

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No. 253/2003

Dated Tuesday this the 11th day of November, 2003.

C O R A M

HON'BLE MR.A.V.HARIDASAN, VICE CHAIRMAN
HON'BLE MR.H.P.DAS, ADMINISTRATIVE MEMBER

S.Jayakumar
Lower Division Clerk
Office of the Director of
Accounts (Postal), Kerala Circle
Trivandrum.

Applicant

(By advocate Mr.Johnson Gomez)

Versus

1. Union of India
Represented by its Secretary
Department of Posts
New Delhi.
2. Chief Postmaster General
Kerala Circle
Trivandrum.
3. Director
Office of the Director of Accounts (Postal)
Kerala Circle
Trivandrum.
4. The Deputy Director
Office of the Deputy Director of Accounts (Postal)
Kerala Circle
Trivandrum.
5. N.Radhakrishnan
Jr.Accountant
Office of the Director of Accounts (Postal)
Kerala Circle
Trivandrum.

Respondents.

(By advocate Mrs.P.Vani, ACGSC (R1-4)
(Mr.Thomas Mathew for R5)

The application having been heard on 11th November, 2003,
the Tribunal on the same day delivered the following:

O R D E R

HON'BLE MR.A.V.HARIDASAN, VICE CHAIRMAN

Applicant and 5th respondent were appointed as Lower Division Clerks by A-1 order dated 31.8.84 and they joined service on the same date. In the gradation list of LDCs, the applicant was placed above the 5th respondent (Annexure A-3).

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The applicant continued to be placed so. However, the applicant did not pass the typing test within 2 years whereas the 5th respondent passed it. The applicant passed typing test only after 2 years in May 1987. While so, Annexure A-5 order dated 22.10.2002 was issued by respondent No.2, in which it was stated that the 5th respondent would continue to be senior to the applicant, inter-alia, stating that though the seniority had been delinked from confirmation, past cases of seniority need not be reopened. Aggrieved by that, the applicant submitted A-7 representation. In reply to the representation, the applicant was informed by A-8 order that in accordance with DG (P&T) letter dated 19.8.1980, "if an LDC fails to pass the typing test within two years, he will lose seniority" and that Shri Radhakrishnan who passed the typing test earlier would be senior to the applicant. A consequential order A-10 dated 10.2.03 was issued informing the applicant that the placement of 5th respondent above him in the seniority list would continue in terms of the Directorate's letter dated 19.8.80. Aggrieved by these orders and the fact that the 5th respondent had been considered and promoted as Junior Accountant overlooking the seniority of the applicant, the applicant has filed this application for the following reliefs:

- (i) Declare that the applicant is senior to the 5th respondent in the cadre of LDC.
- (ii) To call for the records leading to Annexures A-5, A-8 and A-10 and to quash the same.
- (iii) Direct respondents 1 to 4 to promote the applicant to the post of Junior Accountant as on the date on which the 5th respondent, who is the immediate junior of the applicant, was promoted, with all consequential benefits.

2. Respondents 1 to 4 in the reply statement seek to justify the impugned action on the ground that although seniority has

been delinked from confirmation, since it has been stated in the Directorate's letter dated 19.8.80 that past cases of seniority need not be reopened, the applicant who passed the typing test only subsequent to the date on which the 5th respondent passed the same, the 5th respondent would continue to be senior, although it is admitted that in the earlier gradation list of LDCs, this was omitted to be corrected and the 5th respondent was not placed above the applicant. The 5th respondent has also filed a reply statement supporting his placement above the applicant.

3. On a careful scrutiny of the materials placed on record and on hearing the learned counsel on either side, we find that the case of inter-se seniority between the applicant and the 5th respondent had not been settled by any order or any correction made with notice to the concerned, placing the 5th respondent above the applicant. Therefore, it cannot be said that it is a case of settled seniority. The settled position was that the applicant was senior and the 5th respondent was junior. Therefore, the stand taken in the impugned order that the 5th respondent would continue to be senior to the applicant is meaningless and unsustainable because the 5th respondent had been placed above the applicant without settling the seniority with notice to the applicant. The respondents have not made available any document to establish that the seniority of the applicant was ever changed and he was placed below the 5th respondent. The respondents, therefore, have committed a grave error in not considering the applicant for promotion to the post of Junior Accountant when his junior was so considered and promoted.

