

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 2/91
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DATE OF DECISION 25.6.92

Shri K. Gopalakrishna Pillai Applicant (s)
and 2 others.

Shri P. Sivan Pillai Advocate for the Applicant (s)

Versus
Union of India, G.M. S.Railway Respondent (s)
and 3 others

Smt. Sumathi Dandapani Advocate for the Respondent (s) 1 to 3.
CORAM: M/s M Ramachandran & P Ramakrishnan " " 4.

The Hon'ble Mr. N.V. Krishnan - Vice Chairman

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

1. Whether Reporters of local papers may be allowed to see the Judgement? *yes*
2. To be referred to the Reporter or not?
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

(Hon'ble Shri A.V. Haridasan, Judicial Member)

The applicants, three in number, who are presently working as Dy Station Superintendents in the scale of pay of Rs.1600-2660/- in the Trivandrum Division are aggrieved by the order dated 29.10.90 of the 2nd respondent by which their present seniority position is ordered to be revised to their detriment. The material averments in the application can be briefly stated as follows.

2. The applicants were initially appointed as Assistant Station Masters in the scale of pay of Rs.330-560/-. While they were working in the Madurai Division in the area which later

formed part of Trivandrum Division by order dated 17.7.1979 they were promoted to the higher grade in the scale of pay of Rs.425-640/- . The first applicant joined the higher post on 23.7.1979, the second applicant on 10.7.79 and the third on 25.7.1979. As vacancies were not available in the Stations where they were working, they had to join at distant places in the Madurai Division. Though several of the seniors of the applicants in the grade of Rs.330-560/- were promoted earlier than the applicants to the grade of Rs.425-640/- to posts situated at Stations outside the proposed Trivandrum Divisional area, they declined to accept promotion and opted to continue in the grade of Rs.330-560/- hoping to get absorbed in the Trivandrum Division which was later formed carving out portions of Palakkad and Madurai Divisions. As they had declined to accept promotion considering their difficulties in leaving the stations, they were debarred from promotion to the grade of Rs.425-640/- for one year and it was thereafter the applicants were promoted to that grade. Subsequently, the Trivandrum Division was formed carving out portions from Madurai and Palakkad Divisions on 2.10.1979. On the formation of the new Division, the seniority of the officials was determined on the basis of the length of service in the relevant grade duly maintaining their interse position between the employees from the same unit. As the applicants were in the grade of Rs.425-640/-, they were accordingly absorbed in the Trivandrum Division and their seniority position in the grade of Rs.425-640/- in

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the Madurai Division was protected. After the formation of the Trivandrum Division, there came a revision in the distribution of posts in the cadre of SM/ASMs as on the cadre strength on 1.1.1979 and 1.10.1979, i.e. prior to the formation of the Trivandrum Division. As this resulted in additional promotional opportunities in the grade of Rs.425-640/-, the employees who had declined promotions earlier were given another chance to carry out promotions to these vacancies by order dated 19.2.1980 (Annexure A1). Barring one Shri Jayakumar while none carried out the promotion. So, the erstwhile seniors of the applicants in the grade of Rs.330-560/- continued in that grade while the applicants were in the grade of Rs.425-640/-. Thereafter, these employees were promoted to the grade of Rs.425-640/- against the vacancies that occurred in the Trivandrum Division after 2.10.79. On the above basis, the railway authorities published provisional seniority lists and after giving opportunity to all concerned, a final seniority list of the SMs/ASMs as on 1.5.1983 (Annexure A2) was published. The applicants are at sl Nos 111, 110 and 109 respectively in the above seniority list. Thereafter, the applicants were promoted to the grade of Rs.455-700 (1400-2300) and 550-750 (1600-2660). A seniority list of SMs/ASMs in the scale of Rs.1400-2300/- as on 1.4.85 (Annexure A3) was published maintaining the position of seniority of the applicants as in the seniority list at Annexure A2. In these two seniority lists, the erstwhile seniors of the applicants in the scale of Rs.330-560/- prior to the formation of the Trivandrum

