

**CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH**

OA No. 98/2008

DELHI, this the 3rd day of August, 2009

Hon'ble Mr. Justice M. Ramachandran, Vice Chairman (J)

1. Suresh Chand Meena
Son of Shri Kalyan Meena,
R/o Quarter No. 35/Type-III,
G.S.I. Colony, Malviya Nagar,
Jaipur.
 2. Makhan Lal Meena
Son of Shri Mangilal Meena,
R/o Quarter No. 42, Type-IV,
Sector -2, Nirman Vihar-2,
Vidhyadhar Nagar, Jaipur.
 3. Kalu Ram Meena
Son of Shri Badriprasad Meena,
R/o Quarter No. 43, Type-IV,
Sector-2, Nirman Vihar-2,
Vidhyadhar Nagar, Jaipur.
 4. Ramswaroop Meena
Son of Late Shri Chanderlal Meena,
R/o M-62, Kendriya Vihar,
Sector-6, Vidhyadhar Nagar, Jaipur.
 5. Chuttan Lal Meena,
Son of Shri Nalhabhi Ram Meena,
R/o Quarter No.2 /Type-IV,
CPWD Colony, Civil Lines, Ajmer.
 6. Jaikishan Meena,
Son of Late Shri Molabi Ram,
R/o Quarter No. F-4/ 174, Malviya
Nagar, Jaipur.
 7. Ram Charan Meena,
Son of Shri Motilal Meena,
R/o Quarter No. T-1/56, G.S.I. Colony,
Malviya Nagar, Jaipur.
 8. Kishan Avtar Meena,
Son of Shri Shreeman Lal Meena,
R/o Village Padli, Tehsil Mahua,
District Dausa.
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9. Ashok Kumar Meena
Son of Shri Ratan Lal Meena,
R/o Village Ranglal Ka Pura,
Tehsil Toda Bhim, District Karauli.
 10. Hari Singh Meena
Son of Shri Phool,
R/o Village and Post Pahari,
Tehsil Toda Bhim, District Karauli.
 11. Davishankar son of Shri Shyaji Ram,
R/o Village Dobra, Post Dara Station,
Tehsil Ladpura, District Kota (Raj.)
 12. Ram Gopal Meena
Son of Shri Kanchan Lal Meena,
R/o Plot No. 132, Prem Nagar,
Jagatpura, Jaipur.
 13. Prakash Chand Meena,
Son of Shri Dhan Singh Meena,
R/o Village and Post Kala Khana,
Tehsil Hindaun City, District Karauli.
(Rajasthan)
 14. Motilal Prasad Son of Shri Raja Lal Saha,
Qr. No. 48 E, DA Block, Hari Nagar,
Ghantaghar, New Delhi. ... Applicants
- (By Advocate Shri Bhavani Singh Shekhawat proxy for
Shri R.N. Mathur)

VERSUS

1. Union of India, through Secretary Urban
Development, Government of India, Nirman
Bhawan, New Delhi.
2. Director General of Works,
Central Public Works Department (CPWD),
Nirman Bhawan, New Delhi. ... Respondents

(By Advocate Mr. Kunal Rawat, Sr. Standing Counsel assisted by
Ms Kavita Bhati)

ORDER

The above OA had been heard by the Circuit Bench of
Jaipur, CAT on 5.3.2009 and stood reserved for pronouncement of

orders. The issue concerned the claims urged by applicants for ad hoc promotion as might be admissible them over some of their counter parts, on the basis of notional seniority, which already stands assigned to them. Respondents refused to recognize these claims as could be seen from the impugned order dated 18.2.2008.

2. When the draft order was forwarded by Judicial Member for concurrence, a dissenting note prepared by the Administrative Member on 23.3.2009 had been sent over. The Judicial Member, however, had recorded that he was still maintaining the conclusions to which he had arrived, as recorded in the draft order. Vide his note dated 26.3.2009, the Administrative Member expressed his inability to agree with a view so taken. The Hon'ble Administrative Member had referred to the Chairman a question for answer as framed below.

"Whether the applicants who had been allowed seniority treating them appointee of the year 1994 can be allowed to count the period from 1994-95 till 16.2.1991 as regular service on notional basis ?."

However, there was a difference of opinion, expressed by the Judicial Member about the procedure in which the question had been framed, since according to him it was not a case of reference as formulated by Member (A) which was required to be gone into. The issue of difference required to be referred to third Member. The Registry had been directed to send extracts of the reference notes along with copy of judgment/dissenting note to the Principal Bench for doing the needful. Consequently, on the orders of the Hon'ble Chairman, I had been nominated as third Member to look into the points of disagreement, and express my opinion.

