

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

ORIGINAL APPLICATION NO. 287 of 2013

Wednesday this the 3rd day of February, 2016
CORAM

***Hon'ble Mr. Justice N.K.Balakrishnan, Judicial Member
Hon'ble Mrs. P. Gopinath, Administrative Member***

K.P. Appachan,
Regional Director Grade A/Director,
Employees State Insurance Corporation,
Divisional Office, Kozhikode, residing at
ARSHA, Puthenkandathil House, Maikav PO
Thamarassery, Kozhikode -673 573.

...Applicant

(By Advocate Mr. P. Chandrasekhar)

Versus

1. The Union of India represented by the Secretary to Ministry of Labour, New Delhi-110 001.
2. The Secretary to the Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Personnel & Training), New Delhi-110 001.
3. The Director General, Headquarters, Employees State Insurance Corporation, Panchdeep Bhawan, CIG Road, New Delhi-110 002.
4. The Union Public Service Commission, New Delhi-110002 Union Public Service Commission Office, represented by its Secretary.
5. The Joint Director, Headquarters, Employees State Insurance Corporation, Panchadeep Bhawan, CIG Road, New Delhi-110 002.

...Respondents

(By Advocate Mr. Thomas Mathew Nellimootil for R.1,2&4 &
Advocate Mr. T.V.Ajayakumar for R. 3 & 5)

This application having been finally heard on 25.01.2016, the

Tribunal on ...02.2016 delivered the following:

ORDER

Per: Justice N.K.Balakrishnan, Judicial Member

The applicant has approached this Tribunal to quash Annexure A7 to the extent it restricts the promotion of the applicant to the cadre of Regional Director Grade A/Director from 5.5.2011 ignoring the direction issued by this Tribunal and for a declaration that he is entitled to be promoted as Regional Director Grade A/Director w.e.f. 5.2.2011, the date on which his juniors were promoted to the said cadre. Pursuant to the order passed by this Tribunal, Annexure A7 order dated 12.3.2013 was passed by the respondents holding that the promotion of the applicant will be effective only from 1.4.2013 and that he will not have the right to continue in the promoted post and that he will be reverted to the lower post without any notice or assigning any reason thereof. It is further stated therein that the promotion as per Annexure A7 will be subject to the final outcome of WPC No. 5319/2011 filed by Shri Pranay Sinha before the Hon'ble High Court of Delhi.

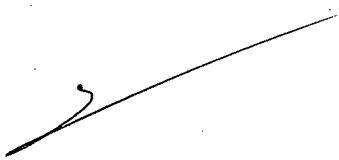
2. The applicant is working as Regional Director Grade A/Director in PB 4 with Grade Pay Rs. 8700/- on adhoc basis from 1.4.2013 in ESI Corporation, Kozhikode. Initially he was appointed as Assistant Director in Group B Service on 28.9.1983 and he was later promoted on adhoc basis as Deputy Director (Group A) w.e.f. 22.5.1989. He was regularized in that post on 7.3.1995. According to the applicant his adhoc promotion as Deputy Director was in a regular vacancy made in accordance with rules

as against the vacancy earmarked for promotion from feeder category and that he is entitled to be regularized in service from 22.5.1989. It is further contended that several of his juniors in the cadre of Deputy Director were even march over the applicant in the seniority list. Though in the meanwhile he was promoted to the cadre of Regional Director Grade A on adhoc basis he is entitled to regular promotion on the cadre of Deputy Director. Annexure A7 is the final seniority list. The applicant's name therein appears in the second seniority list at SI.No.3, where it was noted that he entered the service of ESI on 28.9.1983 and he was promoted as Deputy Director on regular basis w.e.f. 27.3.1995 though he is entitled to regular promotion w.e.f. 22.5.1989, the date on which vacancy in the post of Deputy Director arose. The respondents promoted Shri Mahavir Singh Dahya and Shri L.K. Gupta to the cadre of Regional Director Grade A/Director in Pay Band 3 Rs. 15600-39100 with Grade pay of Rs. 7600/- as per order dated 5.5.2011 vide Annexure A2. OA 516/2012 was filed by the applicant before this Tribunal wherein it was held that the claim of the applicant for promotion should be considered if his juniors in the final seniority list had already been promoted on adhoc basis within a period of two weeks. Though the respondents challenged Annexures A3 and A5 orders before the Hon'ble High Court of Kerala filing OP (CAT), the same was dismissed by the Hon'ble High Court as per judgment dated 4.3.2013 vide Annexure A6. The Hon'ble High Court also held that the applicant is entitled to promotion w.e.f 5.5.2011 the date on which his juniors were promoted and that the revision of rules would be operative only prospectively and not

