

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM

O. A. No. 117
~~XXXXXX~~

1990

DATE OF DECISION 31.12.1990

N.B. Radhakrishnan Nair & Applicant (s)
12 others

M/s K Balakrishnan & Advocate for the Applicant (s)
PK Ravikrishnan
Versus

The Chief Engineer, Respondent (s)
Military Engineering Service,
South West Zone, Naval Base, Cochin-4 & 4 others
Mr. AA Abul Hassan, ACGSC Advocate for the Respondent (s)
(for R.1 to 3)
CORAM: M/s. DV Radhakrishnan &
K Radhamani Amma (for R.4&5)

The Hon'ble Mr. S.P. Mukerji - Vice Chairman

and

The Hon'ble Mr. A.V. Haridasan - Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? NO
2. To be referred to the Reporter or not? NO
3. Whether their Lordships wish to see the fair copy of the Judgement? NO
4. To be circulated to all Benches of the Tribunal? NO

JUDGEMENT

(Mr. A.V. Haridasan, Judicial Member)

The short question for a determination in this application filed under Section 19 of the Administrative Tribunals Act is, whether a senior who has not acquired the eligibility criterion for promotion to the higher post can successfully challenge the promotion of his junior, who has acquired the qualification required by the Recruitment Rules. The facts of the case averred in the application relevant for the disposal of this application can be stated as follows:

2. The applicants are working as Refrigeration Mechanics/Refrigeration Mechanics Highly Skilled II under the

third respondent. Applicants 1 to 4 were appointed to the post on 20.6.1977, 1.11.1978, 6.12.1978 and 13.11.1976 respectively and other applicants were all appointed on 10.6.1980. Respondents 4 and 5 who were working as Refrigeration Mechanics in other units ~~xxx~~ were transferred to Cochin on their application on compassionate ground. Therefore, as per the order No.85362/Org. 4(Civ) (a) dated 27th August, 1976, they are not entitled to count their previous service for promotion in the new units or establishments. Without adhering to the strict principles of the seniority, promotions were made to the posts of Refrigeration Mechanics Highly Skilled Grade-II. Respondents 4 and 5 were directly promoted as Refrigeration Mechanics Highly Skilled Grade-I. As per the settlement between the unions and Government, the Government agreed to upgrade 20 % of the posts of Refrigeration Mechanics as Refrigeration Mechanic Highly Skilled Grade-II. It was further agreed to grant one time exemption from passing trade test and to promote the workmen to the said post on the basis of their seniority with effect from 15.10.1984. It was further agreed that the Refrigeration Mechanic Highly Skilled Grade II would be further promoted as Refrigeration Mechanic Highly Skilled Grade I on completion of one year service in the Grade of Refrigeration Mechanic Highly Skilled Grade II, provided they pass trade test within two chances by June, 1986. In implementation of the above said agreement, respondents

4 and 5 and others were promoted. As the seniority principles were violated, the applicants made representations, but without any effect. Therefore, the applicants filed OA 174/87 which was allowed and the respondents 1 to 3 were directed to revise the seniority list. Pursuant to this judgement, the seniority list of Refrigeration Mechanics Highly Skilled Grade II ~~were~~ ^{was} revised. The respondents 4 and 5 ranked 60 and 62 respectively in that list, while the applicants were all above them. Though the respondents 4 and 5 are far junior to the applicants in the seniority list of Refrigeration Mechanics Highly Skilled II, they were not reverted, but were retained in the post Refrigeration Mechanics Highly Skilled Grade I. The applicants issued a lawyer notice pointing out the illegality in retaining respondents 4 and 5. The second respondent issued a reply dated 21.6.1989, (Annexure-14 impugned order) justifying the retention of respondents 4 and 5 in the posts of Refrigeration Mechanics Highly Skilled Grade I on the ground that the respondents 4 and 5 alone were qualified for promotion, while the applicants were not so qualified, and that their promotion was on the basis of the recommendation of a Regular Departmental Promotion Committee. ~~Though~~ ^{The} 2nd applicant filed a Contempt Petition (Civil) No.18/1989 for taking action against respondents 1 to 3 alleging that the retention of respondents 4 and 5 in the posts of Refrigeration Mechanics Highly Skilled Grade I while they

amounted to contempt of Court in view of the DA 174/87 were junior to the applicants. But the Contempt Petition

was closed giving liberty to the applicants to move against the retention of the respondents 4 and 5 in accordance with

law. It is in this background that the applicants have filed this application. It has been averred that, though according to the Recruitment Rules, 1971, Annexure-15,

passing of a trade test is an essential qualification

for promotion to the post of Charge Mechanic ^{Mechanic Highly Skilled Gde. I} / (Refrigeration),

Since no test was conducted after 1979 in Cochin unit,

the applicants could not be faulted for not acquiring

this qualification and ^{that} / as they are senior to the respon-

dents 4 and 5, the respondents 4 and 5 should not have

been promoted without giving a chance to the applicants.

to pass the trade test and to acquire the eligibility

qualification. Therefore, the applicants pray that the

decision communicated to the applicants in Annexure-14

letter may be quashed, that the promotions of respondents

4 and 5 to the post of Refrigeration Mechanics Highly

Skilled Grade I may be declared invalid and the respon-

dents may be directed by a writ of mandamus or any other

appropriate direction or order to promote the applicants

as Refrigeration Mechanics Highly Skilled Grade-I (Charge

Mechanic) after affording them an opportunity to pass the

trade test.