3. The OA had been re-posted at Jaipur on 20.7.2009. Advocate, Mr. Mathur for the applicant was not available himself but was represented by a colleague. He had put up a request that the matter be taken up later on. However, counsel on behalf of respondents was prepared to make submissions. As the OA was the only case listed on the day it had been decided that the matter will be taken up for orders after hearing the matter as was presented but in case the applicants were coming up with written argument notes, the contentions highlighted would be duly examined. Written submissions on behalf of the applicants had been submitted promptly. Taking notice of the stand adopted by the counsel and also taking advantage of the presence of opinions expressed by the two Members earlier, I may examine the issue that might be coming within my purview as expected of a third member.

4. There are 14 applicants, who have joined together in filing the present application. The Government as well as the Department have been impleaded as respondents. The claims and counter claims had been dealt with on several occasions, and the decisions rendered by the Tribunal itself are presently subject matters of Writ Petitions. I feel a quietus might reach only after the High Courts finally dispose the pending Writ Petitions. Especially taking note of the disputes highlighted herein, I feel it would have been in the interest of all concerned that when the High Court thought it fit to admit the Writ Petition, challenging the order of the Tribunal, the operation of the order as well could have

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been stayed so that the parties could be aware as to where they stand.

5. The employees of Central Public Works Department who are applicants herein have challenged the Annexure A-1 Office Memo/ order issued by the Deputy Director (Admn.) acting on behalf of Director General of Works, New Delhi. Subject matter of the order is shown as implementation of order dated 2.4.2007 passed by the CAT, Principal Bench in OA 1105/2006. The background of the case will have to be noticed in brief before attempting to tackle the question that is raised. For the purpose, I may advert to the pleadings, submissions made, and the text of contentions incorporated in the argument notes.

6. Limited Departmental Competitive Examination had been held by the CPWD Training Institute for selection to the post of Assistant Engineers (Civil & Elect.) in the year 1999. It appears that it was on the basis of the orders of the CAT passed in OA 2239/1998. The list of successful candidates had come on 16.2.2001. On the basis of the results, the applicants could secure appointment. This is stated to be against the year wise vacancies of Assistant Engineers pertaining to period 1994-95 onwards.

7. Thereafter a provisional seniority had come to be published on 4.6.2002. At that point of time some of the persons who had secured promotion noticed that they had been given a position reckoning eligibility from the date of actual assumption charge. As this was contrary to their expectations, on a plea that the

representations submitted were not being taken notice of, OA 2710/2003 came to be filed titled as Vijendra Singh & Ors Vs. UOI and Ors. By order dated 13.5.2004, the Principal Bench had held that the impugned seniority list required to be set aside and the applicants there were to be conferred with notional seniority from the dates and years when vacancies actually had arisen, for accommodating them.

8. An OA seeking more or less identical reliefs had been filed before the Chandigarh Bench of the Tribunal also. The case **A.P. Garg and 17 Ors Vs. UOI & Ors.** had been disposed of in July 2004, the Tribunal substantially taking notice of orders in OA 2710/2003. Writ Petitions at the instance of official respondents and aggrieved persons are as of now pending in Delhi High Court as well as in the Haryana and Punjab High Court challenging the respective orders.

9. A Contempt Application for enforcement of the orders thereafter came to be filed before the Principal Bench. It was later on closed noticing that notional seniority had been assigned to the persons, taking note of the directions issued arising from a Contempt Petition filed before the Chandigarh Bench. The applicants, according to them were remaining complacent on an impression that all technical hurdles as standing in their pathway had been demolished.

10. But they were as if, constrained to file another OA 1105/2006 before the Principal Bench. All the present applicants

fare there as applicants. Ad hoc promotions were being contemplated by the respondents to the cadre of Executive Engineer. According to them the seniority list, which was set aside, was nevertheless, being operated and followed. The notional seniority given to them also was being ignored and there was no reason to leave them aside while conferring ad hoc promotion to their juniors as Executive Engineers.

11. The said OA had been disposed of on 2.4.2007. A direction was issued to consider the case of applicants for conferment of ad hoc promotion and to come up with a final decision in the matter. A CP had also been filed later on at the instance of applicants in OA 1105/2006 as CP 407/2007 (sic 402/2007). The Tribunal did not, however, proceed with the CP, since the respondents at that time had undertaken to look into the matter. Liberty was reserved with applicants viz that if they were aggrieved, they could have agitated their grievance appropriately. The order presently impugned in the OA had come to be passed in the above backdrop. As of now the claims of applicants have been rejected, Respondents holding that they were not eligible for promotion although notional seniority might be available to them. This order is now under challenge. It is not explained as to what was the reason, which prompted applicants to shift the venue of the challenge to Jaipur Circuit Bench, but that is not an issue.