retrospectively. Thus the applicant contends that he is entitled to be promoted from 5.5.2011 the date on which his juniors were promoted as Regional Director Grade A/Director. In violation of the same, Annexure A7 order is issued, which is liable to be quashed, applicant contends. He says that he is entitled to the relief of declaration and consequential benefits as sought for.

3. The respondents 1,2,3 and 5 filed reply statement contending as follows.

It is admitted that applicant was working as Regional Director Group A/Director with Grade Pay of Rs. 8700/- on ad hoc basis from 1.4.2013. It is also admitted that the applicant was initially appointed as Assistant Director in Group B service on 28.9.1983 and that he was later promoted on ad hoc basis as Deputy Director (Group A) w.e.f. 22.5.1989 and later he was regularized in that post on 7.3.1995. But the plea raised by the applicant that his promotion was in a regular vacancy and in accordance with the rules as against the vacancy ear-marked for promotion from feeder category is not correct. The further contention that his juniors were given march over the applicant in the seniority list is also wrong. The applicant has suppressed material facts relating to the issuance of earlier final seniority list of officers which led to the filing of petitions before the judicial fora. In compliance with the direction of the order dated 14.7.2005 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA 2637/2004 the seniority list of Deputy Director was finalized by the ESI corporation on 31.7.1997. After finalization of the above seniority list it



became imperative to recast the seniority list of officers in the cadre of Deputy Directors applying the principle laid down by the Principal Bench of C.A.T. Accordingly seniority earlier fixed on 16.2.1999 and finalized on 24.9.1999 was recast based on the orders issued by the Principal Bench of the C.A.T. Details of the litigation which were pending before the Principal Bench of C.A.T and other Tribunals have been referred to in the reply statement. Hence respondents contend that the applicant is not entitled to get the relief as prayed for.

4. We have heard the learned counsel appearing for both parties and have also gone through the pleadings and documents on record

5. The learned counsel for the applicant would submit that it is totally unnecessary to probe into the seniority list and so many other orders passed by the C.A.T. Principal Bench and other Tribunals in so far as the claim made by the applicant in this case is concerned, it is covered by the order passed by this Tribunal in the earlier round of litigation which attained finality since the OP (CAT) filed against that order has already been dismissed. Annexure A3 is the earlier order passed by this Tribunal in OA 516/2012 which was disposed on 29.10.2012. In para 5 of the order it was held by this Tribunal:

"5. The applicant is the senior most Deputy Director as per Annexure A-4 seniority list. He ranked at Serial No. 42 in Annexure R1(b) seniority list dated 30.08.2012, of the Regional Director Grade-B/Joint Director as on 01.04.2012. Those officials shown at Sl. Nos. 51 and 53 in the said seniority list have been promoted vide Annexure A-2 order dated 05.05.2011 on ad hoc basis as Regional Director Grade-A/Director. There is no reason why the applicant cannot be considered for promotion on ad hoc basis as Regional Director Grade-A/Director, like his juniors placed at

Sl. Nos. 51 and 53 in the draft seniority list of Regional Director Grade-B/Joint Director at Annexure R1(b). The proposed Recruitment Rules can have generally speaking, only prospective effect. There is no illegality in promoting the applicant on ad hoc basis in accordance with existing rules. Waiting indefinitely for the revised Recruitment Rules and perhaps waiting for the retirement of the applicant, is arbitrary and discriminatory, when his juniors are promoted on ad hoc basis. In the facts and circumstances of this case, we are of the considered view that Annexure R1(b) seniority list of Regional Director Grade-B/Joint Director should be finalised as early as possible, at any rate within 6 weeks from the date of receipt of a copy of this order. Thereafter, the claim of the applicant for promotion should be considered as per the existing rules if his juniors in the final seniority have already been promoted on ad hoc basis within a period of two weeks thereafter, in case the new Recruitment Rules are not made effective in the meanwhile. Ordered accordingly."

