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CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No: 772 OF 1991.

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DATE OF DECISION: 2.2.95

Shri S. S. Sankpal, Petitioner

Shri S. P. Saxena, Advocate for the Petitioners

Versus

Union Of India & 2 Others, Respondents


Shri R. K. Shetty, Advocate for the Respondent(s)

CORAM :

The Hon'ble Shri B. S. Hegde, Member (J).

The Hon'ble Shri M. R. Kolhatkar, Member (A).

1. To be referred to the Reporter or not ? ✓
2. Whether it needs to be circulated to other Benches of the Tribunal ?


(B. S. HEGDE)
MEMBER (J).

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BEFORE THE CENTRA-L ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

ORIGINAL APPLICATION NO.: 772 OF 1991.

Shri S. S. Sankpal ... Applicant

Versus

Union Of India & 2 Others ... Respondents.

CORAM :

Hon'ble Shri B. S. Hegde, Member (J).

Hon'ble Shri M. R. Kolhatkar, Member (A).

APPEARANCE :

1. Shri S. P. Saxena,
Counsel for the Applicant.
2. Shri R. K. Shetty,
Counsel for the Respondents.

JUDGEMENT :

DATED : 2-2-95

[Per. Shri B. S. Hegde, Member (J)]

1. The applicant has filed this O.A. with a prayer to set-aside the Order dated 15.10.1992(at exhibit A-1) of the Respondents, in which the request of the applicant for promotion to the post of Upper Division Clerk or equivalent post of Sup.B(N.T) taking into account the past services rendered in the previous unit from which he was transferred, was rejected. He has also prayed for a direction to the Respondents to consider his case for promotion and promote him as U.D.C. in any unit at Kirkee

advised that in case where an Officer seeks transfer from one Ordnance Factory to another on compassionate grounds, he may be asked to give an undertaking that he agrees to go as the junior most person in the grade in the new factory, etc." According to him, the said circular is arbitrary and violation of Article 14 of the Constitution. He states that the seniority of the employee is protected at the new factory and is computed with reference to the initial appointment in the grade, hence on transfer, he is not to lose his seniority and service rendered in the previous unit. The applicant further contended that the JCM is not competent to alter the provisions of reckoning seniority of any employee in the grade in which he is transferred on compassionate grounds to his disadvantage, which is contrary to Article 309 of the Constitution. Therefore, the undertaking given by him is contrary to rules, hence, cannot be taken into consideration. The main contention in this O.A. is that his seniority ought to have been reckoned on the basis of his date of initial appointment as L.D.C. and not from the new date he joined i.e. 01.01.1981.

3. As against this, the Respondents have filed a detailed counter reply, wherein it is stated that the applicant sought for a posting to Kirkee on compassionate ground and negatived most of his contentions raised in the O.A. Further, they aver^{ed} that the applicant was fully aware of his position on the seniority list and his request for transfer was granted only after taking an unconditional declaration from him that he will lose his seniority and he will not be entitled to any travel benefits. Thereafter, the applicant, having accepted the loss of seniority in 1981

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from the date his junior, Mrs. S.S. Lima has been promoted to the post of U.D.C.

2. The applicant has joined the Respondent's Office as a Civilian employee working with the Respondent No. 3. He joined the Indian Ordnance Factory as L.D.C. on 09.06.1976. He states that he is liable to be transferred to anywhere in India in existing grade or on promotion in other Ordnance Factories. The seniority list of the L.D.C. is made on the basis of the date of continuous officiation in the grade in each factory for the purpose of promotion to the post of U.D.C. He was working at Ambernath factory from 1976 to 1981 and on his request for transfer on compassionate grounds, he was transferred to Ammunition Factory, Kirkee on compassionate ground on the basis of the undertaking given by him stating that he was prepared to forego his seniority in the existing grade of L.D.C. held by him and he agreed to reckon his seniority in the aforesaid trade/grade from the date he joined the Ammunition Factory, Kirkee, in accordance with DGOF's letter No. 42/A/1 dated 28.08.1974. He has also given an undertaking that he will travel at his own expense, vide dated 16.12.1980. Pursuant to the undertaking, he has been transferred to Kirkee and joined the new unit at Kirkee on 01.01.1981. In this connection, he draws our attention to R-4 issued by the Respondents stating that "the question regarding loss of seniority in respect of all IEs and NIEs except Supervisors as arrived at JCM-III Level Meeting was taken up with the Ministry of Defence to intimate whether the same is legally enforceable. In this connection, the department of Personnel and A.R. were