12. The CPWD had taken a stand that the applicants in the earlier two applications had been given only notional seniority. It was under the pain of contempt proceedings. It is not final, since the original orders are subject matters of Writ Petitions, which are

pending before High Court. More importantly, according to them when the Recruitment Rules (RRs) provide that eligibility of promotion from the grades of AEs is prescribed as eight years regular service in the case of degree holders and ten years in the case of diploma holders, so long as the applicants did not have the eligible service as prescribed by the rules, it may not be possible for them to demand or press for promotion or ad hoc promotion, especially in view of the advice that had been received by Department from the DOP&T and which were being generally followed by the Government. Strictly the matter was being considered in accordance with the RRs. They had also referred to the decision of the Supreme Court in *R. Prabha Devi & Ors Vs. UOI & Ors.* (AIR 1988 SC 902) wherein the concept of seniority and eligibility had been distinguished. Seniority could have been relevant as between eligible persons alone.

13. It is submitted that the applicants had been advised that as and only when they become eligible for being considered for promotion, their claims were liable to be taken note of. The instructions of the DOP&T alone were to be followed for conferment of ad hoc promotions. It was idle to argue that order as above required to be set aside. If critically examined it would reveal that it never went against the text or import of the decision of the Tribunal.

14. In the above back ground, I may examine whether applicants were in fact required to be considered for promotion to the post of

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Executive Engineer in view of the circumstance that they were notionally promoted to the feeder category and were assigned earlier dates, and whether the period including the notional sector required to be considered as period of eligible/reckonable for the purpose of the Rules.

15. The applicant has a case that Rule 2 (h) of the RRs should be set aside if it interferes with their claims. It is evident that the said clause, which defined regular service could have been understood only in a manner stifling their interests.

16. I may observe that the specific prayer as above is not incorporated in the OA in a manner which could be normally approved. It is well settled that the Courts or Tribunal are not expected to issue a prerogative writ in the nature of certiorari for setting aside or quashing provisions of a statute. Writ of certiorari is normally sought for when an inferior Tribunal or administrative/executive authority issues an order, which is patently irregular for one or other reasons that might be highlighted by an aggrieved person. This definitely is not the situation here where Government servants find an inconvenient situations, in a statute, which may impede career progression. In a fit or appropriate case it may be a fundamental right to seek a writ citing unconstitutionality, irregularity or irrationality of an offending statutory provision for a declaration that it requires to be read down. In other words, what ought to have been sought should have been a declaration, but never a writ of certiorari. The

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request as incorporated in the application is, therefore, not liable to be entertained.

17. The present rule is specific in providing twin conditions, viz that only a regular incumbent is entitled to be promoted, and only if he had minimum years of service as prescribed. The applicants have no case that they had rendered regular service of required length in the present post held by them as prescribed by the rules. It is a pre-condition for seeking promotion. That a prescription is inconvenient, by itself will not make it amenable to successful challenge.

18. The alternate contention made on behalf of applicants is that expression 'regular service' in the Rule is to be understood in a manner the circumstances may dictate. This aspect, it is suggested has been overlooked by the Respondents. The applicants had rested their case on the decision of the Apex Court in *DOI & Ors. Vs. K.B. Rajoria* (2000) 3 SCC 562). The respondent there had approached the Supreme Court challenging the orders of the High Court. He had been notionally promoted to the post of Additional Director General. The post of Director General was a selection post, which was to be filled up from the post of Additional Director General with two years regular service in the grade. The Supreme Court had disagreed with the views taken by the High Court that regular service should stand equated to actual experience. Where the incumbent had come to be appointed to the post in a manner recognized by service rules, the credit thereby secured could not have been over looked.

19. But the observations made by the Supreme Court cannot be applied out of context. The facts of the cases decided by the Supreme Court had no relevance whatsoever to the present claims. While considering the claim of Rajoria, although he had not challenged the eligibility of one Krishnamoorti for being considered for post of Director General, the High Court held that Krishnamoorti was himself not qualified. The Supreme Court by itemized finding only vacated the judgment of High Court ~~in~~ in so far the findings regarding Krishnamoorti had been recorded. In other words, the Supreme Court had come to the rescue of Krishnamoorti alone, as his promotion in fact had been by application an Office Memorandum ^{which} ~~while~~ governed the issue (See paragraph 15 of the Judgment). According to me, this has no real relevance as to the issue at hand. Further Supreme Court had examined only the impact of an OM. It is settled law that Tribunals cannot at all over look Rules framed under Article 309 of the Constitution. In case administrative instructions run counter to rules, the rule position has to be upheld, and this circumstance, therefore, cannot at all be overlooked. The Rule similar to the one available has had not been interpreted in the above decision.