Division and those who had declined promotion were shown as juniors to the applicants. The impugned order at Annexure A4 dated 29.10.1990 has now been issued by the 2nd respondent yielding to the pressure of the 4th respondent, which is a recognised union, upsetting the seniority position of the applicants and proposing to give seniority to those who had declined promotions and were debarred from promotions for a year in the year 1979. In terms of rule 309, 306 and 305 of the Indian Railway Establishment Manual, an employee who did not join the promotion post for his own reason and who has declined promotion has to be placed below all the employees who had been promoted before he has joined the promotion post. Actual date of joining the higher post is the date of entry into the grade and that alone should be the criterion for purpose of seniority. The decision of the respondents to revise the seniority list to the detriment of the applicants on the basis of Annexure A4 order is unreasonable and arbitrary and is liable to be quashed. Hence, the applicants have filed this application under Section 19 of the Administrative Tribunals Act praying that the impugned order at Annexure A4 may be quashed.

3. The respondents 1 to 3 have filed a reply statement and an additional reply statement and the 4th respondent has filed a reply statement. The contentions raised by the respondents 1 to 3 are briefly as follows.

4. The applicants were juniors to the persons represented by the 4th respondent's union in the grade of ASM in the scale

of pay of Rs.330-560/- as they were placed at sl Nos.265, 262 and 260 respectively in the seniority list of ASM, RASMs of the Madurai Division published on 1.12.78 (Annexure R1), while Shri K.P. Thomas, Shri D.R. Monis, Shri K. Eswara Iyer and Shri P.C. John who belong to the union represented by the 4th respondent were placed above them. The Railway Board had issued orders for upgradation of the cadre of SMs by upward revision of the percentage of higher grade posts to take effect from 1.1.1979. While implementing the orders of upgradation, those who were promoted against the higher grade posts were entitled to be retained in the same station by operating higher grade posts there itself as per the recommendations contained in the letter of the Railway Board No.PCIII/78/UPG/8 dated 1.1.1979 (Annexure R2). But owing to some administrative lapses immediate follow up action on the basis of the Annexure A1 order was not taken. The upgradation was implemented in Madurai Division only on 11.10.1980. But in the meanwhile, the vacancies which arose in the higher grade from 1.1.1979 to 2.10.1979 in Madurai Division were filled up by promotion. The employees who were thus promoted were transferred to places where higher grade vacancies were available. Those who carried out the transfer on promotion were fixed in the higher grade on various dates and their seniority also was counted accordingly whereas those who did not carry out the transfer, remained in the lower grade only. Even though the seniors of the applicants while they

were in the grade of Rs.330-560/- were promoted to the higher grade, they could not carry out the promotion as they were not relieved due to acute shortage of ASMs in the erstwhile Madurai Division. It was on account of these reasons and not for any fault of theirs that those seniors represented by the 4th respondent and whose names are not mentioned in the O.A. could not carry out the promotion. Had the upgradation orders been implemented in time by the Madurai Division, the question of transfer on promotion of seniors would not have arisen and the discrepancy would not have occurred. Thus, as the applicants happened to be promoted earlier than their seniors only on account of the peculiar circumstance and due to administrative lapses, the administration is justified in issuing the impugned order at Annexure A4 rectifying the error. After formation of the Trivandrum Division a seniority list of ASMs as on 31.12.81 was issued and in that seniority list, the persons represented by the 4th respondent's union had higher ranking than the applicants. The applicants happened to work in the higher grade of Rs.425-640/- earlier than the persons represented by the 4th respondent's union only because the implementation of the Railway Board's order of upgradation was unduly belated. Had the upgradation been implemented in time, those seniors would have been promoted to the grade of Rs.425-640 earlier than the applicants and for this reason, the promotion of the applicants to the grade of Rs.455-700/- with effect from 1.8.83 and Rs.1600-2660/- with effect from 12.2.89 cannot be held legal and valid.