he cannot be aggrieved in approaching the Tribunal after a lapse of 10 years in the year 1991, which is barred by time and that by allowing the application at this stage would result in unsettling¹² settled issues. It is further contended, that the service of the applicant in the grade of L.D.C. is not transferrable and the next promotion of U.D.C. also is within the scope of local authority without transfer and not All India basis and thus it is clear that the seniority for these posts are individual factory based and not on All India basis. The transfer of outstation employees in respect of posts which are within the local D.P.C, scope are not ordered in public expense but only at the request of the individuals either on compassionate grounds or on mutual basis at their own interest. In respect of Industrial and other Non-Industrial Employees in respect of whom seniority list and D.P.C. is maintained locally, such transfers are not ordered except on compassionate ground or mutual transfers at their own request with the conditions and the acceptance of such transfers are at the discretion of the management. In so far as Supervisors, seniority and promotion was centrally controlled by O.F.B., therefore, the question of losing their seniority does not arise. The O.F.B. in their letter dated 14.04.1987, an amendment was brought to the circular in 1974 and 1976 stating that the Supervisors and allied categories of Staff on compassionate ground transfer will lose their seniority and their seniority will be reckoned from the date of their reporting at the new Factory. It is obvious that in case an Undertaking by an employee is not given, his transfer would not be accepted, which is at the discretion of the local

General Manager. With regard to certain persons referred to in the O.A., the respondents have urged that both the names mentioned in the O.A. i.e. Shri P.M. Bhute and Shri V. S. Lacca, were working in the capacity of Supervisory Grade, which was controlled by Ordnance Factory Board, (Head Quarters) which is an All India basis and next promotion are ordered by Ordnance Factory Board only. The service conditions are centrally controlled by the Ordnance Factory Board and thus the question of losing their seniority does not arise, whereas the D.P.C. for the post of L.D.C. or U.D.C. in Ordnance Factory is controlled at the local factory/unit level. Hence the case of the applicant cannot be compared with that of both Shri Bhute and Lucca.

4. We have heard the rival contentions of the Counsel for the parties and have perused the various documents and pleadings furnished in support of their contention. Though the applicant has filed this O.A. in 1991, he was allowed to amend the O.A. and the amended application was filed on 07.06.1993 and reply was filed on 23.08.1993. On perusal of the pleadings, we find, that it is a mere assertion of the applicant, that the circumstances are identical, even assuming that others case are similar to that of the applicant, the applicant has no right to any particular post. He can only claim to be considered for the post of U.D.C. It is for the authority to decide if same common principle was involved in such cases. Admittedly, the post of U.D.C. is a non-selection post and is filled by promotion of L.D.C. grade as eligibility for promotion.

5. The main thrust of argument of the Learned Counsel for the applicant is that for, the purpose of eligibility for the post of U.D.C., the date of his appointment as L.D.C. or joining the grade on 09.06.1976 is to be taken into consideration and not from the date of his joining at Kirkee i.e. 01.01.1981. In view thereof, the main point for determination in this case as to whether in determining seniority of an employee, the service rendered by him in earlier unit at Ambarnath Factory can be taken into account or not. The applicant, in his pleadings have stated that it is now a settled principle of law, as decided by the Full Bench of the Tribunal that services rendered in old unit will count for promotion even when one joins new unit on compassionate grounds and his seniority counts from the date of joining new unit. It is apparent that the applicant has been harping upon the eligibility criteria considering the regular service rendered by him in both units rather than seeking promotion on the basis of seniority in the new unit. The Learned Counsel for the applicant, Shri S. P. Saxena, vehemently contended that the facts of this case is covered by the decisions of the Full Bench of the Tribunal as well as the decision of the Madras Bench. However, except relying upon the decisions of the aforesaid decisions, he has not been able to furnish any statutory rules/recruitment rules regarding service conditions, except stating that SRO No. 14(E) dated 04.05.1989 stipulates that the minimum of 8 years regular service in the grade of L.D.C. is the eligibility for next higher grade promotion of U.D.C. However, the said limit of minimum regular service

has been reduced to 5 years of regular service with effect from 04.05.1989. Therefore, he contends that the instructions of the Respondents vide dated 28.5.1974 and 28.09.1987 are contrary to the aforesaid SRO and hence the same is required to be quashed.