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4. In the light of what is stated above, we allow this application, set aside the impugned orders and direct the respondents to consider the applicant for promotion to the post of Junior Accountant with effect from the date his junior the 5th respondent was considered and promoted, especially in view of the fact that even in A-2 eligibility list for promotion as Junior Accountant, the applicant was placed above the 5th respondent. The above exercise shall be complied with and necessary orders issued as expeditiously as possible and at any rate within a period of three months from the date of receipt of a copy of this order. No costs.

Dated 11th Nov. 2003.

H. P. DAS
ADMINISTRATIVE MEMBER

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A. V. HARIDASAN
VICE CHAIRMAN

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 253/2003

TUESDAY THIS THE 13th NOVEMBER, 2007

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER**

S. Jayakumar
Lower Division Clerk
office of the Director of Accounts (Postal)
Kerala Circle, Trivandrum.Applicant

By Advocate Mr. Johnson Gomez

Vs.

- 1 Union of India represented by its Secretary
Department of Posts
New Delhi.
- 2 Chief Postmaster General
Kerala Circle,
Trivandrum
- 3 Director
O/o the Director of Accounts(Postal)
Kerala Circle,
Trivandrum.
- 4 The Deputy Director
O/o the Deputy Director of Accounts(Postal)
Kerala Circle,
Trivandrum.
- 5 N. Radhakrishnan
Jr.Accountant
O/o the Director of Accounts(Postal)
Kerala Circle,
Trivandrum.Respondents.

By Mr George Joseph, ACGSC for R 1-4
Mr. Shafik M.A. For R-5

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

This case has been remanded by the Hon'ble High Court to reconsider the matter with the following directions:

"Respondent relied on Annexure A-11, wherein Annexure A-5 was withdrawn and decided that seniority will be taken up according to advise as well as confirmation. However, it is the case of petitioner that in paragraph 3 in A-11 itself, it is stated that the seniority as on the date of Annexure A-11 will not be affected. Department has filed a seniority list before this Court. On going through the order we are of the view that these facts were not considered by the Tribunal. Effect of A-5,A-11 who was considered as senior, when A-11 was passed etc. were not considered. Therefore Ext.P-4 is set aside and case is remanded back to the Tribunal to reconsider the matter.

The Writ Petition is disposed of accordingly."

2 Fresh notices were issued. The applicant in the O.A. filed M.A. 583/07 for a direction to the 3rd respondent to produce the Gradation list and F.No. 26, File No. Adm-E/C-26 Vol.II which was allowed. Accordingly, the respondents have produced the following documents:

- (i) F.No. 26 with Gradation list as on 1.7.98
- (ii) Gradation list maintained at the Dy. Director, Postal Accounts office as on 1.7.1992
- (iii) Gradation list as on 1.7.2001

3 To recapitulate the facts briefly, the applicant had approached this Tribunal in this O.A aggrieved by Annexure A-10 order informing him that

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the 5th respondent's placement above him in the seniority will continue and the fact that the 5th respondent had been considered and promoted as Jr. Accountant overlooking the seniority of the applicant. The applicant and the 5th respondent were appointed as LDC by Annexure A-1 order dated 31.8.884 and joined the service on the same date. In the Gradation list of LDCs the applicant was placed above the 5th respondent in the order of merit. However, the applicant did not pass the typewriting test within two years as he passed the test only in May, 1987 whereas the 5th respondent had passed the test on 25.2.1986 within the period of two years. The applicant was informed by Annexure A-8 order dated 20.12.2002 that in accordance with DG P&T OM dated 19.8.1980 "if an LDC fails to pass the typing test within two years they will lose seniority." On that basis only the applicant came to be informed that the 15th respondent will be placed above him in the seniority list.

4 The Hon'ble High Court in its order observed that for allowing the prayer of the applicant the Tribunal had relied on Annexure A-11 order. However, in para 3 of Annexure A-11 itself it is stated that seniority as on the date of Annexure A-11 will not be affected. Therefore the Hon'ble High Court was of the view that the effect of Annexures A-5, A-11 and who was considered as senior when Annexure A-11 was passed etc. were not considered by the Tribunal. We have re-examined the effect of the order at Annexure A-11 and also perused the gradation list and the file produced by the respondents. Annexure A-5 which is one of the impugned orders before this Tribunal is an order of the CPMG dated