Against the non-implementation of the upgradation with effect from 1.1.1979, there were some representations and the representatives of the organised labour unions took up the matter for discussion in the PNM meeting at the divisional level. But the matter could not be settled on account of the divergent opinions of the rival groups. Ultimately, the labour unions including the 4th respondent brought up the matter for discussion in the PNM meeting with the General Manager and it was as a result of that Southern Railway the Headquarters after going into the matter in depth issued the impugned order at Annexure A4 with the approval of the competent authority. As the Madurai Division did not implement the upgradation in time, some of the employees filed a petition before the Hon'ble High Court of Kerala claiming promotion with effect from 1.1.1979 and this petition was disposed of on the basis of a submission made by the administration that the applicants had been promoted with effect from 1.1.79. Having found that the order passed by the Division was not in order, the promotions of the applicants had necessarily to be revised. Since the issue of seniority has thus become a problem to the Trivandrum Division, a Southern Railway reference was made to the Headquarters for nomination of an officer to have a discussion with the Trivandrum, Madurai and Palakkad Divisions and it was only subsequently that the matter was taken up in the PNM meeting. Therefore, as the impugned order at Annexure A4 was issued only with a view to rectify the mistake, the applicants have no

legitimate grievance. As the persons who would be affected by the decision in this application are not brought on the array of parties, the application is liable to be dismissed.

4. The contentions raised by the 4th respondent in his affidavit are that the persons to be affected by the decision in this application have not been impleaded, that the applicants are working in the present cadre being promoted on account of incorrect position assigned to them in the seniority list, that in view of the correct principles laid down in Annexure A4, they are liable to be reverted and that none of the seniors of the applicants in the cadre of ASMs in the scale of Rs.330-560/- has declined promotions. They could not give effect to the promotion as they were not relieved due to acute shortage of ASMs in the erstwhile Madurai Division. There was no order debarring the seniors of the applicants from promotion. After the upgradation of posts with progressive effect from 1.1.1979, a provisional seniority list of SMs and ASMs in the grade of Rs.425-640 as on 31.12.81 was published by the administration in which the applicants were shown at sl nos.134, 135 and 136 while the persons represented by the 4th respondent's union were placed at sl nos. 121 to 132. The applicants have suppressed this fact in the application. Annexure A2 and A3 seniority lists were issued forgetting the correct seniority position represented in the provisional seniority list as on 31.12.89. The earlier promotion given to the applicants has been set at nought because of the Railway Board's order. As the seniority of the members of

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the 4th respondent's union has been recognised with effect from 1.1.79, the decision taken by the administration to revise the seniority list as reflected in Annexure A4 is proper and valid.

5. The applicants have filed a rejoinder. The following are the material contentions raised in the rejoinder.

6. As the Annexure A4 assailed in the application is an order proposing revision of seniority on a new principle, and as the seniority has not been revised and beneficiaries of such revision have not been identified, it is not necessary that those persons should be impleaded. As the 4th respondent who espoused the cause of these unidentified persons is in the array of parties, there is no merit in the contention that the application is liable to be dismissed for this sole reason. It is absolutely false to say that none of the seniors of the applicants declined promotion. A copy of the order dated 24.7.1979 debarring Shri K.P. Thomas from promotion for one year from 1.2.1979 (the first person represented by the 4th respondent's union) specifically for declining promotion is produced as Annexure A7. The same is the case with all others and records pertaining to this must be available with the administration. The averments in the reply statement of the respondents 1 to 3 that those who were promoted against the higher grade post on upgradation were entitled for retention in the same station by operating the higher grade there itself, is untrue and devoid of bonafides.