6. The Full Bench decision of the Tribunal in K. Balasubramanian V/s. Union Of India decided on 05.10.1987, has held that while resolving the conflicting decisions of the Madras Bench and the Bangalore Bench, on the question whether the service rendered by a L.D.C. in one unit could be reckoned as part of the qualifying service or not for the purpose of further promotion to the post of U.D.C. under the DRDO, Ministry of Defence, Group 'C', non-gazetted (Ministerial) posts Recruitment Rules, 1960. The Tribunal observed that "the applicant joined regular service at Bangalore in 1977, transferred on his own request to Cochin in 1981 and accorded bottom seniority as per rules. Rules provided for 8 years regular service in the grade as eligibility condition for promotion. The applicant's services in Bangalore unit as L.D.C. for consideration for promotion to the cadre of U.D.C. Since he has thus completed 8 years of regular service in the cadre of L.D.C. on 07.05.1985, he was eligible to be considered for promotion from that date onwards. Nevertheless, the applicant was not considered on the plea that he had not completed 8 years in the unit. Accordingly, the Tribunal held only 8 years regular service in the grade was required, and not in the unit, etc." He also relies upon the two decisions of

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the Madras Bench of the Tribunal. In N. Kumaresan V/s. the Commandant Defence Services decided on 15.03.1988, it was held "that service rendered in old unit will count for promotion even when he joins new unit on transfer or compassionate grounds and his 'seniority' counts from the date of joining new unit. In that case, since vacancies existed, under the circumstances, the Tribunal directed the Respondents to consider the case of the applicant for promotion in the cadre of Stenographer Grade-II, if he is found fit to hold the post. Similarly, in the case of K. Suresh Kumar V/s. Member, Audit Board and Ex-Officio and Others decided on 25.10.1991, it was held that even when he has come on transfer by loss of seniority, previous experience has to be counted for eligibility conditions for promotion. The applicant was working in the office of the A.G., Nagaland as Auditor and he (passed) the Departmental Confirmatory Examination held in May, 1978. On 01.03.1984, he was promoted as "Senior Auditor" in the same office when a scheme of restructuring of cadres in the Indian Audit and Accounts Department was introduced. Thereafter, the applicant sought for unilateral transfer to the office of the Member, Audit Board, Madras. As unilateral transfers are not permissible to cadres where posts are filled by promotion and such transfers are permissible only against non-promotional posts which are filled in by direct recruitment, the applicant was transferred to the office of the Member, Audit Board, Madras, on his own request, he joined the said post on 20.10.1986.

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Though he had put in more than 7½ years of service as Auditor and 2½ years of service in the grade of Senior Auditor, he was not considered for promotion to the post of Senior Auditor from 01.01.1988.

According to the Recruitment Rules, for promotion to the post of Senior Auditor, auditors who have completed three years of service in the grade of Rs. 330-550 (pre-revised) and have passed the Departmental Confirmatory Examination, are eligible for promotion. The Tribunal, relying upon the ratio laid down by the Full Bench, held that the applicant would be eligible for consideration for promotion to the post of Senior Auditor from 01.01.1988.

7. The Respondents have raised a preliminary objections, that the application is barred by limitation and the Tribunal has no jurisdiction to adjudicate upon the dispute regarding the applicant's seniority which arose in the year 1981. Regarding limitation, the Learned Counsel for the applicant, Shri Saxena, draws our attention to the decision of the Principal Bench in Shri "Tota Ram Sharma V/s. Union of India" decided on 08.06.1990. The Tribunal held that in the case of infringement of fundamental right, it is a continuing wrong so long the applicant's grievance has not been redressed. Therefore, the plea of limitation would not survive. Similarly, when any order is to be treated as void-abinitio, there is no limitation to debar the claim. There is considerable force in the contention of the applicant so far as the limitation is concerned. Secondly, we will have to see whether the applicant has impleaded

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the affected parties at the time of filing the O.A. On perusal of the documents, we find, that though he has impleaded the affected parties on 31.10.1993 by filing a M.P., the same was rejected by the Tribunal on the ground that the respondents who were sought to be joined now were necessary parties. Relief should have been sought initially against them. The application for impleading the new respondents is barred by time and the same was rejected.