20. In the arguments note, it is pointed out that the decisions relied on by the Govt. of State of Uttranchal Vs. Dinesh Kumar Sharma (2007 (1) SCC 683) and Jagdish Chandra Patnaik & Ors. Vs. State of Orissa & Ors. (1998 (4) SCC 456), have no application to the facts of the case. The issue that had come to be decided in the present application had no relation, it had been

al urged, whatsoever with the judgments cited. This was because

controversy was about the eligibility when seniority had already been given with retrospective effect and the promotions were also to be assumed as having been given with retrospective effect. This circumstance could not have been ignored.

21. On the other hand, learned counsel for respondents had very heavily relied on the Judgment of Prabha Devi's case (supra) as well as D.K. Sharma's case (supra). In R. Prabha Devi, the Supreme Court had occasion to hold that rule making authority had been competent to frame rules laying down eligibility condition for promotion to a higher post. The qualifications prescribed always have to be satisfied before a person could be considered for appointment, and eligibility does not mean that a person who is senior is eligible to be preferred to a junior who alone had eligibility as prescribed by the rules. In other words, seniority was to be relevant only as respects persons, who were eligible as well. Adverting to Patnaik's case (supra), it had specifically been held by the Supreme Court that the year in which vacancy occurs against which recruitment was made is not to be looked into for determination of inter-se-seniority (as between direct recruitee and promotee). The Court had held that it is difficult to accept the contention that the year in which the vacancy occurred is relevant for the purpose of determination on promotion.

22. However, the decision in Patnaik may not be relevant as of now, since certain reliefs have been granted by the Tribunal, and it is for the High Court in the pending Writ Petitions either to accept

the proposition recorded by the Tribunal or to reject the same. The judgments presently relied on can have ^{reference} reliance only in such proceedings. Likewise in the decision in D.K. Sharma's case (supra) it had been held that even if candidate is eligible for promotion when post fell vacant, his seniority could be reckoned only from the date of his substantive appointment to the said vacant post under the Rules and not retrospectively from the date of occurrence of vacancy. Again, this decision can have relevance at the time of adjudication of the Writ Petition to which reference had been made.

23. I am of the opinion that principles as had been highlighted in Prabha Devi's case (supra) is relevant vis-à-vis the rules, which had been brought to my notice. The present rules which governs the service in Ministry of Urban Affairs and Employment (Department of Urban Development), Central Engineering (Electrical & Mechanical) Group A Service Rules, 1996. The post concerned is listed as item No. 4 at schedule I to the Rules. The qualifying service prescribed by schedule II is regular service of 8 or 10 years as the case may be in the grade of AEs. It is to be noticed that under Rule 10 every officer on appointment to the service either by direct recruitment or by promotion shall be on probation for a period of two years. It is not a case of the applicants that they had been appointed to the post in 1994 on regular basis. They could have undergone probation only from the date from which they had joined the post which was only in the year 2002. Probation period could not have been presumed,

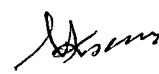
without rendering of actual service. Appropriate Rules provided for exemption whenever such a situation presented itself. The duty of the Court is to reconcile situations, which may at times appear as conflicting. When the applicants had been given only notional seniority, and not notional promotion, and when the validity of the basic orders are presently under challenge, it may not be justifiable to precipitate situations, adding on to uncertainties, by ordering that seniority would bring in attendant benefits as well.

24. Further it is brought to my notice that the Delhi High Court has directed that promotions, even ad hoc, to the category of Executive Engineers is to be brought about only after obtaining orders from the High Court. Therefore, before going for guess work and probabilities, the applicants/respondents are obliged to bring to the attention of the Court, the dead lock or ambiguity that might be existing.

25. Taking notice of the totality of the circumstances, I agree with the view that has been taken by Judicial Member that the applicants have not made out any case for interference. The seniority given to them which itself is subject to further orders that are to be passed by the High Court will not entitle them to count such service as regular service for further promotion. Therefore, application is liable to be rejected and I do so.


(M. Ramachandran)
Vice Chairman (J)

In view of the majority decision, the OA will stand dismissed.


(M. Ramachandran)
Vice Chairman (J)