The Annexure R2 and R2A were implemented in Madurai Division in respect of the grade Rs.425-640/- as early as on 11.1.1980 and not on 11.10.80 as contended by the respondents. This should be evident from a copy of the order dated 11.1.1980 at Annexure A8. The averments in the reply statement of the respondents 1 to 3 that even though promotion orders were issued, the seniors of the applicants were not relieved due to acute shortage of ASMs in the erstwhile Madurai Division is a blatant lie. The seniority list as on 31.12.81 published on 15/3/82 produced and marked as Exhibit D3 is a provisional seniority list and the same was finalised by Annexure A2. As the provisional seniority list has no existence after the seniority list has been finalised, the contention raised basing on the provisional seniority list is untenable. Though from 1979 to 1983, the members of the 4th respondent's union were working in the lower grade while the applicants were working in the higher grade, they did not raise any grievance or objection. Though they raised objection to the provisional seniority list at Exhibit D3, all the objections were rejected and a final seniority list Annexure A2 was issued. The members of the 4th respondent's union did not challenge the seniority lists at Annexure A2 and A3 in 1983 and 1985 and, therefore, at this distance of time, it is not possible to unsettle the settled seniority list. Though the persons represented by the 4th respondent's union were given another opportunity to carry out the promotion by order dated 19.2.1980 at Annexure A1, they did not carry out the promotion

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and none of them had been fitted against the upgraded post enabling them to get the benefit of upgradation. The persons represented by the 4th respondent's union were not promoted against the upgraded posts on 1.1.79. Even if they were so promoted to the upgraded posts, they should not have been retained in Trivandrum Division in 1979 as there were already excess operation of posts in Trivandrum Division. The contention is untrue. that the issue was taken up at the PNM. The issue raised in 1990 was an ordinary representation.

7. We have heard the arguments of the counsel for the parties and have also gone through the pleadings and documents on record. We shall first consider the contention of the respondents that the application is not maintainable as the persons who are affected by the grant of relief in the application have not been impleaded. The prayer in this application is to quash the order dated 29.10.1990 at Annexure A4, which directs revision of seniority of the applicants vis-a-vis their erstwhile seniors in the grade of Rs.330-560/- disregarding the fact that the applicants were placed above them in the seniority list of SMs/ASMs issued in 1983 and 1985. On the *revision of seniority, which only contains certain guidelines regarding* basis of the Annexure A4 order, a revision in the seniority has not taken place and the persons who would be affected by such revision has not yet been ascertained. In these circumstances, it is impracticable to implead the unascertained persons. The contention of the respondents that the application is bad/non-joinder of parties for non-impleadment of those

would be
who ~~are~~ / affected by grant of relief by the application has
no merit. An almost similar situation was considered by the
Hon'ble Supreme Court in the General Manager, South Central
Railway, Secunderabad and another v. A.V.R. Siddhantti and
others (1974 SCC (L&S) 290) and their Lordships observed as
follows:-

"As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop Departments. The respondents-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 servant 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. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition."

The rationale of the above decision applies to the facts of this case ~~XXXX~~ and, therefore, we ~~reject~~ [✓] the contention
that the application is / for non-joinder of parties.

8. It is not disputed that prior to their promotion to the grade of Rs.425-640/- by order dated 17.7.1979, the applicants were juniors to some of the persons (Shri KP Thomas etc) belonging to the 4th respondent's union in the grade of

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ASMs in the scale of Rs.330-560/-. It is again a common case that the applicants gave effect to the promotion to the scale of Rs.425-640/- and joined the posts in that grade on 23.7.79, 10.7.79 and 25.7.79 respectively while those seniors who are members of the 4th respondent's union having not given effect to the promotion granted to them, remained in the lower grade of Rs.330-560/-. It is further an admitted case that the applicants were further promoted to the grade of Rs.455-700/- with effect from 1.8.83 and to Rs.1600-2660/- with effect from 12.2.1989. It is also a fact beyond dispute that in the revised final seniority list of SMs/ASMs of the Trivandrum Division as on 1.5.1983 published on 23.5.1983 at Annexure A2 and in the revised seniority list of the SMs/ASMs in the scale of Rs.1400-40-1800-E8-50-2300 as on 1.4.85 (Annexure A3), the applicants were placed above those members of the 4th respondent's union who, though were seniors to the applicants in the scale of Rs.330-560, were promoted to the scale of Rs.425-640 only subsequently. The grievance of the applicants is that this position of seniority settled several years ago is now sought to be revised to their detriment by the impugned order at Annexure A4. It is the case of the applicants that as the applicants happened to be promoted earlier to the scale of Rs.425-640 than those who were seniors to them in the scale of Rs.330-560/- for the reason that those seniors declined promotion as they did not want and to join the promoted post at distant places/they were debarred from promotion for a year. The respondents 1 to 3 have in