8. It is an undisputed fact that transfer from one unit of the Ordnance Factory to other unit is permissible as against Direct Recruit vacancy and not against a promotee quota. This aspect has been clarified by the Madras Bench Decision in K. Suresh Kumar V/s. Member, Audit Board and Ex-Officio & Others. It is not the length of service or eligibility is to be determining factor for the purpose of seeking promotion to the post of U.D.C. In the instance case, seniority is the ^{-cum-merit} criteria and the seniority was to be counted with effect from the date he joined in the new unit, i.e. Ammunition Factory, Kirkee. In fact, the facts and circumstances laid down in deciding the Full Bench matter was different from the present case. There it was held, for the purpose of eligibility, regular service in the cadre is to be taken into account as per recruitment rules, whereas the instructions issued by the Ministry applies in respect of persons who came on transfer to another unit, if the instructions are contrary to statutory rules, the same cannot held to be valid.

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9. The Respondents while denying the contentions of the applicant and in support of their stand taken in the reply, relied upon the decision of the Tribunal, decided by the Patna Bench in Nageshwar Prasad Sinha V/s. Union Of India & Others in O.A. No. 392 of 1990 decided on 10.04.1991 wherein the Tribunal has held that the claim of the applicant regarding his seniority over Respondent No. 6 has been emphatically denied by the Respondents because of the Rule 38 aforesaid and one who comes on transfer on his own request will be placed junior to all. In support of that plea, the Respondents relied upon the decision of the Supreme Court in Government of Andhra Pradesh & Others V/s. M.A. Kareem & Others [1991 (17) ATC 303], that the respondents were Lower Division Clerks in district units of Andhra Pradesh Police. The facts are as under :-

"The Respondents were Lower Division Clerks. On 21.11.1968, the Chief Office called for names of persons who were willing for transfer to that office without benefit of previous service. The volunteers were also required to give undertaking to this effect. They joined Chief Office sometime in 1970. In the meantime, the Chief Office in its Memo dated 18.1.1969 (annexure-B) enquired from the District Unit whether there were Lower Division Clerks who were willing to come on transfer if condition regarding forgoing of seniority was not insisted. The respondents took shelter of this memo to claim benefit of their past service. Besides, they claimed their transfer to be in public interest as was evident from the fact that they had been paid Transfer Travelling Allowance. The A.P. Administrative Tribunal allowed their petition. Allowing the appeal by the State.

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Accordingly, the Court held that the cadre of the Chief Office is altogether different from cadre of the district units. The service conditions of Chief Office were better, which was presumably the reason for the respondents to given up their claim for past service. Though the differential advantage was not so substantial as to attract every Lower Division Clerk working in the district units, and a Memo had to be circulated, so far as the respondents were concerned, they found it in their own interest to forgo their claim for seniority on the basis of their past service. Significantly, their letters of consent were sent to the Chief Office many months after issue of annexure-B letter and they were allowed to join on clear understanding that they would not be entitled to count their past services. The respondents cannot now turn back and repudiate their commitment. The respondents cannot also validly plead that their transfer should be treated in public interest because they were paid Transfer Travelling Allowance, etc."

In this connection, the Supreme Court observed that the courts and tribunals should be slow in disturbing the settled affairs in a service after such a long period. Moreover, the respondents did not implead their colleagues who have been prejudicially affected by the impugned judgement.

10. Since the Supreme Court decision cited above, is subsequent to the decisions of the Full Bench of the Tribunal and the Madras Bench, the ratio laid down in Supreme Court would be binding on all Courts and Tribunals and no authority by a Court or Tribunal to act in disregard of the law declared by the Supreme Court.

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11. In the light of the above, the admitted facts are that the applicant was appointed as a direct recruit as L.D.C. from the Unit at Ambernath Factory and he came to Ammunition Factory, Kirkee on his own request by giving an Undertaking. The Supreme Court in Kareem's case has clearly held that persons likely to be affected by virtue of challenging the seniority list prepared by the respondents, after a lapse of many years, cannot be raked up and mere mention of names of such persons was not sufficient. As mentioned earlier, in the instant case, the applicant has tried to implead the affected persons and the said plea has been rejected by the Tribunal. In this O.A., it is nothing but a mere assertion by the applicant. Even assuming that the cases cited by the applicant are similar to that of the applicant, the applicant has no right to any particular post, as rightly pointed out by the Courts, he can only claim to be considered for the post of U.D.C. Eligibility and Seniority are two different terms and that cannot be equated with each other. The applicant may be eligible for consideration for the post of U.D.C. However, when a promotion to U.D.C. arises in the new unit, he will have to stand alongwith others in the seniority list prepared by the Respondents in Ammunition Factory, Kirkee and can get his promotion alongwith his colleagues, who are stated to be senior in that unit, for the purpose of promotion. It is not denied by the applicant that he joined the service prior to the circular dated 28.5.1974 of the Respondents. Accordingly, he is not governed by the said circular. Equally, it is not his case that his