3. In the reply statement filed by the second respondent,

the promotion of the respondents 4 and 5 as Refrigeration

Mechanics Highly Skilled Gde. I is sought to be justified

on the ground that they have passed the trade test and served in the grade of Refrigeration Mechanic Highly Skilled Grade II for ~~the~~ sufficient length of time and have therefore satisfied the eligibility criterion as per the Recruitment Rules for promotion to the posts of Refrigeration Mechanics Highly Skilled Grade I (Charge Mechanic) while the applicants though senior to the respondents 4 and 5 in the seniority list of Refrigeration Mechanics Highly Skilled Grade II did not come within the zone of consideration since they have not passed the trade test. It has further been averred that the trade test was not held since 1979 in Cochin unit in which R.4 and 5 were posted as there was no vacancy and as the vacancies ~~arose~~ ^{of} all ~~on~~ a sudden by reason of restructuring, the respondents 1 to 3 could not keep the post in abeyance till the applicants could acquire the test qualification. The respondents 4 and 5 also in the reply statement have contended that, though they were junior to the applicants in the seniority list of Refrigeration Mechanics Highly Skilled Grade II, as the applicants were not qualified to be considered for promotion to the post of Refrigeration Mechanic Highly Skilled Grade-I (Charge Mechanic), the promotion of the respondents 4 and 5 who were test qualified cannot be challenged by the applicants. It has been contended that, when the Recruitment Rules prescribe a qualification, a person who has not acquired that qualification ^{however} ~~however~~ senior in the feeder category, can have no claim to be included

in the zone of consideration. The respondents thus contended² that the promotion of the respondents 4 and 5 is in order and according to rules.

4. We have heard the arguments of the learned counsel on either side and have also perused the documents produced.

5. ² That the respondents 4 and 5 ranked junior to all the applicants in the seniority list of Refrigeration Mechanics Highly Skilled Grade II of Cochin Unit is a fact beyond dispute. That before getting a transfer to Cochin Unit the respondents 4 and 5 had passed the trade test required for promotion to the post of Refrigeration Mechanics Highly Skilled Grade I (Charge Mechanic) is also a fact not disputed. Annexure-15 is an extract from the S.R.O. 211, Ministry of Defence, Air Headquarters (Class III Non-Gazetted, Non-Ministerial Posts) Recruitment Rules, 1971 framed in exercise of powers conferred by proviso to Article 309 of the Constitution. The post of Charge Mechanic (Refrigerator) is classified as non-selection post and in column. 10 under the caption "in case of recruitment by promotion/transfer grades from which promotion to be made" it is stated as follows:

"Promotion: Refrigeration Mechanic who has minimum service of 3 years in the grade and has passed recruitment trade test for the post as prescribed by the Engineer-in-Chief."

So according to the Recruitment Rules, passing the departmental trade test is an essential qualification

for promotion to the post of Charge Mechanic which is designated as Refrigeration Mechanics Highly Skilled Grade I. It was agreed between the Union of industrial workers and Government that 20% of the posts of the Refrigeration Mechanics would be upgraded as Highly Skilled Grade II and that Refrigeration Mechanics Highly Skilled Grade II would be further promoted as Refrigeration Mechanics Highly Skilled Grade I on completion of one year service provided they pass the trade test within 2 chances by June, 1986. On the date when the respondents 4 and 5 were promoted as Refrigeration Mechanics Highly Skilled Grade I both of them had admittedly acquired both these eligibility criteria, though they were junior to the applicants in the cadre of Refrigeration Mechanics Highly Skilled Grade II whereas the applicants had not passed the departmental trade test. The respondents 4 and 5 had before their transfer on request to Cochin Unit passed the departmental trade test whereas the applicants have not so passed. Since the respondents 4 and 5 have acquired both the qualification prescribed under the Recruitment Rules they were promoted as Refrigeration Mechanics Highly Skilled Grade I. The grievance of the applicants is that trade tests were not held since 1979, therefore, they could not acquire the qualification, and that for that reason they cannot be overlooked in the matter of promotion because unless trade test were held in time

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there was no means by which they ^{could} ~~pass~~ the trade test.

So according to the applicants the promotion of the respondents 4 and 5 overlooking their seniority is violative of article 14 and 16 of the Constitution of India.

In this context reference was made to the decision of the Supreme Court in State of Maharashtra Vs. Jagannath Achyut Karandikar, 1989-Supp.(1) Supreme Court Cases 393, wherein it was observed as follows:

"If the examination is not held in any year, the person who has not exhausted all the permissible chances has a right to have his case considered for promotion even if he has completed nine years' service. The government instead of promoting such persons in their turn made them to wait till they passed the examination. They are the persons falling into the category of "Late Passing". To remove the hardship caused to them the government wisely restored their legitimate seniority in the promotional cadre. There is, in our opinion nothing improper or illegal in this action and indeed, it is in harmony with the object of the 1962 Rules."