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their ~~xxx~~ counter affidavit stated that none of the seniors of the applicants have actually declined promotion and that none of them had been debarred from promotion for that reason and that the seniors could not give effect to the promotion only because on administrative grounds they were not relieved from the posts in which they were working. The 4th respondent also have raised this contention. If, as a matter of fact, senior persons though promoted were disabled from giving effect to the promotion on the ground of administrative exigencies, it will be unjust to deny to them the seniority for the reason that their juniors had given effect to promotion earlier. But the contention of the respondents that the seniors of the applicants were disabled from joining at the promoted posts as they were not relieved and that they were not debarred from promotion is found to be false from the documents at Annexure A7 and A10. Annexure A7 is a copy of the order No.50/79/TP-1 dated 24.7.79 of the Divisional Office, Personnel Branch, which reads as follows:-

"The undermentioned ASMs promoted to scale Rs.425-640(R) from scale Rs.330-560 have not joined the stations before 15.6.1979 as ordered. They are, therefore, treated as unwilling to go on promotion and debarred for one year for promotion to scale Rs.425-640(R) as noted against each. They will lose seniority in scale Rs.425-640 to their juniors in scale Rs.330-560 promoted to scale Rs.425-640 after them."

S/Shri R. Subramanian and M. Rajan Unnithan were debarred for a period of one year from 3.6.78, Shri K.G. Ramachandran from 16.12.78 and Shri K.P. Thomas was debarred for a period of one year from 1.2.1979. Annexure A10 is a copy of the

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dated 30.5.1979

office order No.42/79-TP.I of the Divisional Office, Personnel Branch, Madurai. It is stated in this order as follows:-

"The undermentioned ASMs/RASMs under orders of promotion to scale Rs.425-640 have not yet joined as SMs/ASMs in the promoted scale Rs.425-640(R). Representations for change of stations etc received in this connection were gone through. They are advised that they should carry out the promotional transfers as already ordered before 15.6.1979. If they do not carry out their promotional transfer before 15.6.79, they will be deemed that they are unwilling to go on promotion and they will be debarred for one year from the date of issue of the office order promoting them originally."

It appears that it was pursuant to this order that Annexure A7 order was issued. It is evident that the applicants were promoted after their seniors had declined promotion and from Annexure A7 and A10, it is evident that those who had declined promotion had been debarred from promotion for a period of one year from the date of issue of original order of promotion. Therefore, it is evident that the Railway Administration has suppressed the material fact that those members of the 4th respondent's union who though were seniors to the applicants in the scale of Rs.330-560 happened to be their juniors in the seniority list at Annexure A2 and A3 for the reason that they had having declined their promotion been debarred from promotion for a period of one year. Not only that the 3rd respondent has suppressed this fact, but also he had in the counter affidavit sworn that it was for no fault of the seniors but due to the fact that they were not relieved owing to acute shortage of ASMs in the erstwhile Madurai Division that they could not give effect to the promotion. This statement has been found to be false in the

