention of the appellants before this Court was that they had a right to be promoted within their quota during the years 1981 to 1987, when vacancies for promotees' quota became available. M. Subba Reddy, the

appellant in that case, was regularized from 27-12-1986 vide order dated 9-9-1988, when no direct recruits were available and, therefore, it was improper for the Corporation to place direct recruits above the promotees. The appellant submitted that in such a case the quota in Item 3(1) of Annexure 'A' to the Recruitment Rules would not apply; that the said item prescribed only quota and not rota for seniority and that the direct recruits could not claim appointment from the date of vacancy in their quota before their selection.

44. They added that seniority was dealt with only by Regulation 3 of the Service Regulations, 1964 and not by Regulation 34 of the Recruitment Regulations, 1966. That in view of the 15-9-1995 amendment, Regulation 34 referred to only allocation of vacancy and not for determination of seniority. A total ban on direct recruitment was imposed by the State from the year 1977 to 1988 and, thus, the purported quota-and-rota rule contained in Item 3 of Annexure 'A' could not have been given effect to.

45. The majority view of this Court was that where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down. We, with respect, do not support the view of the learned Judges that in the facts and circumstances of the case the quota has not broken down because of inaction on the part of the Government in imposing ban in filling up the posts meant for direct recruits. The appellants in the said case were promoted in a regular manner having been regularized in service with retrospective effect. Their services were not regularized from the date of their initial ad hoc promotion but with effect from the date when the vacancies became available. Their services after regularization would not be by way of a stopgap arrangement. The direct recruits who were appointed in the years 1990 and 1991, in terms of Item 3 of Annexure 'A' would be considered to have been appointed only after their successful completion of training. They were borne in the cadre in the years 1990-1991 and, thus, prior thereto they cannot claim seniority. The learned third Judge, dissenting



with the learned two Judges, has held that the direct recruit can claim seniority from the date of his regular appointment, but he cannot claim seniority from a date when he was not borne in the service. Thus, the direct recruits of 1990 and 1991, by reason of the impugned seniority list, could not have been placed over and above the appellant promotees because the purported quota-and-rota rule contained in Item 3 of Annexure 'A' could not have been given effect to because the State Government had imposed total ban on direct recruitment from the years 1977 to 1988. In such a situation, the said quota rule became inoperative. We agree with the dissenting view of the learned Judge that in the facts of the case, the quota rule became inoperative because the direct recruits were borne in the cadre when they were appointed against the vacancies meant for them. Therefore, the majority view in M. Subba Reddy⁶ is of no assistance to the AFHQ Civil Service (Direct Recruits) Officers' Association as the relative seniority between the direct recruits and regularly appointed/promoted candidates within their respective quota, in the present case, shall be determined by the length of the continuous officiation in the grade of ACSOs from their respective appointment to the substantive vacancies in terms of Schedule III within their quota as held by CAT in M.G. Bansal case, which has attained finality after dismissal of SLPs filed against the said order of the Tribunal.

29. Reference to the decision of Suraj Parkash Gupta has also been made in extenso in a very recent case of State of J&K v. Javed Iqbal Balwan, (2009) 4 SCC 529.

30. Though the private respondents relied upon the decision of the Apex Court in the case of Union of India v. Madras Telephone SC & ST Social Welfare Assn. , (2000) 9 SCC 71, the same relating to relative

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supremacy of statutory rules over executive instructions and the Rules thereof being of 1966, whereas the rules applicable to the facts of this case are of 1981 as amended, the said decision does not come to the rescue of the private respondents. In any event, the latest decision of the Apex Court by a larger bench has been taken support of. It is also pertinent to mention here that the applicants were promoted as early as in late eighties or early nineties. To change their seniority to their detriment at this juncture would mean unsettling the settled affair. The 147 candidates whose seniority has been reflected in the impugned order qualified in the competitive examination in 2002 in which event, the settled seniority of the applicant who stood promoted long back cannot be unsettled. Perhaps it is for this reason that the Tribunal in its order in OA No. 1497/96 administered a caution that those who stood passed in the qualifying examination prior in point of time would all be senior to those who qualify subsequently.

31. In view of the above, the O.A. is allowed. The impugned seniority at Annexure A-7 and the Annexure A-32 promotion order issued based on the Annexure A-7 seniority are hereby quashed and set aside. Respondents are directed not to disturb the seniority of the applicants and similarly situated individuals by interpolating the seniority



of the combined competitive exam qualified individuals (147), whose seniority has to be below that of those who had passed in the qualifying examination prior to 1996. Seniority list should therefore be recast accordingly. Further promotion to the post of Executives {TES Group B (Telecom)} should be on the basis of the recast seniority. No cost.

(Dated this the 5th February 2010)


K. NOORJEHAN
ADMINISTRATIVE MEMBER


Dr. K.B.S. RAJAN
JUDICIAL MEMBER

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