In that case the State Government had prescribed ^{a pass in the} ~~prescribed~~ departmental examination as a condition precedent for promotion to the cadre of Superintendent. Examinations were required to be conducted every year and the officials had to pass ^{the exam} ~~pass~~ within the stipulated period. Those who could not pass within the time frame ^{would lose} ~~lose~~ their seniority, but, they would be promoted as and when they qualify themselves. For some reason the Government failed to hold examinations every year. In the year 1968, 1969 and 1970 the Government did not hold the examination. The Govt. did not pass any order

extending the period prescribed for passing the examination. The juniors who qualified themselves were promoted overlooking the case of the seniors and seniors were only promoted upon their passing the examination. But the Govt. revised the seniority list of Superintendents so as to reflect the rankings in the lower cadre irrespective of the date of promotion. It was the validity of the revision of seniority ^{that} was challenged before the High Court. The High Court held that the revision of seniority was not proper. It was in that context that the Hon'ble Supreme Court held that the High Court was wrong and that the seniors whose seniority was upset for reason beyond their control were entitled to revision of seniority as the rules provided for relaxation of the time limit within which the department test qualification should be acquired. But in this case we are not concerned with the revision of any seniority in the promoted category. The only question which we are concerned with in this application is whether the promotion of the respondents 4 and 5 who had acquired the eligibility criterion for promotion overlooking the seniority of the applicants who had not acquired the qualification is justified or not. So the facts and circumstances being entirely different from the decision cited has no relevance to this case.

6. In R.Prabha Devi and others Vs. Govt. of India, through Secretary, Ministry of Personnel and Training, Administrative Reforms and others, 1988(7) ATC-63, the Hon'ble Supreme Court has observed as follows:

"The prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-

making authority. This eligibility condition has to be fulfilled by the Section Officers including senior direct recruits in order to be eligible for being considered for promotion. When qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment. Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfils the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor it can override it in the matter of promotion to the next higher post. The rule in question which prescribes an uniform period of qualified service cannot be said to be arbitrary or unjust violative of Article 14 or 16 of the Constitution."

Though the applicants are senior to the respondents 4 and 5, since they have not acquired the qualification prescribed under the Recruitment Rules for promotion to the grade of Refrigeration Mechanic Highly Skilled grade I, they are not eligible for promotion to that grade and therefore, they cannot question the promotion of the respondents who have acquired the eligibility qualifications. As observed by the Hon'ble Supreme Court in the decision "Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility". The right to be considered for promotion accrues to a person who has acquired the eligibility for such consideration, on the date of

occurrence of vacancy. In this case when vacancy occurred in the post of Refrigeration Mechanic Highly Skilled Grade I as a result of the restructuring of the cadre, respondents 4 and 5 who had passed the trade test, and had the requisite length of service in the grade of Refrigeration Mechanic Highly Skilled grade II acquired a right to be considered for promotion, where as to the applicants who had not passed the trade test no such right accrued.

7. The learned counsel for the applicants vehemently argued that as the respondents 4 and 5 have passed the trade test before they were transferred on their request to Cochin unit accepting bottom seniority, the service rendered by them in their prior units and the test qualification acquired during the period of that service cannot be considered and counted for promotion. We cannot agree with this argument. When the Recruitment Rules for promotion to the next higher grade provide that one should have put in minimum period of service and passed a test, this qualification once acquired would not be lost just because the incumbent by reason of a transfer on request happened to be placed below an official who has not passed the trade test or rendered the minimum service prescribed by the Recruitment Rules. In such cases, seniority in the grade and length of service in the particular grade may not be identical. A similar argument was turned down by the Madras Bench of the

Tribunal in TA 770/86. Referring to the argument, that by reason of a transfer, on acceptance of bottom seniority, the service rendered in the prior unit cannot be considered for any purpose, the Bench observed as follows:

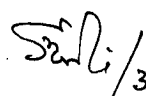
"We are not persuaded to agree with the counsel. Evidently, the argument is fallacious as it proceeds on the mistaken premise that service in a particular grade is to be equated with seniority in that grade for all purposes. The period of actual service in a grade is one thing, while fixation of rank in the seniority list is something different."

We are in respectful agreement with this observation of the Bench. Therefore, as the applicants have not acquired the necessary qualification to claim eligibility for consideration to the grade of Refrigeration Mechanics Highly Skilled Grade I while the respondents 4 and 5 had satisfied the eligibility criterion, we are of the view that the promotion of respondents 4 and 5 did not give rise to any legitimate grievance to the applicants.

8. In the conspectus of facts and circumstances, finding no merit in the application, we dismiss the same without any order as to costs. This will be however without prejudice to the claims of the applicants to legitimate seniority in the grade of H.S. I as and when they enter that grade after satisfying the eligibility criteria.


(A.V. HARIDASAN)
JUDICIAL MEMBER

31/12/90


(S.P. MUKERJI)
VICE CHAIRMAN

31.12.1990