In the light of the categoric finding entered by this Tribunal, there is no reason why the applicant cannot be considered for promotion on adhoc basis as Regional Director Grade A/Director like his juniors at Sl.No. 51 and 53 in the draft seniority list. It would scuttle the plea raised by the respondents that the seniority list was subsequently recast based on the directions issued by the Principal Bench of C.A.T. It is important to note that the applicant herein was not a party to any of those proceedings. So far as the case on hand is concerned, there is an inter party judgment Annexure 3. The directions thereof made by this Tribunal are binding on the respondents and they are bound to implement the order in letter and spirit, the applicant's counsel rightly submits.

6. While Annexure A3 application was pending before the Tribunal, the case advanced by the respondents was that there was a proposal to amend or to bring a new Recruitment Rule and so further promotion could

be guided by that Recruitment Rules. It was observed by this Tribunal that the proposed Recruitment Rules can have, generally speaking, only prospective effect. It was on that reason, it was held by this Tribunal that there is no illegality in promoting the applicant on ad hoc basis in accordance with the existing Recruitment Rules.

7. It was found by the High Court that if persons at Sl.No. 51 and 53 in the seniority list had been promoted as earlier as on 5.5.2011 on adhoc basis as Regional Director Grade A/Director, there is no reason sustainable on the face of the constitution and the laws, to allow the establishment to desist from promoting the 1st respondent also as the Regional Director Grade A/Director on ad hoc basis with effect from 5.5.2011, the date on which the persons at Serial Nos. 51 and 53 in Annexure R.1(b) seniority list stood promoted on ad hoc basis. If the establishment were to still to keep away from doing so, that will amount to hostile discrimination, it was held. Though a review petition was filed by the respondents before the High Court, the effect of judgment has not been effaced.

8. The applicant is at Serial Number 42 in the seniority list, which was referred to in Annexure A6 judgment of the High Court. It was held by the High Court in Annexure A6:

"Though we approve the submissions on behalf of the Establishment that there could be retrospective amendment to the Service Rules/Recruitment Rules, the fact of the matter remains that the amendment in hand operates only with effect from 01.06.2011. The right of the 1st respondent- employee, to be considered at par with the persons at serial Nos.51 & 53 in Annexure-R1(b) seniority list for promotion on OP(CAT) 831/13 ad hoc basis as on

05.05.2011 stands unassailable. Under such circumstances, we do not see any merit in this original petition, in so far as it is against Ext.P6. We see no jurisdictional error or legal infirmity in that decision of the Tribunal. We may also note that when the 1st respondent/applicant had moved the Tribunal, he was 59 years old. Any delay by the Establishment by scanty reasons, would affect him. We find no ground to interfere with Ext.P6 .

Since the Establishment wanted more time to give effect to Ext.P6, it moved the Tribunal for enlargement of time. The application for enlargement of time was dismissed by the Tribunal as per the impugned Ext.P15 order. We are sure that if the Establishment gives effect to Ext.P6 immediately, and places such compliance before the Tribunal, the learned Tribunal will consider the matter sympathetically and excuse the Establishment and its Officers; rather, they invite proceedings in contempt of courts jurisdiction."

It is vehemently argued by the learned counsel for the respondents that since Annexure A6 judgment was rendered on a matter which was not an issue which arose for consideration, an application for Review was filed and that Review Petition was disposed of by the Hon'ble High Court as per Annexure R3(f) dated 10.7.2013. The contention that the effect of Annexure A6 judgment was taken away by the order passed on the Review Petition is not acceptable. We do not find that the findings entered by the Tribunal in Annexure A3 or the decision rendered by the High Court in Annexure A6 were nullified by the order passed on the Review Petition.