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22.10.2002 on a reference made by the Deputy Director of Postal Accounts, Kerala Circle, Trivandrum regarding the fixation of seniority of the applicant vis-a-vis the 5th respondent and it relies on the DOPT circular dated 4.11.1992 (A-11) states the position that the seniority between the two employees had already been fixed prior to the issue of the said communication. The letter is reproduced below:

To

The DDPA
Trivandrum -695 001

NO.ST/20/Dlgs/93(PT) Dated at Trivandrum -33 the 22.10.2002

Sub: Fixation of seniority-casse of Shri S. Jayakumar and
Shri N. Radhakrishnan, LDCs

REF:- Your letter No. 666/Admn.I/E 1/C-2611 dated
18.9.2002

According to DG (P&T) letter No. 56/14/80/SPB-I dated 19.8.1980 if an LDC fails to pass the typing test within 2 years they will lose seniority. Shri N. Radhakrishnan passed the typing test within 2 years while Shri S. Jayakumar passed the test after 2 years. Accordingly Shri Radhakrishnan was placed senior to Shri Jayakumar.

Though confirmation has been delinked from seniority vide OMNO. 20011/5/90-Estt(D) dated 4.11.1992 on DOPT, in the said letter it has been clearly stated that the seniority already determined according to the existing principles on the date of issue of the order will not be reopened, even if in some cases the seniority has already been challenged or is in dispute. In the instant cases, the seniority of the officials has already been fixed prior to the issue of the orders dated 4.11.1992. The seniority already fixed prior to the issue of the orders dated 4.11.1992 need not be disturbed.

As such I am directed to inform you that Shri N. Radhakrishnan will continue to be senior to Shri Jayakumar.

Sd/- NGK Nair
Assist. Director(Staff)

5 Annexure A-11 is the OM of the Department of Personnel & Training dated 4.11.1992 issued in the wake of the policy decision to delink seniority from confirmation. Paragraphs 3 and 4 are reproduced below:

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3 The general principle of seniority mentioned above has been examined in the light of the judicial pronouncement referred to above and it has been decided that seniority may be delinked from confirmation as per the directive of the Supreme court in para 4 of its judgment dated 2.5.90. Accordingly in modification of the general principle 3, proviso to general principle 4 and proviso to general principle 5(i) contained in MHA (now DOPT OM NO. 9/11/RPS dated 22.12.59 and para 2.3 of this department OM dt. 3.7. (copy enclosed) it has been decided that seniority of a person regularly appointed to a post according to rule would be determined by the order of merit indicated at the time of initial appointment and not according to the date of his confirmation.

4 These orders shall take effect from the date of issue of this Office Memorandum. Seniority already determined according to the existing principles on the date of issue of these orders will not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of these orders.

6 The Hon'ble High Court invited our attention to para 4 though it was mentioned as para 3 in the order it is seen that the reference made is actually to para 4. The above orders could show that confirmation was delinked from seniority only from the date of issue of Annexure A-11 OM dated 4.11.1992 and by virtue of the position stated in para 4 seniority already determined according to the existing principle on the date of issue of the order will not be reopened even if it has been challenged or in dispute and it will continue to be determined on the principle already existed. According to the principle already existing prior to 1992 as laid down in Annexure A-5 order, an LDC who fails to pass the type test within two years will lose their seniority. Therefore it has to be seen whether the seniority of the applicant vis-a-vis the 5th respondent was determined with

reference to this principle on 4.11.1992. The Hon'ble High Court has also referred to the position in the Gradation list which was produced before them and also before us. We have verified the position with reference to the three Gradation lists available. The position in these records is that in the Gradation list as on 1.7.1992, the applicant is at Sl. No. 24 and the 5th respondent is at Sl. No. 25 at page 22 as on 1.7.1992. The date of substantial appointment in column 7 is shown as 1.4.1988 for both the individuals and the date of commencement of Government service is shown as 31.8.1984 in both the cases. This entry conclusively proves that both the applicant and the 5th respondent were confirmed on substantive posts on the same date. This is further confirmed by the notes in the file F-6 which starts from the representation received from the applicant/5th respondent regarding their seniority. The 5th respondent had in his representation claimed that he is senior to the applicant. According to the general principle, seniority is to follow in the order of confirmation on which the office had noted at page 2/note file that "as "both the officials had been confirmed on the same date, the provision of the rule cited by Shri N. Radhakrishnan is not applicable in this case". However, since there was a doubt regarding their seniority with reference to the passing of the typing test within two years, the matter was referred to the CPMG through the DGP&T. In the list as on 1.7.2001 at page 18, the applicant had been initially shown as Sl. No. 16, the 5th respondent is at Sl. No. 17. But it has been corrected as the 5th respondent as Sl. No. 16 and the applicant as Sl. No. 17. It is evident that the correction in this list was carried out after the matter was referred to the CPMG through the