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light of what is seen stated in Annexure A7 order. Therefore, it is evident that the seniors of the applicants who declined promotion were debarred from promotion to the grade of Rs.425-640/- for a period of one year while the applicants who were juniors were promoted to the scale of Rs.425-640. ~~xx~~ It is well settled that continued officiation in a grade is a good criterion for reckoning seniority in the absence of any rules to the contrary. The respondents have referred to a seniority list of SMs/ASMs as on 31.12.81 at Exhibit D3 and have contended that according to this seniority list, the applicants were placed below the members of the 4th respondent's union. But this was only a provisional seniority list. The Annexure A2 revised seniority list was prepared after considering all the representations received from SMs and ASMs. This seniority list published on 23.5.83 reflects the seniority of the SMs/ASMs as on 1.5.83. The applicants are placed above the persons represented by the 4th respondent's union. The same order of seniority is reflected in Annexure A3 seniority list of SMs/ASMs as on 1.4.85. The members of the 4th respondent's union have not challenged ~~the~~ seniority list all these years. In such circumstances, after a lapse of seven years it is not open for the Administration to unsettle the seniority list especially when the applicants had been promoted to more than one higher grades successively. The respondents have contended that on implementation of the upgradation, the promotion of all the members of the 4th respondent's union have been given effect to from 1.1.1979

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and, therefore, viewed in that light the seniors of the applicants while they were in the scale of Rs.330-560/- are entitled to be placed above the applicants as the mistake in not implementing the upgradation has been later rectified. By a promotion with retrospective effect, it is not possible to alter the seniority acquired by persons working in a cadre. In State of Bihar and others v. Shri Akhouri Sachindra Nath and others, reported in 1991 LAB.I.C. 1261, the Hon'ble Supreme Court has observed as follows:-

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"It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondent Nos.6 to 23 cannot be made senior to the respondents Nos.1 to 5 by the impugned government orders as they entered into the said service by promotion after the respondents Nos.1 to 5 were directly recruited in the quota of direct recruits."

The seniority of the applicants vis-a-vis those of the members of the 4th respondent's union who had lost seniority on account of their failure to comply with the order of transfer was settled as early as in the year 1983 as is seen from the Annexure A2 seniority list. Since none of them had it necessary thought to challenge the seniority list, the Annexure A2 and A3 seniority lists have come to stay and the same have been operated for the purpose of further promotions. Under such circumstances, the respondents 1 to 3 cannot after a lapse of seven years, as if suddenly waking up from a prolonged

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slumber, topple the seniority list to the detriment of the applicants saying that on account of their lapse in implementing the Railway Board's decision of upgradation of posts in the year 1979, the members of the 4th respondent's union have suffered some loss of seniority. The contention of the respondents that if the upgradation of posts was implemented immediately on notification, the seniors of the applicants who had declined promotion would not have had the necessity to decline promotion since they could have been accommodated in the same station does not appear to be based on any factual foundation. No administrative decision in the year 1979 to operate the promoted posts in the same station irrespective of the fact whether vacancies existed there or not has been seen taken. Therefore, on a careful scrutiny of the entire facts and circumstances of the case, we are of the view that the impugned order at Annexure A4 directing revision of the seniority list of SMs/ASMs to the detriment of the applicants deciding to maintain the inter se seniority of the applicants and those who had declined promotions to the grade of Rs.425-640/- on the basis of their erstwhile seniority in the scale of Rs.330-560 is unreasonable, arbitrary and illegal.

9. In the result, we allow the application and quash the impugned order dated 29.10.1990 of the Chief Personnel Officer, Southern Railway, Madras (Annexure A4) and direct

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the respondents 1 to 3 to maintain the position of the applicants in the existing seniority list. However, we make it clear that in case on any valid ground the administration proposes to effect any change in the seniority of the officials, they are at liberty to do so but only after giving notice to all concerned and after giving them opportunities to present their case.

10. There is no order as to costs.

(A. V. HARIDASAN)
JUDICIAL MEMBER

(N. V. KRISHNAN)
VICE CHAIRMAN

25.6.92

ps

8.6.93

CP(C) No.79/93

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Mr. P. Sivan Pillai
Mrs. Sumati Dandapani

According to petitioner the proposal in Annexure-C cannot be justified in the light of the direction in Annexure.A. Annexure-C is only a show cause notice. There is no final order placed before us. The petition is premature and dismissed. However, respondents will do well to follow Annexure-A before passing final order in the matter.

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Mr. Sankaran Nair (J)

Mr. K. P. M.

C. Sankaran Nair (J)

V.C.

R. Rangarajan
AM