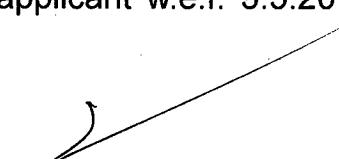
The order on the Review Petition reads thus:

"After arguing the matter for some time and faced with the situation that there is nothing in the judgment sought to be reviewed beyond the factual situation noted in paragraph 5 of the order of the Tribunal rendered on 23.10.2012 on OA 516/2012 the learned counsel for the establishment sought leave to withdraw this review petition. We have looked into the

review petition and see no ground to review the judgment. There is no error apparent on the face of the record of the judgment sought to be reviewed. What is stated in the judgment is in conformity with the findings rendered by the Tribunal. Review Petition fails and the same is accordingly dismissed."

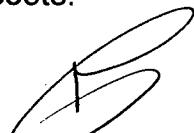
The learned counsel for the respondents would submit that the last sentence "what is stated in the judgment is in conformity with the findings rendered by the Tribunal" will make it all the more clear that Annexure A6 judgment is not in respect of the issue answered in Annexure A3 order and so Annexure A6 order has to be ignored. We are afraid, we cannot accept that submission, since there is nothing in Annexure R3(f) to indicate that the effect of Annexure A6 judgment has been taken away. On the other hand it is stated that the judgment is in conformity with the finding entered by the Tribunal. That would seal the fate of the plea now raised by the respondents that effect of Annexure A6 judgment has been taken away. It was already held by this Tribunal in Annexure A3, which was confirmed by the High Court, that the applicant is entitled to be promoted on ad hoc basis as Regional Director Grade A/Director w.e.f 5.5.2011 on which day his juniors were promoted on ad hoc basis. As such Annexure A7 order which is issued in violation of the decision rendered in Annexure A3 and Annexure A6 has to be quashed.

9. The contention raised by the respondents that the applicant can be promoted only w.e.f. 1.4.2013 cannot be accepted. That plea is to be brushed aside as untenable. There is specific finding with regard to the promotion to be given to the applicant w.e.f. 5.5.2011 on which day his

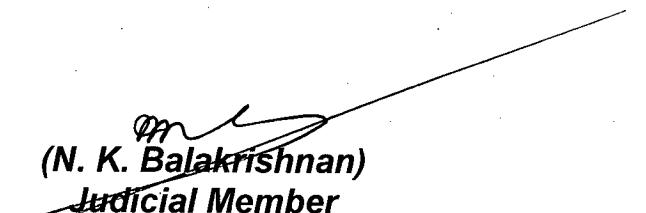


juniors (who were placed at Sl.No.51 and 53) were promoted. The applicant was at Sl.No.42. He has to be promoted with effect from that date i.e., 5.5.2011. Other issues or matters cannot be mixed up or clubbed in their attempt to get over the judgment which is an inter party judgment (Annexures A3 and A6). Therefore, we have no hesitation to hold that the applicant is entitled to get a declaration that he is to be promoted to the cadre of Regional Director Grade A/Director w.e.f. 5.5.2011 the date on which his juniors were promoted to the said cadre and not w.e.f. 1.4.2013 as stated in Annexure A7. To that extent Annexure A7 order is quashed. Since the applicant was entitled to be promoted w.e.f. 5.5.2011 he is also entitled to get the consequential benefits, namely arrears of pay, allowances etc.

10. The OA is allowed accordingly. Respondents are directed to pass a fresh order granting promotion to the applicant w.e.f. 5.5.2011 the date on which the applicant's juniors were promoted as Regional Director Grade A/Director. The applicant shall also be paid the arrears of salary and allowances. The respondents shall complete the above exercise within two months from the date of receipt of a copy of this order. There is no order as to costs.



(Mrs. P. Gopinath)
Administrative Member



(N. K. Balakrishnan)
Judicial Member