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DGP&T and having been finally clarified and confirmed by Annexures A-5, A-8 and A-10 orders which have been impugned here. Therefore these corrections cannot be taken into account for determining the seniority as on 4.11.1992 which is the date of Annexure A-11 OM. For that purpose, the seniority as shown in the Gradation list as on 1.7.1992 has to be reckoned in which the applicant is shown senior and the 5th respondent is junior. It was the contention of the applicant in the O.A. also that the applicant was shown as senior to the 5th respondent in the Gradation list as on 1.7.1992, 1.7.2001 and also in the list of successful candidates in the departmental examination for promotion to LDCs and Junior Accountants held in 1992 and on 4.5.1999 at Annexure A-2 and A4 which is borne out by the records. There was no challenge to the seniority of the applicant for a period of almost 18 years. The respondents have in Annexure A-5 letter stated that the seniority of the officials had already been fixed prior to the issue of the order dated 4.1.1992 and seniority thus fixed already need not be disturbed. But the seniority already fixed in respect of the applicant as discussed above was that the applicant was senior to the 5th respondent. No re-fixation of seniority on the basis of the earlier passing of the typing test by the 5th respondent has been done by the respondents in accordance with the law after issuing a notice to the applicant. On the other hand, the respondents had confirmed both the individuals as the same dates viz. 1.4.88 with/without taking into account the dates of their passing the typing test, which was in their knowledge on that date. No specific order has been shown to us, revising the seniority as shown in the gradation lists complying with this principle of natural

justice. In fact the respondents became aware of the orders issued in Annexure A-5 regarding the fixation of seniority only for the first time in 1999 when the representations were received from the persons and it was only after three years in 2002, a final communication was received from the CPMG on the matter. Therefore, the question arises whether the respondents can alter the seniority of the applicant merely by virtue of applying their 1980 instruction and stating that the applicant's seniority is deemed to have been altered with reference to the 5th respondent. Even if it is considered that the general principle of seniority prior to 1992 would act in favour of the 5th respondent, the respondents having not taken recourse to any such action at the appropriate time cannot do so after this long gap of more than two decades. The Annexure A-11 order extracted supra is also clear on this aspect. It states that the seniority already determined on that date will not be reopened even if in some cases it has been challenged or in dispute. In the instant case the seniority was already determined in favour of the applicant even if it is open to argument that the principles were not correctly followed. But seniority was not in dispute at the time of issue of the order as the first representation received from the 5th respondent was in 1999 i.e. after 7 years of the issue of OM and if the date of passing the test is to be taken into account 13 years had already lapsed. It is settled law that a settled seniority cannot be unsettled. In fact the earlier order of the Tribunal has been delivered keeping this principle in view as para 3 thereof will indicate:

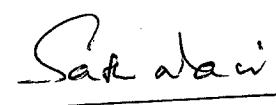
"3 On a careful scrutiny of the materials placed on record and on hearing the learned counsel on either side, we find that the case of inter-se seniority between the applicant and the 5th respondent had not been settled by any order or any correction made with notice to the

concerned placing the 5th respondent above the applicant. Therefore, it cannot be said that it is a case of settled seniority. The settled position was that the applicant was senior and the 5th respondent was junior. Therefore, the stand taken in the impugned order that the 5th respondent would continue to be senior to the applicant is meaningless and unsustainable because the 5th respondent had been placed above the applicant without settling the seniority with notice to the applicant. The respondents have not made available any document to establish that the seniority of the applicant was ever changed and he was placed below the 5th respondent. The respondents, therefore, have committed a grave error in not considering the applicant for promotion to the post of Junior Accountant when his junior was so considered and promoted."

7 Thus, judgment after hearing the learned counsel on both sides, perusing the records produced before us and keeping in view the direction of the Hon'ble High Court, we are of the considered view that our earlier orders shall stand as the records produced now further re-enforce the findings of this Tribunal. The O.A. is allowed. No costs.

Dated 13th November, 2007.


GEORGE PARACKEN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

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