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juniors are promoted to the post of U.D.C. after joining the new unit. As stated earlier, his main contention is that of seniority to be counted from the date of his initial appointment as L.D.C. However, promotion can be given as and when his seniors have been promoted in accordance with the service rules. Admittedly all those who are promoted before the applicant, were senior to him and thus no injustice has been caused to him, except Mrs. Lima, who is alleged to be junior to the applicant, was senior to him in that unit, hence promoted before him. Therefore, it cannot be said that the undertaking given by the applicant was not in accordance with the existing rules. Having given an unconditional undertaking that he will not seek seniority in the new unit, it is not proper for him at the same time to seek seniority on the basis of the eligibility conditions. Regarding promotion to the post of U.D.C., he will have to wait and could be considered alongwith others, who are similarly placed in the new unit for the purpose of seniority and for all other purpose, he will not lose any pensionary benefits and other benefits available to him by virtue of his length of service.

12. The only prayer made by the applicant in this O.A. is to direct the Respondents to consider the case of the applicant for promotion to the post of U.D.C. or equivalent post of Sup.B(NIT) taking into consideration his eligibility and give promotion from the date his junior is promoted on the totality of service but not on the seniority in the unit.

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13. The Full Bench of the Tribunal took the view that the Respondents have not been able to show that there was a severance in his service upon his transfer or that the nature of the duties of the applicant in his previous office were different from that rendered in the entire period of service in the former office for reckoning eligibility for promotion and the rules governed for promotion to the cadre of U.D.C. from the cadre of L.D.C. are statutory rules. Any instructions governing seniority in the cadre of L.D.C. cannot have the effect of amending the rules or restricting the operation of the said rules. Inasmuch as in these rules, there is a rule governing seniority, the instructions may regulate seniority in the cadre of L.D.C. but they cannot control the operation of the statutory rule governing promotion to the cadre of U.D.C. That being the significance of the Full Bench decision, since the applicant is seeking voluntary transfer to the new unit i.e. Ammunition Factory, Kirkee, it is incorrect on the part of the applicant to seek promotion on the basis of the eligibility keeping in view of his past service, ignoring the seniority list prepared in the new unit and ignoring the interests of persons who are working in that unit earlier than the applicant. We are unable to accept the submission of the applicant. As mentioned earlier, this case is distinguishable on facts and the applicant is bound by his Undertaking given in view of Supreme Court's decision cited above (Supra).

14. In view of the ratio laid down by the Supreme Court referred to above, the applicant has

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sought for voluntary transfer from one unit to another and the seniority of which is separate from each other and having given an undertaking that he would be bound by the seniority list of that unit, it is not open to the applicant to agitate the same, taking the plea that his previous service should be counted for the purpose of promotion to the post of U.D.C. Accordingly, we are perforced to distinguish the ratio laid down by the Madras Bench and the Full Bench of the Tribunal, keeping in view the Supreme Court decision and thus it is not open to the applicant to seek promotion on the basis of his earlier service rendered in the previous unit, which has nothing to do with the claiming seniority on the basis of the seniority in which he is working i.e. Ammunition Factory, Kirkee. It is true, for the purpose of pensionary benefits and all other benefits, the service rendered in the previous unit shall be counted. However, for the purpose of seniority, he is bound by the seniority list prepared by the Ammunition Factory, Kirkee. In case his junior has been promoted in that unit, then he will have a grievance against the respondents. In that case, it is open to him to agitate the matter in accordance with the existing rules.

15. For the reasons stated above, we are of the view, that in view of the ratio laid down by the Supreme Court in State of Andhra Pradesh V/s. M.A. Kareem's case, in the facts and circumstances of the case, the applicant is not entitled to the benefit on his transfer to a new

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unit to count the previous service for the purpose of seniority of U.D.C. in the Ammunition Factory, Kirkee. He could be considered for promotion to the post of U.D.C. or equivalent post of Sup.B(N.T) with effect from the date his juniors, if any, have been promoted. Accordingly, we see no merit in the O.A. and the same is dismissed but no order as to costs.

M R Kolhatkar

(M. R. KOLHATKAR)

MEMBER (A).

B S Hegde

(B. S. HEGDE)

MEMBER (J).

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